

INTERNATIONAL COURT OF JUSTICE

THE GAMBIA'S OBSERVATIONS ON
MYANMAR'S REPORT OF 23 MAY 2022

REPUBLIC OF THE GAMBIA

v.

REPUBLIC OF THE UNION OF MYANMAR

7 June 2022

1. In accordance with the Court’s letter of 23 May 2022 (ref: 156649), the Republic of The Gambia (“The Gambia”) submits these Observations on the Fifth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (the “Fifth Report”).¹

2. These Observations, like those The Gambia submitted in response to the First,² Second,³ Third,⁴ and Fourth⁵ Reports, are intended to highlight the principal shortcomings in the Fifth 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 Fifth Report.

3. Myanmar’s genocidal state policies against the Rohingya remain in place. The Fifth Report, like those before it, 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 Fifth 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 and Fourth Reports, conditions for the Rohingya have deteriorated following the Tatmadaw’s coup of 1 February

¹ *Fifth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020* (23 May 2022) [**hereinafter** the “Fifth 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 *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”].

2021,⁶ leaving the Rohingya even more vulnerable to further acts of genocide by the same organization that is responsible for the events of 2016-2018 that are the subject of The Gambia's Application.⁷ In her report to the UN Human Rights Council dated 15 March 2022, the UN High Commissioner for Human Rights ("UN High Commissioner") emphasized that "[a]lthough the security situation in Rakhine State remained relatively stable, the overall human rights situation of the Rohingya community saw no improvement".⁸

5. Specifically, the UN High Commissioner reported:

"Previously identified patterns of discrimination, such as deprivation of citizenship rights and civil documentation, restrictions on freedom of movement and restrictions on access to health and education services, as well as to livelihood opportunities, remained. Refugees and displaced persons did not have the right to return. The right to seek justice and obtain redress for past violations remained completely unaddressed and continued to negatively affect every aspect of daily life. Interviewees and interlocutors unanimously stated that, so long as the Tatmadaw enjoyed impunity and exerted influence on civil and political life in Myanmar, *a further deterioration in the situation of human rights of the Rohingya could be expected.*"⁹

6. The continued pervasive discrimination against the Rohingya, Myanmar's ongoing denial of their very identity, and the impunity accorded to those who committed genocide during the "clearance operations" of 2016 to 2018, especially members and leaders of

⁶ 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.

⁷ 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, paras. 16, 20, available at <https://www.ohchr.org/Documents/Countries/MM/GA76report-annex-SR-Myanmar.pdf>.

⁸ UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights, *Situation of human rights in Myanmar since 1 February 2021*, UN Doc. A/HRC/49/72 (15 March 2022), available at https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_72_AdvanceEditedVersion.docx, para. 55 [hereinafter "UN High Commissioner March 2022 Report"].

⁹ UN High Commissioner March 2022 Report, para. 55.

the Tatmadaw who now wield all levers of state authority, 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 inflicts conditions of life calculated to bring about their destruction, which the UN Fact-Finding Mission identified as one of seven indicators of Myanmar's genocidal intent.¹⁰ On 16 December 2021, 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”.¹¹

8. The General Assembly further expressed “deep concern” 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”.¹²

9. In his report to the UN Human Rights Council on 16 March 2022, the UN Special Rapporteur on the Situation of Human Rights in Myanmar (“UN Special Rapporteur”) explained how the cascading layers of discriminatory policies lead to preventable deaths for Rohingya:

“The roughly 600,000 Rohingya in Rakhine State continue to have their human rights systematically violated. More than 130,000 remain confined to IDP camps and even those living in villages are

¹⁰ 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”].

¹¹ UN General Assembly, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/RES/76/180 (adopted 16 December 2021), preamble [hereinafter “UNGA 2021 Resolution”].

¹² UNGA 2021 Resolution, preamble.

denied the right to move freely. Most villagers need to apply for permission to travel between locations in Rakhine State, a system that is enforced at checkpoints manned by security forces throughout the region. Since the coup, Rohingya have faced renewed arrest for undocumented travel and, as of mid-2021, 67 Rohingya were on trial while 58 had been convicted and sentenced up to two years for travel outside of Rakhine State. Travel restrictions and nighttime curfews can have life-and-death consequences, especially for those seeking treatment for acute medical conditions. An outbreak of diarrhea in Rohingya IDP camps that began in January 2022 has led to deaths that could have been prevented by timely medical treatment.”¹³

10. In its Fifth Report, Myanmar misleadingly asserts that its travel restrictions apply to all holders of NVC card holders “regardless of ethnicity or religion”.¹⁴ However, that is a distinction without a difference – the NVC card itself is designed to force Rohingya to give up their right to citizenship and their Rohingya identity.¹⁵ The “existing rules and regulations”¹⁶ that Myanmar is enforcing through its imposition of the NVC card requirements and other travel restrictions are targeted specifically against the Rohingya, and no other ethnic, racial, or religious group.

11. In response to media reports of new travel restrictions that Myanmar has imposed on the Rohingya, which are described in The Gambia’s Observations on Myanmar’s Report of 23 November 2021,¹⁷ Myanmar again asserts, without any evidence, that it did not impose such new restrictions, and that curfews are in place for putative security reasons.¹⁸ Fact-finding by the

¹³ UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, Thomas H. Andrews, UN Doc. A/HRC/49/76 (16 March 2022), available at https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_76_AUV.docx, para. 85 [hereinafter “UN Special Rapporteur March 2022 Report”].

¹⁴ See Fifth Report, para. 86.

¹⁵ See Memorial paras. 6.26-6.35.

¹⁶ Fifth Report, para. 86.

¹⁷ *The Gambia’s Observations on Myanmar’s Report of 23 November 2021* (7 December 2021), para. 11.

¹⁸ Fifth Report, paras. 86-87.

United Nations, however, directly contradicts these assertions. As explained by the UN High Commissioner:

“The military authorities further restricted freedom of movement for Rohingya. According to interviewees and other sources, in October the military-run national registration and citizenship department reintroduced the requirement for Rohingya without a national verification card to receive temporary travel authorization for movements between Buthidaung and Maungdaw townships in Rakhine State. On 25 November 2021, the Buthidaung Township military-run general administration department imposed on all “Bengalis” (a derogatory and exclusionary term) the requirement of obtaining a travel permit known as “form 4”, further disenfranchising Rohingya. Rohingya reported that all those processes involved extortion. One person reported that informal fees for each permit may amount to over 25,000 kyats (approximately \$15) and that other arbitrary payments may be demanded at security checkpoints. Sources also reported that Rohingya received travel authorizations for very short time frames, sometimes for as little as three days despite making requests for one month. Those and other restrictions severely compromised access to services and the sustainability of livelihoods, prolonging dependence on humanitarian assistance, exacerbating vulnerabilities and protection risks, prompting negative coping mechanisms, including accepting significantly underpaid jobs to secure some form of earnings, and entrenching segregation and discrimination.”¹⁹

12. As in its Fourth Report, Myanmar appears to admit in its Fifth Report that it has engaged in discriminatory arrests and prosecutions. Myanmar states that between “16 October 2021 and 15 April 2022, 834 Muslims from northern Rakhine State (356 males and 478 females) were detained in other States and Regions” for travel restriction violations.²⁰ Of the 834 Rohingya that Myanmar admits were arrested for violating the discriminatory travel restrictions,

¹⁹ UN High Commissioner March 2022 Report, para. 56.

²⁰ Fifth Report, para. 117.

the Fifth Report states that “504 persons were under prosecution”, “184 were sentenced”, and “81 youths were sent to youth training schools/youth development centres”.²¹

13. Independent media have also reported arrests of Rohingya for alleged violations of discriminatory travel restrictions. The Tatmadaw arrested 104 Rohingya in June 2022 for entering Ayeyawady Division “illegally from Rakhine State”.²² A boat carrying at least 90 Rohingya from Sittwe, the capital of Rakhine State, capsized off the coast of Myanmar in May 2022, resulting in at least 17 deaths; a Tatmadaw official, referring to the Rohingya as “Bengalis”, said the “rest will be deported as usual”.²³ A group of 48 Rohingya were arrested for movement restriction violations in February 2022.²⁴ In December 2021, a court in northern Rakhine State sentenced 199 Rohingya to five years in prison for violating discriminatory travel restrictions.²⁵

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

“The Rohingya continue to be effectively cut off from access to citizenship in Myanmar. Few Rohingya are able to meet the documentary hurdles imposed by the 1982 Citizenship Law, which is applied in an extremely discriminatory manner against the Rohingya. Rohingya persons are by-and-large unwilling to accept National Verification cards (NVC) because of the stipulation that

²¹ Fifth Report, para. 117.

²² “Irrawaddy Authorities Arrest 104 Rohingya”, Myanmar Peace Monitor (2 June 2022), *available at* <https://www.bnionline.net/en/news/irrawaddy-authorities-arrest-104-rohingya>.

²³ “At least 17 Rohingya, including children, killed in boat capsized”, Al Jazeera (24 May 2022), *available at* <https://www.aljazeera.com/news/2022/5/24/at-least-17-rohingya-including-children-killed-in-boat-capsize>.

²⁴ “48 Rohingya arrested for movement restriction violations”, Mizzima (10 February 2022), *available at* <https://www.mizzima.com/article/48-rohingya-en-route-malaysia-arrested-yangons-kyauktan-township>.

²⁵ Myo Tun, “More than 100 Rohingya fleeing persecution in Rakhine State sentenced to five years in prison”, Myanmar NOW (16 December 2021), *available at* <https://www.myanmar-now.org/en/news/more-than-100-rohingya-fleeing-persecution-in-rakhine-state-sentenced-to-five-years-in-prison>.

they register as ‘Bengali,’ effectively identifying them as foreigners.”²⁶

15. These policies reflect and reinforce Myanmar’s long-standing denial of the very existence of the Rohingya as a group. That denial is reflected in a protest letter that Myanmar sent in January 2022 to the International Organization for Migration (IOM) regarding a website that the IOM had created in response to an IOM-conducted mental health assessment of Rohingya refugees that had found that 45% of Rohingya live with distress symptoms and 73% identified a loss of cultural identity as a result of the genocidal violence in 2017.²⁷ The IOM’s website, which is called the Rohingya Cultural Memory Centre, is designed “to provide the Rohingya refugees in the camps of Cox’s Bazar with a creative and safe space to share their knowledge, preserve their cultural heritage and reconnect with their individual and collective memory, as a community and as an ethnic group from Myanmar”.²⁸

16. Myanmar’s protest to the IOM asserted that:

“The term ‘Rohingya’ has always been rejected by the Burmese people and is not recognized by the Burmese people. Myanmar has also rejected the false and misleading statements and information contained on the website...”²⁹

17. As in the Fourth Report,³⁰ the Fifth Report refers to reports submitted by Union Ministries and State and Regional Governments in response to Directives issued in April 2020 by the Office of the President on compliance with the Convention on the Prevention and Punishment of the Crime of Genocide.³¹ However, the Report does not make those alleged

²⁶ UN Special Rapporteur March 2022 Report, para. 86.

²⁷ UN International Organization for Migration, Rohingya Cultural Memory Centre, *available at* <https://rohingyaculturalmemorycentre.iom.int/>.

²⁸ “Myanmar junta protests to UN migration agency about Rohingya Cultural Memory Center”, Radio Free Asia (7 January 2022), *available at* <https://www.rfa.org/english/news/myanmar/protests-01072022173000.html>.

²⁹ *Ibid.*

³⁰ Fourth Report, paras. 30-32.

³¹ Fifth Report, para. 36.

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

18. As was the case with its previous reports, the Fifth Report fails to indicate any meaningful actions regarding accountability for the acts of genocide committed during the “clearance operations” of 2016-2018. Recent developments confirm that impunity for the crimes committed against the Rohingya remains deeply entrenched.

19. The Fifth Report’s section on “Proceedings within the military justice system” consists of two short paragraphs.³² There is no change in the status of the alleged investigation into the “events at Chut Pyin Village”, nor any information reported on any other proceedings or investigations.

20. As discussed in The Gambia’s Memorial, the 2017 clearance operation in Chut Pyin was particularly brutal, involving the systematic murder of men and boys, the murder and burning alive of children, and the mass rape of women, among other atrocities.³³ The UN Fact-Finding Mission estimated that 127 children aged five or under were murdered among the more than 358 Rohingya killed during that operation.³⁴ This clearance operation also involved the separation of men and boys from women, with the men and boys executed with their hands tied behind their backs, and the women raped and then shot and killed.³⁵

³² Fifth Report, paras. 46-47.

³³ Memorial, paras. 8.108-8.120.

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. 796. MG, Vol. II, Annex 40.

³⁵ Memorial, para. 8.114.

21. In its Second Report, Myanmar stated that “[o]n 15 September 2020, the Myanmar Defence Services announced that a court-martial on Chut Pyin and Maung Nu would commence before the end of 2020.”³⁶ Almost two years later, there is still no action, just as there was no meaningful action resulting from alleged military investigations into the incidents of Inn Dinn, Gu Dar Pyin, Maung Nu, and Taung Bazar.³⁷

22. Myanmar’s reported “Civilian accountability” likewise confirms that crimes committed against the Rohingya go unpunished. The Criminal Investigation and Prosecution Body (“CIPB”), which, according to the Fourth Report,³⁸ was “re-established with new members” appears to have met only once, on 20 February 2022.³⁹

23. As before, the CIPB’s work has not advanced beyond the 139 cases previously announced in the First Report two years ago. 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 penalties, which included nothing more serious than forfeiture of one or two years of service for pension purposes.⁴⁰ The crimes alleged to have been committed have not been disclosed. Fifteen of the 23 cases against the Border Guard Police have been declared closed. Of the 29 cases against “local people”, only three have led to sentences.⁴¹

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

³⁶ Second Report, para. 55.

³⁷ See *The Gambia’s Observations on Myanmar’s Report of 23 November 2021* (7 December 2021), paras. 17-21.

³⁸ Fourth Report, para. 33.

³⁹ Fifth Report, para. 40.

⁴⁰ Fourth Report, para. 40.

⁴¹ Fifth Report, para. 45.

Rohingya women and girls across northern Rakhine State.⁴² The Fifth Report confirms 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”.

25. The Fifth Report mentions that between “16 October 2021 and 15 April 2022, 32 gender-based violence cases were reported throughout the country”, with five taking place in Rakhine State.⁴³ Only one of those five cases led to a successful prosecution and in that case the alleged perpetrator is described by Myanmar as “a Muslim man”.⁴⁴

26. The risk of continued sexual violence by Myanmar’s armed forces against Rohingya women and girls remains acute. The UN General Assembly in its December 2021 resolution expressed:

“its concern that Rohingya Muslims and other minorities, in particular women and girls, remain at significant risk of sexual violence, notably following the conflict between the security and armed forces and the Arakan Army...”⁴⁵

III. Denial of Humanitarian Assistance and Adequate Healthcare

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

28. Notwithstanding the Fifth Report’s assertions regarding the alleged provision of services in Rakhine State, the UN High Commissioner reports that humanitarian assistance and health services, like COVID-19 vaccinations, remain restricted and unavailable for the Rohingya:

⁴² See Memorial, Chapter 9.

⁴³ Fifth Report, para. 78.

⁴⁴ Fifth Report, para. 79.

⁴⁵ UNGA 2021 Resolution, preamble.

“Humanitarian access continued to be time limited, location specific, restricted in scope and subject to several layers of approvals, particularly for villages and sites in remote locations where humanitarian needs were greatest. Although a COVID-19 vaccination campaign was being rolled out in Rakhine State, costs related to travel and relevant authorizations, as well as access and availability, were reported as hindering effective coverage for Rohingya.”⁴⁶

29. The Fifth Report lists various health facilities to which Myanmar claims Rohingya have access.⁴⁷ However, as noted in Section I above, Myanmar’s web of discriminatory policies makes accessing such facilities impossible for them. The UN High Commissioner for Refugees, in June 2022, explained:

“Access to local hospitals is dependent on a cumbersome referral process which requires approvals from local administrators. Additional barriers including the need for male aides, curfews, high medical costs, and security checkpoints leave pregnant women little choice but to give birth inside camps. Discriminatory policies have, for decades, denied the Rohingya basic rights including citizenship, freedom of movement and equal access to healthcare.”⁴⁸

30. Likewise, Rohingya remain largely excluded from receiving birth certificates. The UN High Commissioner for Refugees June 2022 report observes:

“Rohingya births are typically unregistered. In Myanmar, only nurses or mid-wives assigned by the State are allowed to record births in the official register, the first step towards obtaining birth certificates. Following the intercommunal clashes of 2012, many Rohingya communities had to move into displacement camps with no access to state-assigned nurses and midwives. As a result, new births were effectively excluded from the official register. ...

Birth certificates are one of several core documents required for a person in Myanmar to apply for citizenship documentation.

⁴⁶ UN High Commissioner March 2022 Report, para. 58.

⁴⁷ *See* Fifth Report, paras. 93, 96, and 98.

⁴⁸ UN High Commissioner for Refugees, “Life in Limbo” (2 June 2022), *available at* <https://myanmar.un.org/en/184536-life-limbo>.

Without this proof of legal identity, Rohingya children face an uncertain future. Many could miss out on their rights being protected and upheld.

As they grow up, the children will be unable to acquire other important identity documents such as national registration cards, leaving them legally and administratively invisible. They will be unable to obtain higher education as well as enter the formal job market. With limited opportunities available, prospects for upward socioeconomic mobility are poor and trap the Rohingya in a cycle of poverty.”⁴⁹

IV. Inadequate Efforts to Curtail Hate Speech against the Rohingya

31. The Fifth Report describes hate speech awareness activities like radio broadcasts of “anti-hate speech” public service announcements,⁵⁰ but the Report once again ignores Myanmar’s ongoing dissemination of hate speech. As detailed in Chapter 7 of The Gambia’s Memorial, the Tatmadaw have used multiple media channels specifically to propagate anti-Rohingya hate speech.⁵¹

32. As documented in a December 2021 report by the United States Institute of Peace, the Tatmadaw are spreading hate propaganda seeking to link the anti-coup movement to Islam and Muslims, and its spokesperson claimed that the Organization of Islamic Cooperation is arming the opposition to the junta:

“The military and its supporters also propagate the fabricated narrative of an imminent Muslim takeover and link the NLD [National League for Democracy] and the anti-coup movement to Islam. Plugging into widely held Islamophobia nurtured for years by the military, the generals and their supporters spread narratives of Muslim influence on the NLD and the anti-coup movement, comparing the Peoples’ Defense Forces [the armed opposition to the military junta] to the Taliban. Burma Monitor, a Myanmar-based civil society organization that tracks online hate speech and disinformation, catalogued numerous examples of this gambit, including doctored photos of prominent members of the shadow

⁴⁹ *Ibid.*

⁵⁰ Fifth Report, paras. 49-50.

⁵¹ Memorial, Chapter 7.

National Unity Government with full beards, one of them holding a large grenade.

More recently, the military junta's spokesman, Zaw Min Tun, claimed that the army seized a cache of Turkish weapons that were delivered to anti-regime PDF fighters. To hammer the point home, he went on to say, 'I assume that the OIC [Organization of Islamic Cooperation] is getting involved in the matter.'⁵²

33. Independent media reports in December 2021 and January 2022 confirm the Tatmadaw's dissemination of anti-Muslim hate pamphlets claiming that "[t]he OIC is propagandising against the Buddhist people so they will turn on each other, insult the sacred religion of Buddhism, and kill monks. They are bribing [the PDF] with money and supporting them with weapons...".⁵³

V. Inadequate Efforts for Repatriation and Resettlement

34. The Fifth Report continues to show that Myanmar is not taking steps to allow for repatriation of Rohingya refugees and for resettlement of internally displaced Rohingya who are confined to internment camps, many since 2012. UN bodies and experts agree that conditions are not suitable for the safe, dignified, and voluntary return of the Rohingya refugees.

35. The General Assembly in December 2021 expressed:

“deep concern at the excessive use of force by Myanmar security and armed forces, taking place in most states and regions, the continuing forced displacement of civilians, including of minorities, the recruitment and use of children, abductions, arbitrary detentions and killings, and the use of facilities functioning as schools for military purposes and for committing crimes, as well as reports of violations and abuses of human rights,

⁵² Billy Ford and Zarchi Oo, “Myanmar Coup: Military Regime Seeks to Weaponize Religion”, U.S. Institute of Peace (16 December 2021), *available at* <https://www.usip.org/publications/2021/12/myanmar-coup-military-regime-seeks-weaponize-religion>.

⁵³ Zaw Ye Thwe, “Propaganda flyers become latest weapon in junta's arsenal”, Myanmar NOW (7 January 2022), *available at* <https://www.myanmar-now.org/en/news/propaganda-flyers-become-latest-weapon-in-juntas-arsenal> (brackets in original). *See also* Chris Barrett, “Divide and rule: Myanmar junta ‘weaponising’ racial tensions”, The Sydney Morning Herald (4 December 2021), *available at* https://www.smh.com.au/world/asia/divide-and-rule-myanmar-junta-weaponising-racial-tensions-20211203-p59eid.html?fbclid=IwAR3YhrwX6-QmR0BLNr9T46EVeXKgCuzJhRMf-DbZ_8mO925PKmvolW LZGuc.

including those involving the use of landmines, making conditions in Rakhine State unsuitable for the voluntary, safe, dignified and sustainable return of all refugees and forcibly displaced persons, including Rohingya...”⁵⁴

36. The UN Special Rapporteur reported in December 2021 that the Tatmadaw’s attacks on civilians, its land confiscations in Rakhine State, and the ongoing discriminatory policies against the Rohingya all contribute to the absence of conditions that would allow for the safe, sustainable, and dignified return of the Rohingya:

“The relentless assault by the Myanmar military junta’s attacks against its own people, as well as the systematic land clearance in Rakhine State, and the ongoing system of discrimination against the Rohingya in law and practice continue at this time. This means that the conditions for the safe, sustainable, dignified return of the Rohingya to their homeland currently do not exist. It will take considerable time and significant effort to create such conditions in Myanmar.”⁵⁵

37. The UN High Commissioner concurred with this assessment in her March 2022 report:

“Conditions in Rakhine State remained un conducive for the safe, voluntary, dignified and sustainable return of refugees and internally displaced persons. Owing primarily to security concerns in the camps in Cox’s Bazar, Bangladesh, however, some families decided to return to Myanmar. Consistent with Tatmadaw policies aimed at excluding Rohingya from life in Myanmar, those individuals were arrested, charged and prosecuted for illegal entry. Similarly, Rohingya rescued at sea while undertaking perilous journeys either from Bangladesh or Myanmar to third countries, or moving inside Myanmar, faced arrest and prosecution.”⁵⁶

⁵⁴ UNGA December 2021 Resolution, preamble.

⁵⁵ UN Special Rapporteur on the situation of human rights in Myanmar, Tom Andrews, *End of Mission Statement* (19 December 2021), available at <https://www.ohchr.org/en/statements/2022/03/mission-bangladesh-13-19-december-2021?LangID=E&NewsID=28001>.

⁵⁶ UN High Commissioner March 2022 Report, para. 57.

38. In his March 2022 report, the UN Special Rapporteur emphasized the Tatmadaw's destruction of Rohingya villages and building of new structures there for the military and/or government as a barrier to the safe, dignified, and voluntary return of Rohingya:

“No progress has been made towards the safe, dignified and voluntary return of Rohingya who were driven from their homes. Many of the properties which belonged to Rohingya in villages from which they were driven by attacks in 2012, 2016 and 2017 have been razed and are now the site of new commercial projects, government buildings or military installations. Given current conditions, the Special Rapporteur considers the situation in Rakhine State to be uncondusive to the voluntary, sustainable return of Rohingya refugees from Bangladesh.”⁵⁷

39. The Fifth Report does not provide any information as to how these barriers to the safe, dignified, and voluntary return of Rohingya are being addressed. Instead, it presents updated statistics on Myanmar's verification process of names for repatriation. Specifically, Myanmar claims to have reviewed, as of 15 April 2022, the names of 58,214 people and, of those, verified 32,898 as former residents of Rakhine State.⁵⁸ According to the Fourth Report, as of 9 July 2021, Myanmar had reviewed no more than 46,684 people and verified only 31,119 as residents of Rakhine State.⁵⁹ Thus, in nine months, Myanmar reviewed an additional 11,530 names but verified only an additional 1,779 residents of Rakhine State. In the four years since this process started, Myanmar has only reviewed 7% of the names received from Bangladesh.

40. In regard to releasing Rohingya from their internment in IDP camps, the Fifth Report does not provide clarity on how that process will proceed and to what extent the affected Rohingya have been consulted and included in the process. The Report does make clear, however, that the Rohingya are not being allowed to return to their homes; rather, the plan is to relocate them to new villages.⁶⁰ As the UN High Commissioner has noted, the fundamental

⁵⁷ UN Special Rapporteur March 2022 Report, para. 87.

⁵⁸ Fifth Report, para. 56.

⁵⁹ Fourth Report, para. 61.

⁶⁰ Fifth Report, para. 66.

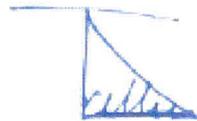
issues of discriminatory laws, land and property rights, and citizenship have not been resolved as part of the IDP camp closure process:

“The military authorities reportedly intended to move forward with implementing the national strategy for closing camps for internally displaced persons developed by the previous civilian government, although they had not yet addressed fundamental issues of citizenship, freedom of movement and housing, land and property rights. Engagements with affected communities were described as cursory.”⁶¹

* * *

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

42. 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
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Agent of the Republic of The Gambia

7 June 2022

⁶¹ UN High Commissioner March 2022 Report, para. 59.