

INTERNATIONAL COURT OF JUSTICE

THE GAMBIA'S OBSERVATIONS ON
MYANMAR'S REPORT OF 23 NOVEMBER 2021

REPUBLIC OF THE GAMBIA

v.

REPUBLIC OF THE UNION OF MYANMAR

7 December 2021

1. In accordance with the Court’s letter of 23 November 2021 (ref: 155674), the Republic of The Gambia (“The Gambia”) submits these Observations on the Fourth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (the “Fourth Report”).¹

2. These Observations, like those The Gambia submitted in response to the First,² Second,³ and Third⁴ Reports, are intended to highlight the principal shortcomings in the Fourth 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 Fourth Report.

3. Myanmar’s genocidal state policies against the Rohingya remain in place. Like the previous reports, the Fourth Report contains much information that is irrelevant to the Provisional Measures Order and many assertions that are not credible and impossible to verify because Myanmar continues to prohibit UN experts and international non-governmental organizations from accessing much of the country, in particular northern Rakhine State. Other information provided in the Fourth Report confirms that Myanmar has failed to meaningfully implement the Court’s Order.

4. As noted in The Gambia’s Observations on Myanmar’s Third Report, conditions for the Rohingya have deteriorated following the Tatmadaw’s coup of 1 February 2021,⁵ leaving the Rohingya even more vulnerable to further acts of genocide by the same organization that is

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

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, paras. 4-15.

responsible for the events of 2016-2018 that are the subject of The Gambia’s Application. In his report to the UN General Assembly dated 2 September 2021, the UN Special Rapporteur on the situation of human rights in Myanmar (“UN Special Rapporteur”) emphasized:

“The estimated 600,000 largely stateless Rohingya in Rakhine State *continue to face existential threats* and remain discriminated against in accessing citizenship, freedom of movement, and other fundamental rights. Since the coup, the junta has demonstrated that it intends to ensure that the Rohingya remain disenfranchised and segregated.”⁶

5. The UN Special Rapporteur further reported:

There are an estimated 130,000 stateless Rohingya who remain confined in internment camps in Rakhine State, and those in villages throughout the state face increased movement restrictions and are continually impeded from accessing citizenship, services, and livelihoods. As a result, *the Rohingya remain at grave risk of mass atrocity crimes.*”⁷

6. 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.

I. Ongoing Discrimination against the Rohingya as a Group

7. Myanmar has done nothing to dismantle the oppressive and discriminatory system of restrictions targeting the Rohingya that has inflicted conditions of life calculated to bring about their destruction and that were identified by the UN Fact-Finding Mission as one of seven indicia of genocidal intent.⁸ In her remarks to the UN General Assembly on 22 October 2021, the

⁶ UN General Assembly, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, Thomas H. Andrews, UN Doc. A/76/314 (2 September 2021), Annex 1 – Additional Human Rights Concerns Observed by the Special Rapporteur, para. 16, available at <https://www.ohchr.org/Documents/Countries/MM/GA76report-annex-SR-Myanmar.pdf> (emphasis added) [hereinafter “UN Special Rapporteur September 2021 Report”].

⁷ UN Special Rapporteur September 2021 Report, para. 20 (emphasis added).

⁸ 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. See *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), paras. 6.1-6.89 [hereinafter “Memorial”].

Special Envoy of the UN Secretary-General on Myanmar (“UNSG Special Envoy”) reported: “In Rakhine State, the Rohingya remain in camps with no freedom of movement and restricted access to basic services, including health care and education, as well as livelihoods.”⁹ On 17 November 2021, the Third Committee of the UN General Assembly adopted by consensus a resolution on the Rohingya situation expressing concern that:

“policies and practices at all levels limiting freedoms of movement, expression, association and assembly, or which are discriminatory in their application or impact, have not been reviewed, amended or repealed”.¹⁰

8. The Third Committee further expressed concerned over the fact that:

“in Rakhine, 600,000 stateless Rohingya Muslims remain largely segregated and discriminated against in accessing citizenship and other fundamental rights, a large number of whom remain confined in camps with no freedom of movement and grossly restricted access to basic services, including health care and education, as well as livelihoods”.¹¹

9. Despite Myanmar’s assertions to the contrary in its Fourth Report,¹² not only do these restrictions persist, but further restrictions have been newly introduced. As confirmed by the UN Special Rapporteur, the movement restrictions long-imposed on the Rohingya remain firmly in place:

“Rohingya in Rakhine State still need permission and documentation to travel from townships and village tracts (including to urban areas within townships), severely restricting access to income generation activities as well as access to health, life-saving and basic services. Virtually all Rohingya, except the very small number who hold citizenship cards, but including those who hold Identity Card of National Verification/National

⁹ UN General Assembly, Third Committee Interactive Dialogue, Remarks by Mr. Christine Schraner Burgener, Special Envoy of the Secretary-General on Myanmar (22 October 2021), available at https://estatemts.unmeetings.org/estatemts/11.0030/20211022/q61Xla8ydXoV/fvYUIUpFhKSt_en.pdf.

¹⁰ UN General Assembly, Third Committee, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/C.3/76/L.30/Rev.1 (adopted 17 November 2021), preamble [hereinafter “UNGA Third Committee 2021 Resolution”].

¹¹ UNGA Third Committee 2021 Resolution, preamble.

¹² See Fourth Report, paras. 99-100, 110.

Verification Card, still require authorization to leave Rakhine State, in addition to exorbitant ‘fees’ they must pay to junta authorities. This one time and time-limited authorization is exceedingly difficult to obtain, considering the administrative and financial requirements, making it unattainable for most.”¹³

10. Since the February 2021 coup, Myanmar has imposed additional movement restrictions and prosecution policies specifically targeting the Rohingya. As the UN Special Rapporteur has reported, these have resulted in the Rohingya’s “systematic imprisonment”:

“Since February 2021, further restrictions have been imposed on some Rohingya camps and villages, including curfews and reinstatement of old reporting rules. While reporting all overnight guests to village or town administrators is a requirement across Rakhine State, in some locations the Rohingya are not among those permitted to overnight in other villages – indicative of the dynamics between the Tatmadaw and different ethnic groups.

Since February 2021, the junta has reinstated a policy that was abandoned in April 2020, resulting in the systematic imprisonment of Rohingya apprehended while travelling without documentation within Myanmar. As a result, from February to July 2021, at least 58 persons, including 32 children, were sentenced to up to two years imprisonment and 67 others are currently on trial. This occurs in a context where access to legal representation may be further hindered for the Rohingya, following the aforementioned Amendment of the 2016 Legal Aid Law announced by the junta on 29 April 2021, which removes stateless persons and foreigners among the list of eligible persons to receive state supported legal aid in criminal proceedings.”¹⁴

11. Myanmar appears to admit to these discriminatory prosecutions in its Fourth Report, which refers to 183 “Muslims” who have been detained, 49 prosecuted, and 44 sentenced for merely having attempted to travel within Myanmar.¹⁵ As a recent example of these prosecutorial practices, the media reported in November 2021 that more than 200 Rohingya fleeing oppressive conditions were arrested and transferred to Myanmar police and immigration

¹³ UN Special Rapporteur September 2021 Report, para. 21.

¹⁴ UN Special Rapporteur September 2021 Report, paras. 22-23.

¹⁵ Fourth Report, para. 138.

authorities.¹⁶ Further, in late November 2021, additional movement restrictions on the Rohingya were reportedly imposed in Buthidaung township, requiring any Rohingya seeking to leave the township to obtain documented permission from the township immigration office.¹⁷

12. Myanmar’s discriminatory policies continue to deny Rohingya access to citizenship and birth registration. As reported by the UN Special Rapporteur:

“Rohingya people continue to face discriminatory laws and policies blocking their access to citizenship, documentation and civil registration. Despite legislative commitments to universal birth registration under the 2019 Child Rights Law, the birth of Rohingya children continue to not be systematically registered. Updating civil registration records, including birth and marriages, through the household list remains a challenge, negatively affecting access to legal documentation, basic services, and freedom of movement.”¹⁸

13. Myanmar’s forced imposition of the National Verification Card system, discussed in detail in the Memorial,¹⁹ also continues. The UN Special Rapporteur stated:

“The junta continues to force or coerce Rohingya to accept the Identity Card for Nationality Verification (ICNV)/National Verification Card (NVC). The ICNV/NVC still does not serve as a predictable or accessible pathway to citizenship, nor has it increased access to rights, including freedom of movement, in a consistent and predictable manner. The NVC process continues to require Rohingya to self-identify as foreigners and, as such, remains an administrative tool to erase Rohingya ethnic-identity. Furthermore, it led to additional rights restrictions for the Rohingya, e.g. by requiring ICNV/NVC for travel and/or for certain livelihoods activities (such as fishing) that were previously undertaken without this requirement. In some instances, the junta

¹⁶ “*More than 200 Rohingya arrested by navy off Myanmar coast*”, UCA News (30 November 2021), available at <https://www.ucanews.com/news/more-than-200-rohingya-arrested-by-navy-off-myanmar-coast/95169#>.

¹⁷ Myo Tun, “*Rohingya in Buthidaung hit with even tougher travel restrictions*”, Myanmar NOW (29 November 2021), available at <https://www.myanmar-now.org/en/news/rohingya-in-buthidaung-hit-with-even-tougher-travel-restrictions>.

¹⁸ UN Special Rapporteur September 2021 Report, para. 17.

¹⁹ Memorial, 6.28-6.35.

continues the practice of requiring Rohingya to accept the ICNV/NVC as a condition for their release from detention. ...

The junta is undertaking a national citizenship scrutiny exercise, known as “Pan Khin” (“Project Flowerbed”, launched to ostensibly issue citizenship documentation to 3.8 million people from 3 May 2021 to 3 November 2022). The Special Rapporteur received credible reports that junta authorities are forcing or coercing Rohingya to accept NVCs in the context of “Pan Khin.” The Special Rapporteur also notes that past national-level citizenship scrutiny campaigns in Myanmar were carried out in a discriminatory and violent manner regarding the Rohingya people.”²⁰

14. These policies reflect Myanmar’s long-standing denial of the very existence of the Rohingya as a group. In response to the Third Committee’s consensus adoption of its November 2021 resolution, Myanmar’s Ministry of Foreign Affairs declared: “Myanmar does not recognize the term ‘Rohingya’. The real aim of using this term is to claim wider ethnicity and territorial status.”²¹

15. The Fourth Report refers to reports submitted by Union Ministries and State and Regional Governments in response to three 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.²² However, the Report does not make those alleged reports available to the Court for examination, and there is no indication that any of the discriminatory policies targeting the Rohingya have been repealed as part of this process. Indeed, no actions seem to have been taken whatsoever, other than the issuance of the Directives themselves.

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

16. As was the case with its previous reports, the Fourth Report fails to indicate any meaningful progress regarding accountability for the acts of genocide committed during the

²⁰ UN Special Rapporteur September 2021 Report, paras. 18-19.

²¹ Republic of the Union of Myanmar, Ministry of Foreign Affairs, *Myanmar sees no reason for UN’s resolution other than a politically motivated agenda* (19 November 2021), available at <https://www.facebook.com/513368565530110/posts/1903430459857240>.

²² Fourth Report, paras. 30-32.

“clearance operations” of 2016-2018. Indeed, recent developments indicate that impunity for the crimes committed against the Rohingya remains deeply entrenched.

17. Although the Fourth Report indicates that the Tatmadaw’s Court of Inquiry is still investigating “events at Chut Pyin Village”, it casts doubt on the process by disclosing an inability to collect witness statements from victims.²³ The Report states that the investigation into the incidents of Inn Din, Gu Dar Pyin and Maung Nu have been concluded;²⁴ none of these investigations resulted in credible accountability for the crimes committed. To the contrary, the lack of accountability sends another unmistakable message of impunity for acts of genocide against the Rohingya.

18. As discussed in The Gambia’s Memorial, the Inn Din incident related to the summary execution of ten Rohingya men who were executed while on their knees with their hands bound behind their backs. That incident was only investigated after two Reuters journalists exposed the crime, and the journalists were prosecuted by the Tatmadaw for their reporting and sentenced to seven years in prison.²⁵ The subsequent Inn Din court martial led to the sentencing of four officers and three soldiers, but Senior-General Min Aung Hlaing pardoned and released each of the seven officials after they served only seven months of their sentence, far shorter time in prison than the Reuters journalists, who were released due to international pressure after 18 months in prison.²⁶

19. 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.²⁷ Myanmar’s Second

²³ Fourth Report, para. 45.

²⁴ Fourth Report, para. 46.

²⁵ Memorial, paras. 11.18-11.20.

²⁶ Memorial, paras. 11.21-11.22.

²⁷ 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. MG, Vol. II, Annex 40; Memorial, paras. 1.23, 8.15-8.16, 8.63, 11.43.

Report noted 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”.²⁸ One of these officers, Myanmar reported, 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”.²⁹

20. The “clearance operation” at Maung Nu involved, *inter alia*, the systematic killing of children and elderly and widespread sexual violence.³⁰ According to Myanmar’s Third Report, only three members of the Tatmadaw—one officer and two soldiers—have been convicted as a result of the Maung Nu investigation, 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 two soldiers.³¹ Their sentences included forfeiture of one year’s military service for pension purposes for the officer and 1-2 years imprisonment with hard labor for the soldiers, a further confirmation of the pervasive impunity, particularly for officers responsible for atrocities against the Rohingya. No senior officers, responsible for planning and ordering genocidal acts against the Rohingya, have ever been charged with any crimes.

21. The Fourth Report discloses that the investigation into the crimes committed in Taung Bazar has been closed, with no officers held responsible for any actions, because “there were no incidents alleged to have been perpetrated by members of the Myanmar Defense Services”.³² However, the UN Fact-Finding Mission verified that “clearance operations” took place “in a large cluster of villages, known collectively in Rohingya as Taung Bazar”, and that “[m]ultiple Rohingya villages in this region were subjected to a wave of ‘clearance operations’ as soldiers moved from one village to the next over a period of days”.³³ The UN Fact-Finding

²⁸ Second Report, para. 53.

²⁹ Second Report, para. 53.

³⁰ See Memorial, paras. 8.121-8.136.

³¹ Third Report, para. 36.

³² Fourth Report, para. 49.

³³ 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), para. 881. MG, Vol. II, Annex 40.

Mission also identified Taung Bazar as one of the village tracts where “[m]ass gang rape, involving multiple perpetrators and multiple victims in the same incident” occurred between 25 August and mid-September.³⁴ The secretive “investigation”, the lack of charges, and the impunity for these acts is emblematic of the military’s treatment of the crimes committed against the Rohingya.

22. In contrast to the impunity for those who committed crimes against the Rohingya, the Fourth Report recounts that four members of the Tatdamaw were held responsible for the mistreatment in April 2020 of ethnic Rakhine who were alleged members of the Arakan Army. Courts martial from this incident resulted in a soldier sentenced to one year imprisonment, a sergeant forfeiting two years of military service for pension purposes, and two captains charged with supervision failures.³⁵

23. Myanmar’s reported “civilian accountability” also confirms that crimes committed against the Rohingya go unpunished. According to the Fourth Report, the Criminal Investigation and Prosecution Body (“CIPB”) was “re-established with new members”.³⁶ It is unclear if the new membership has anything to do with the military government’s announced plans to investigate the work of the Advisory Commission on Rakhine State and the Independent Commission of Enquiry (“ICOE”),³⁷ the status of which is not included in the Fourth Report.

24. The CIPB’s work has not advanced beyond the 139 cases previously announced in the First Report. Of those 139 cases, 87 cases are of alleged members of “ARSA and their collaborators”, 29 are of “local people”, and 23 are of members of the Myanmar Border Guard police. None are members of the Tatmadaw. Only two of the 23 cases against the Border Guard Police have led to sentences, which included nothing more serious than forfeiture of one or two

³⁴ 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), para. 921. MG, Vol. II, Annex 40.

³⁵ Fourth Report, paras. 50-53.

³⁶ Fourth Report, para. 33.

³⁷ 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>.

years of service for pension purposes.³⁸ The crimes alleged to have been committed have not been disclosed.

25. The Fourth Report refers to the enactment on 24 August 2021 of an amendment to Myanmar’s Penal Code Law (the “Amendment”) that identifies the offence of genocide as a crime under the municipal law of Myanmar, punishable by death, life imprisonment or fine.³⁹ Section 311A of the Amendment provides:

“Whoever, with intent to destroy, in whole or in part, a national, ethical, racial or religious group:

- a) Kills members of the group; or
- b) Causes grievous hurt or serious mental harm to members of the group; or
- c) Deliberately inflicts on the group conditions of life calculated to bring its physical destruction in whole or in part; or
- d) Imposes measures, not in accordance with any existing laws, intended to prevent births within the group; or
- e) Forcibly transfers children of the group to another group,

Is said to have committed the offence of genocide.”⁴⁰

26. The Amendment includes a glaring departure from Article II of the Genocide Convention by defining an act of genocide as including only measures intended to prevent births within the group that are “*not in accordance with any existing laws*”. As described in Chapter 6 of The Gambia’s Memorial, Myanmar has had in place, since 2015, a package of national laws that “discriminate against” Rohingya women and girls for the express purpose of remedying “[c]oncerns that Rohingya would soon be outnumbering the ‘native’ groups”.⁴¹ Furthermore,

³⁸ Fourth Report, para. 40.

³⁹ Fourth Report, paras. 54-55.

⁴⁰ Fourth Report, Annex 3.

⁴¹ 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), para. 1409. MG, Vol. II, Annex 40; Memorial, para. 12.20.

local authorities in northern Rakhine State have adopted regional laws and orders targeting the Rohingya's ability to "live and reproduce normally", including through marriage restrictions and restrictions on the permissible number and spacing of children.⁴² These national and regional laws constitute birth prevention measures in violation of the Genocide Convention. However, the "existing laws" exemption in the Amendment would exclude these laws and any birth prevention measures taken under them against the Rohingya from the Amendment's definition of the offence of genocide.

27. Moreover, it is doubtful that the Amendment would apply to members of the Tatmadaw. Myanmar's Constitution provides that the Tatmadaw "independently administer and adjudicate all affairs of the armed forces", and it is the 1959 Defence Services Act, not the Penal Code Law, that defines crimes applicable to members of the Tatmadaw.⁴³ As noted by the UN Fact-Finding Mission, "Myanmar's Constitution allows Myanmar military personnel convicted of any crime to be pardoned or potentially protected from prosecution" and "the Commander-in-Chief of the Defense Services ... to make final and conclusive decisions on military justice".⁴⁴ The Tatmadaw's exemption from the penal laws and civil justice system was acknowledged by Myanmar's now-former Agent during the hearing on provisional measures in December 2019: "Under its 2008 Constitution, Myanmar has a military justice system. Criminal cases against soldiers or officers for possible war crimes committed in Rakhine must be investigated and prosecuted by that system."⁴⁵

28. Myanmar continues to fail to provide accountability for the massive, systematic and extremely brutal rape, gang rape, sexual assault, and genital mutilation of Rohingya women

⁴² 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), para. 1409. MG, Vol. II, Annex 40; Memorial, paras. 6.39-6.64.

⁴³ 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), para. 1579. MG, Vol. II, Annex 40.

⁴⁴ 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. 237. MG, Vol. III, Annex 49; Memorial, para. 12.141.

⁴⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Provisional Measures*, Verbatim Record CR2019/19 of Public Sitting held on 11 December 2019, para. 17 (Aung San Suu Kyi).

and girls across northern Rakhine State.⁴⁶ The Fourth Report indicates that no action has been taken, and no plans have been made, to address the crimes of sexual violence committed during the 2016-2018 “clearance operations”. The restructured “National Action Plan” discussed in the Fourth Report does not address accountability for those crimes.⁴⁷

29. In his September 2021 report, the UN Special Rapporteur noted “reports of detention and forced labour among women and girls living in camps and in conflict-affected areas”.⁴⁸ He also expressed concerns regarding the trafficking of Rohingya women and girls, noting that:

“Recent reports estimate that over 30 women and girls are trafficked monthly from internment camps in Rakhine State. It was reported to the Special Rapporteur that, in certain instances, the Rakhine State Government intercepted the trafficking process; however, instead of protecting the victims, authorities arbitrarily detained the women and adolescent girls who were being trafficked. Rohingya trafficking survivors are denied meaningful legal assistance.”⁴⁹

30. The Fourth Report does not directly address these concerns, but it does claim that *one* Muslim girl benefited from the services of a temporary safe house in Rakhine State, and *one* Muslim woman benefited from the work of the “One Stop Women Support Centers”.⁵⁰

III. Denial of Humanitarian Assistance and Adequate Healthcare

31. As discussed above in Section I, the discriminatory policies targeting the Rohingya, including the discriminatory restrictions on movement, continue to deny the Rohingya adequate healthcare, humanitarian assistance, and access to livelihoods.

⁴⁶ See Memorial, Chapter 9.

⁴⁷ Fourth Report, paras. 81-83.

⁴⁸ UN Special Rapporteur September 2021 Report, para. 24.

⁴⁹ UN Special Rapporteur September 2021 Report, para. 26.

⁵⁰ Fourth Report, paras. 84-86.

32. The UN Special Rapporteur explained the ongoing challenges faced by the Rohingya in this regard:

“Rohingya community access to sexual and reproductive healthcare, including emergency obstetric care, continues to be limited due, among other factors, to the denial of freedom of movement. Authorities continue to extort money from Rohingya at checkpoints, further restricting freedom of movement. Various actors continue to deny Rohingya access to blood transfusions, instead reserving blood at local hospitals for ethnic-Rakhine people. As a result, Rohingya patients must resort to an expensive black market for blood. The Rakhine State government continues to deny travel authorizations to healthcare workers, citing security concerns. The government has also failed to take reasonable actions to provide security to healthcare providers. Decades of persecution, mass atrocity crimes, and systematic discrimination have also limited Rohingya access to health education and health-outreach campaigns.”⁵¹

33. Notwithstanding the Fourth Report’s claims regarding the alleged provision of services in Rakhine State, the UN General Assembly Third Committee has continued to express “grave concern” over, *inter alia*, “ongoing restrictions on humanitarian access”, as well as “the limited steps taken to ensure access to health care for Rohingya, particularly in the time of COVID-19”.⁵²

IV. Inadequate Efforts to Curtail Hate Speech against the Rohingya

34. The Fourth Report briefly notes hate speech awareness activities like radio broadcasts of “anti-hate speech” public service announcements, without providing the content of that programming.⁵³ But the Report once again ignores Myanmar’s ongoing dissemination of hate speech through online channels. As detailed in Chapter 7 of The Gambia’s Memorial, the Tatmadaw networks of “coordinated inauthentic behavior” were created specifically to propagate anti-Rohingya hate speech.⁵⁴

⁵¹ UN Special Rapporteur September 2021 Report, para. 29.

⁵² UNGA Third Committee 2021 Resolution, para. 6.

⁵³ Fourth Report, paras. 58-59.

⁵⁴ Memorial, paras. 7.24-7.26.

35. In May 2021, Facebook conducted a review of all influence operations that engaged in “coordinated inauthentic behavior” (*i.e.*, using fake accounts to mislead the public) on its platform in violation of Facebook policies from 2017-2020, which included over 150 such operations originating from over 50 countries.⁵⁵ According to Facebook’s study, fraudulent influence operations conducted by Myanmar’s military and police rank third globally in Facebook’s accounting of the top sources of influence operations engaged in coordinated inauthentic behavior.⁵⁶ Myanmar also ranks as the country most frequently targeted by domestic-focused influence operations on Facebook—in other words, Myanmar’s military and police propaganda networks target the Myanmar population on Facebook using coordinated inauthentic behavior more than any other actor in any other country in the world.⁵⁷

36. The Tatmadaw’s propaganda operations have remained in place and disseminated anti-Rohingya hate speech. In July 2021, Facebook “removed 79 Facebook accounts, 13 Pages, eight Groups, and 19 Instagram accounts in Myanmar that targeted domestic audiences and were linked to individuals associated with the Myanmar military”.⁵⁸ It found that this operation was linked to the Tatmadaw and its anti-Rohingya operations from 2018:

“Our investigation revealed some links between this operation and the activity we removed in 2018. Although the people behind it attempted to conceal their identities and coordination, our investigation found links to individuals associated with the Myanmar military.”⁵⁹

37. Some of these anti-Rohingya operations are migrating to other online platforms, like Telegram, where they can spread with less visibility because of the private nature of the

⁵⁵ Facebook, Threat Report: The State of Influence Operations 2017-2020 (May 2021), p. 3, *available at* <https://about.fb.com/wp-content/uploads/2021/05/IO-Threat-Report-May-20-2021.pdf>.

⁵⁶ *Ibid.*, p. 7.

⁵⁷ *Ibid.*, p. 8.

⁵⁸ Facebook, July 2021 Coordinated Inauthentic Behavior Report (July 2021), p. 3, *available at* <https://about.fb.com/wp-content/uploads/2021/08/July-2021-CIB-Report.pdf>.

⁵⁹ *Ibid.*, p. 4.

Telegram platform.⁶⁰ The Third Committee reiterated its “deep concern over the continued spread of false news, hate speech and inflammatory rhetoric, in particular through social media, notably targeting Rohingya Muslims and other minorities”.⁶¹

V. Inadequate Efforts for Repatriation and Resettlement

38. The Fourth Report continues to show that Myanmar is not taking steps to allow for repatriation of Rohingya refugees and for the resettlement of internally displaced Rohingya who are confined to internment camps, many since 2012. UN bodies and experts are in agreement that conditions are not suitable for safe, dignified, and voluntary return of the Rohingya refugees. On 10 November 2021, the UN Security Council reiterated its “concern that recent developments pose particular serious challenges for the voluntary, safe, dignified and sustainable return of Rohingya refugees and internally displaced persons.”⁶² The Third Committee likewise expressed:

“deep concern at the escalating violence and the continuing forced displacement of civilians, as well as violations and abuses of human rights against Rohingya Muslims and other minorities, thus making conditions unsuitable for the voluntary, safe, dignified and sustainable return of all refugees and forcibly displaced persons to Myanmar, including Rohingya Muslims”.⁶³

39. The UNSG’s Special Envoy similarly concluded that “[p]rogress on addressing the root causes have been severely hampered by the military’s actions. Consequently, the prospect of repatriation for Rohingya sheltering in Bangladesh is dwindling.”⁶⁴ The UN Special Rapporteur concurred, noting that:

⁶⁰ Andrew Nagemson, “Channelling hate and disinformation: Myanmar’s bad actors move to Telegram”, *Frontier Myanmar* (15 September 2021), available at <https://www.frontiermyanmar.net/en/channelling-hate-and-disinformation-myanmars-bad-actors-move-to-telegram/>.

⁶¹ UNGA Third Committee 2021 Resolution, preamble.

⁶² UN Security Council, Security Council Press Statement on Myanmar, UN Doc. SC/14697 (10 November 2021), available at <https://www.un.org/press/en/2021/sc14697.doc.htm>.

⁶³ UNGA Third Committee 2021 Resolution, preamble.

⁶⁴ UN General Assembly, Third Committee Interactive Dialogue, Remarks by Mr. Christine Schraner Burgener, Special Envoy of the Secretary-General on Myanmar (22 October 2021), available at https://estatements.unmeetings.org/estatements/11.0030/20211022/q61XIa8ydXoV/fvYUIUpFhKSt_en.pdf.

“According to available data, the vast majority of Rohingya refugees in Bangladesh want to return to their ancestral homelands in Rakhine State. Unfortunately, the necessary conditions for their safe, dignified and sustainable return to Myanmar do not exist. The safety and security of Rohingya refugees and those who remain in Myanmar will continue to be in jeopardy as long as current conditions exist.”⁶⁵

40. The figures in the Fourth Report of Rohingya who lost their homes during the “clearance operations”, and as a result of the subsequent razing of Rohingya villages by the Tatmadaw, demonstrates that returnees cannot go back to their previous homes or areas of residence.⁶⁶ The Third Committee raised similar concerns:

“that, in northern Rakhine State, the implementation of policies under the guise of economic development and reconstruction by the Myanmar and the heavy militarization of the area have resulted in the alteration of the demographic structure, which further prevents the members of the displaced Rohingya Muslim population from returning to Rakhine State”.⁶⁷

41. The Fourth Report states that as of 9 July 2021, of the 829,001 names that Bangladesh has provided Myanmar for verification via a process that began in 2018, Myanmar had reviewed no more than 46,684 and verified only 31,119 as having been residents of Rakhine State.⁶⁸ More than eight months earlier (31 October 2020), Myanmar had reviewed 40,138 names and verified 26,814.⁶⁹ Thus, in just over eight months, Myanmar reviewed only an additional 6,546 names and verified only 4,305. In sum, this means that Myanmar has thus far reviewed only 5.6% of the names submitted by Bangladesh in this three-year process, and has verified only 3.7% of them, the same percentages as The Gambia identified in response to the Third Report.

⁶⁵ UN Special Rapporteur September 2021 Report, para. 30.

⁶⁶ Fourth Report, para. 72.

⁶⁷ UNGA Third Committee 2021 Resolution, preamble.

⁶⁸ Fourth Report, para. 61.

⁶⁹ Second Report, para. 71.

42. The Fourth Report also does not indicate any substantial progress in releasing the Rohingya from their internment in IDP camps.⁷⁰ As the UN Special Rapporteur reported, over 130,000 Rohingya “remain confined” in such camps.⁷¹

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43. For these reasons, it is The Gambia’s view that the Fourth 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.

44. 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 2021

⁷⁰ Fourth Report, para. 74.

⁷¹ UN Special Rapporteur September 2021 Report, para. 20.