

# Struggling to survive

Report | Burmese Rohingya Organisation UK | November 2023



*Rohingya communities in Rakhine State subjected to appalling conditions of life, denied humanitarian assistance after Cyclone Mocha, and trapped by armed conflict*

## Executive summary

**[21 November 2023]** Six years after the genocidal attacks by the Myanmar military, Rohingya survivors in Rakhine State and the refugee camps in Bangladesh remain extremely vulnerable. Rohingya refugees in Bangladesh are threatened by spiralling violence in the camps, drastic cuts in food rations, and a coercive repatriation effort. Rohingya in Rakhine State are threatened by humanitarian aid blockades following the devastation of Cyclone Mocha and a rapidly intensifying armed conflict, in which they are treated as expendable pawns by all sides.

Six months after Cyclone Mocha killed hundreds of Rohingya in Rakhine State, those who are confined to internment camps have been subjected to increasingly unsanitary, degrading conditions, without enough food, water, or shelter. Discriminatory policies and humanitarian aid restrictions prevent them from accessing timely medical care and have led to further preventable deaths. Reports of suicide among Rohingya men, women and children in the camps since Cyclone Mocha attest to the depths of desperation, sense of abandonment, and hopelessness they are experiencing.

Moreover, Rohingya communities now find themselves trapped in the middle of rapidly intensifying armed conflict after the year-long ceasefire in Rakhine State broke down on 13 November. BROUK is gravely concerned for their safety and well-being. Indiscriminate shelling by the Myanmar Army in Myebon township has already killed and injured Rohingya civilians. The regime's blockade of all major roads and waterways within Rakhine State and the main route between Sittwe-Yangon will have a further punishing effect on Rohingya communities, who are largely dependent on humanitarian aid.

The evidence documented by BROUK and presented in this latest briefer (together with seven previous briefings) demonstrates that the Myanmar military's conduct continues to cause irreparable harm to the Rohingya. The evidence points to the ongoing commission of the genocidal act of deliberately inflicting conditions of life calculated to bring about the physical destruction of the Rohingya in whole or in part.

On 15 November 2023, Canada, Denmark, France, Germany, the Netherlands and the United Kingdom filed a joint declaration of intervention in the case brought by The Gambia against Myanmar at the International Court of Justice. The countries' joint statement announcing the filing highlighted that, 'the Genocide Convention requires States Parties to prevent the crime of genocide and hold those responsible to account'. The Maldives filed its declaration of intervention on 16 November. BROUK welcomes the interventions and urges the Court to deal with procedural matters as swiftly as possible, to avoid delays in the administration of justice for the Rohingya community.

Myanmar has indicated that it intends to press ahead with a pilot repatriation project to return Rohingya refugees from the camps in Bangladesh to northern Rakhine State by the end of the year. 'Model villages' for the returnees have been constructed in areas where atrocity crimes are known to have taken place, in breach of provisional measures ordered by the International Court of Justice instructing Myanmar to 'prevent the destruction of and ensure the preservation of evidence' related to alleged genocidal acts.

In the meantime, the international community must find concrete ways to leverage the provisional measures ordered by the International Court of Justice, to ensure they fulfil their purpose of protecting

the Rohingya. This includes securing public hearings at the UN Security Council on the junta's continued breaches of the order to ensure that there are consequences for non-compliance. Any future UN Security Council resolution must recognise that enduring peace and security in Myanmar and justice for the Rohingya are intertwined, and either refer the situation in Myanmar to the International Criminal Court or establish an ad hoc international tribunal for Myanmar.

## Introduction

This report covers the time period of May-November 2023, coinciding with Myanmar's next reporting deadline for its compliance report on the International Court of Justice's provisional measures order. BROUK's 5<sup>th</sup> and 6<sup>th</sup> reports focused on the conditions of life imposed on the Rohingya who remain in Myanmar and who have been left to languish in appalling conditions in IDP camps since 2012. BROUK's last report, the 7<sup>th</sup> of this series, was released in the immediate aftermath of the devastating Cyclone Mocha. Already at that point, BROUK raised grave concerns about the impact of the regime's restrictions on humanitarian access. This present report continues BROUK's reporting on these two ongoing issues, as well as addressing new concerning developments related to intensifying armed conflict in Rakhine State, the deteriorating situation for Rohingya refugees in Bangladesh, and the junta's pilot repatriation scheme.

On 14 May, Cyclone Mocha struck Myanmar, leaving behind a trail of destruction in its wake. According to UN estimates, 7.9 million people lived in the areas of Rakhine, Chin, and Kachin States and Magway and Sagaing Regions that were heavily impacted by the storm and 700,000 homes were damaged or destroyed.<sup>1</sup> Widespread devastation was reported in Sittwe and Rathedaung townships in Rakhine State, where the cyclone made landfall. According to information received by BROUK, around 400 people are believed to have died, most of them displaced Rohingya confined to camps and villages along Sittwe's coastline. As the UN Special Rapporteur on the human rights situation in Myanmar has highlighted, 'The devastation wrought by Cyclone Mocha, attributable in large part to the SAC's actions and policies, further underscores the vulnerability of the Rohingya as a result of the systemic discrimination against them.'<sup>2</sup>

In the aftermath of the cyclone, the junta has deliberately blocked humanitarian access to impacted communities, with callous disregard for human life. The Rohingya – defined by the International Court of Justice as 'extremely vulnerable' – have faced devastating consequences arising from the regime's restrictions on humanitarian access, described in detail in this briefing.

In mid-August 2023, the UN Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator Martin Griffiths travelled to Rakhine State and met with Senior General Min Aung Hlaing to negotiate humanitarian access in Rakhine State and other parts of the country. His visit followed weeks of high-level meetings by members of the UN Country Team with senior members of the regime to try and secure access for a coordinated humanitarian response to the disaster. These meetings have yielded little in the way of tangible results but have been widely reported by State media as part of the junta's propaganda efforts to prop up its own legitimacy.<sup>3</sup>

The regime has continued to defy UN Security Council Resolution 2669, notably the calls for 'full, safe and unhindered humanitarian access' and 'restraint and de-escalation of tensions.'<sup>4</sup> Instead, the regime

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<sup>1</sup> UNGA, 'Report of the Special Rapporteur on the situation of human rights in Myanmar – advance unedited version' (12 October 2023) 11 [56] UN Doc A/78/527.

<sup>2</sup> *ibid* 15 [81].

<sup>3</sup> *ibid* 12-13 [63-64].

<sup>4</sup> UN Security Council, 'Resolution 2669 (2022) Adopted by the Security Council at its 9231st meeting' (21 December 2022) UN Doc S/RES/2669 (2022).

has increased its use of airstrikes against civilian populations. On average, the military have conducted 32 airstrikes per month so far in 2023, compared with 8 per month after the junta seized power in 2021 and 26 per month in 2022.<sup>5</sup> On 15 November, a military airstrike on a village in Matupi township in southern Chin State killed 13 civilians, including several children. According to credible reports, no combatants are present in the village and no fighting has taken place there since the 2021 military takeover.<sup>6</sup> On 9 October, an airstrike by the military on a village in Kachin State where internally displaced people (IDPs) were sheltering killed at least 28 people, most of them women and children.<sup>7</sup>

Armed conflict has escalated rapidly across Myanmar in recent weeks. On 27 October, the Three Brotherhood Alliance comprising the Arakan Army (AA), the Myanmar National Democracy Alliance Army and the Ta'ang National Liberation Army launched a major offensive against junta forces in northern Shan State. Other armed opposition forces quickly followed suit, with clashes intensifying in the southeast and northwest of the country.

On 13 November, the fragile year-long humanitarian ceasefire between the AA and the Myanmar Army collapsed. Armed clashes between the two sides have resumed across Rakhine State, including the three northern townships of Rathedaung, Buthidaung and Maungdaw, where most Rohingya live, as well as in Pauktaw where more than 26,500 Rohingya IDPs are confined to camps.<sup>8</sup> The situation is also very tense in Sittwe town, where the military has deployed tanks. All major roads and waterways within Rakhine State have been blockaded by the regime, including transport links between Sittwe and Yangon. This will have dire consequences for populations dependent on humanitarian aid for their survival, in particular Rohingya IDPs confined to camps across cyclone-affected areas of Rakhine State.

Six years after the genocidal attacks by the Myanmar military, Rohingya survivors in both Rakhine State and the refugee camps in Bangladesh remain extremely vulnerable. Citing funding shortfalls, the World Food Programme has been forced to cut food rations for Rohingya refugees in Bangladesh from \$12 per person per month down to \$10, then just \$8. Even prior to the first round of rations cuts, health indicators for Rohingya refugees in Bangladesh were bleak. Forty percent of Rohingya children experienced stunted growth, and more than half suffered from anaemia.<sup>9</sup> As the UN Special Rapporteur has noted, 'Despite their immense suffering and great need, the international community appears to be turning its back on the Rohingya people.'<sup>10</sup> At the time of writing, the 2023 Rohingya Humanitarian Crisis Joint Response Plan which funds programs for Rohingya refugees in Bangladesh was only 45 percent funded.<sup>11</sup>

Rohingya families in the Bangladesh refugee camps have also faced increased violence at the hands of armed groups – including the Arakan Rohingya Salvation Army (ARSA) - and criminal gangs, including murder, kidnapping, torture, rape and sexual assault. Rohingya refugees face multiple barriers to seeking justice for these crimes.<sup>12</sup> In addition, they have faced pressure and coercion from the Bangladesh

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<sup>5</sup> UNGA, UN Doc A/78/527, *op. cit.* 7 [28].

<sup>6</sup> Source: Chin Human Rights Organisation.

<sup>7</sup> Myanmar Now, 'Military airstrike on civilian village a war crime, says international rights group' (17 October 2023) available at <<https://myanmar-now.org/en/news/military-airstrike-on-civilian-village-a-war-crime-says-international-rights-group/>> accessed 15 November 2023.

<sup>8</sup> This rapidly evolving situation is described in more detail under **Rakhine State context** below.

<sup>9</sup> OHCHR, 'Bangladesh: UN experts decry devastating second round of rations cuts for Rohingya refugees' (1 June 2023) available at <<https://www.ohchr.org/en/press-releases/2023/06/bangladesh-un-experts-decry-devastating-second-round-rations-cuts-rohingya>> accessed 15 November 2023.

<sup>10</sup> UNGA, UN Doc A/78/527, *op. cit.* 14 [71].

<sup>11</sup> UNOCHA, '2023 Rohingya Humanitarian Crisis Joint Response Plan: Financials' available at <<https://humanitarianaction.info/plan/1143/financials#page-title>> accessed 16 November 2023.

<sup>12</sup> See, HRW Bangladesh: Spiraling Violence Against Rohingya Refugees (13 July 2023) available at <<https://www.hrw.org/news/2023/07/13/bangladesh-spiraling-violence-against-rohingya-refugees>> accessed 15 November 2023.

authorities to take part in the Bangladesh-Myanmar pilot repatriation project, including the confiscation of ration cards, cash incentives, and beatings.<sup>13</sup>

A 30-member Myanmar delegation visited Bangladesh from 27-29 October to press ahead with this pilot repatriation project.<sup>14</sup> The timing of this and other high-profile visits suggests that the pilot repatriation scheme is likely a cornerstone of the regime's efforts to persuade the International Court of Justice that they are complying with the Court's provisional measures order for the State to 'take all measures within its power' to protect the Rohingya.<sup>15</sup> However, according to information obtained by BROUK, several of the regime's so-called 'model villages' for Rohingya returnees as part of the pilot repatriation scheme have been constructed on the same sites where mass killings and other alleged genocidal acts took place during the 2016-2017 'clearance operations'. This breaches the Court order, which instructs Myanmar to 'prevent the destruction of and ensure the preservation of evidence' related to alleged genocidal acts.

This latest briefing from BROUK highlights this breach of the provisional measures order. It also provides further evidence of the regime's ongoing commission of the genocidal act of deliberately inflicting conditions of life calculated to bring about the destruction of the Rohingya group, in the wake of Cyclone Mocha.

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

### ***Background to the ICJ case***

In 2016 and 2017, BROUK and many other human rights organisations documented gross human rights violations perpetrated by the Myanmar military and its proxies during 'clearance operations' in Myanmar's Rakhine State, resulting in significant loss of life and severe mental and physical harm to the Rohingya.<sup>16</sup> These included mass rape of Rohingya women, children burned alive, machete attacks, shooting at fleeing villagers, the use of rocket launchers to raze entire Rohingya villages to the ground, coordinated massacres, as well as landmines laid at the border to target those fleeing the violence.<sup>17</sup>

In March 2017, the Independent International Fact-Finding Mission on Myanmar (UNFFM) was established by the UN Human Rights Council.<sup>18</sup> In 2019, the UNFFM found that Myanmar had committed four out of the five underlying acts of genocide enumerated in the Genocide Convention, namely killings members of the Rohingya group, causing serious bodily or mental harm to members of the group, deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part, and imposing measures intended to prevent births within the group.<sup>19</sup> It further concluded that genocidal intent to destroy the Rohingya people in whole or in part could be inferred from the State's pattern of conduct.<sup>20</sup>

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<sup>13</sup> UNGA, UN Doc A/78/527, *op. cit.* 15 [79].

<sup>14</sup> The Daily Star, 'Rohingyas willing to go home, not to model villages' (7 November 2023) available at <<https://www.thedailystar.net/rohingya-influx/news/rohingyas-willing-go-home-not-model-villages-3463426>> accessed 15 November 2023.

<sup>15</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, International Court of Justice Provisional Measures Order (23 January 2020), 23 [72].

<sup>16</sup> See for example, US Holocaust Memorial Museum and Fortify Rights, '“They Tried to Kill Us All”: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar' (15 November 2017); Fortify Rights, '“They Gave Them Long Swords”: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar' (19 July 2018); Physicians for Human Rights, '“Please Tell the World What They Have Done to Us”: The Chut Pyin Massacre: Forensic Evidence of Violence against the Rohingya in Myanmar' (19 July 2018).

<sup>17</sup> BROUK, 'Burned, Stabbed, and Shot: Physical evidence of atrocities committed against the Rohingya' (May 2017) 13-27. BROUK, '“I Thought I Would Die”: Physical evidence of atrocities against the Rohingya' (1 November 2017) 12-31.

<sup>18</sup> UN Human Rights Council Resolution 34/22, adopted 24 March 2017 (3 April 2017) UN Doc A/HRC/RES/34/22. The UNFFM mandate was to “establish the facts and circumstances of the alleged recent human rights violations by military and security forces...in Myanmar, in particular in Rakhine State...with a view to ensuring full accountability for perpetrators and justice for victims.” The UNFFM published two seminal reports of its detailed findings in 2018 and 2019.

<sup>19</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 1 January 1951) 78 UNTS 277 art II.

<sup>20</sup> UNFFM 2019 report 'Detailed findings of the Independent International Fact-Finding Mission on Myanmar' (16 September 2019) UN Doc A/HRC/42/CRP.5 70 [220].

On 11 November 2019, The Gambia filed a case against Myanmar before the International Court of Justice (ICJ), alleging that Myanmar has committed genocide against the Rohingya people. The ICJ is the principal judicial organ of the United Nations. It deals with disputes between States, *not* the individual criminal responsibility of particular perpetrators. The legal basis for the case is the Genocide Convention, to which both States are a party. The Gambia has also accused Myanmar of *continuing* to commit genocidal acts and of violating its other obligations under the Convention by failing to *prevent* and *punish* genocide.

Establishing that genocide has taken place under the Genocide Convention requires demonstrating both the commission of genocidal acts and genocidal intent – namely the intent to destroy a national, ethnic, racial, or religious group in whole or in part. The Gambia’s initial filing primarily focused on the first three genocidal acts enumerated in the Convention perpetrated by the Myanmar military and other State actors with the intent to destroy the Rohingya in whole or in part: 1) killing members of the group; 2) causing serious bodily or mental harm to members of the Rohingya group; and 3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part by destroying or otherwise denying access to food, shelter and other essentials of life.<sup>21</sup>

The Gambia’s case against Myanmar marks the first time that a State without a direct connection to the alleged crime of genocide has brought a case before the ICJ under the Genocide Convention.<sup>22</sup> In doing so, The Gambia has emphasised the importance of the legal concepts of *erga omnes* obligations (owed to the international community as a whole) and *erga omnes partes* obligations (owed by any State party to all the other States parties to a convention), both of which apply to the crime of genocide.<sup>23</sup>

### ***The ICJ’s provisional measures order***

Provisional measures are the equivalent of a legal injunction or court order, instructing a State to immediately take certain steps prior to a final ruling on the case.<sup>24</sup> As part of its original case filing, The Gambia included an urgent request for the Court to order provisional measures in light of ‘the ongoing, severe and irreparable harm being suffered by members of the Rohingya group.’<sup>25</sup>

On 23 January 2020, the ICJ issued a relatively rare unanimous order on provisional measures. The Court described the Rohingya remaining in Myanmar as ‘extremely vulnerable’. As part of its rationale for issuing the order, the ICJ made it clear that, ‘Myanmar has not presented to the Court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention.’<sup>26</sup> In short, the provisional measures order recognises that Myanmar’s actions prior to the order were wholly inadequate to protect the Rohingya. It creates an expectation that Myanmar must take concrete measures in order to meet its obligations under the Genocide Convention.<sup>27</sup>

Without prejudging the merits of the case - i.e. whether or not genocide has already taken place - the ICJ ordered Myanmar to ‘take all measures within its power’ to prevent irreparable harm against the Rohingya. In brief, the provisional measures imposed by the Court require Myanmar to prevent the commission of genocidal acts, ensure security forces and those under its influence do not commit or incite genocide, preserve evidence of alleged genocidal acts, and report back within four months on its

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<sup>21</sup> *The Gambia v. Myanmar*, International Court of Justice ‘Application Instituting Proceedings and Request for Provisional Measures’ (11 November 2019) 38 [113] 4 [2] 55-56 [99-110] 58 [114].

<sup>22</sup> The case was brought with the support of the other 56 States belonging to the Organisation of Islamic Cooperation. Final Communiqué of the 14th Islamic Summit Conference (31 May 2019) 10 [47] OIC/SUM-14/2019/FC/FINAL.

<sup>23</sup> The ICJ has held that “the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*”. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment, 11 July 1996 [31].

<sup>24</sup> Global Justice Center and Global Centre for the Responsibility to Protect, ‘Q&A: The Gambia v. Myanmar - Rohingya Genocide at the International Court of Justice’ (May 2020).

<sup>25</sup> *The Gambia v. Myanmar*, ICJ ‘Application Instituting Proceedings and Request for Provisional Measures’ (11 November 2019) [113].

<sup>26</sup> *The Gambia v. Myanmar*, ICJ provisional measures order *op. cit.* 22 [73].

<sup>27</sup> USHMM, ‘Practical Prevention - How the Genocide Convention’s Obligation to Prevent Applies to Myanmar - Report #2: The Denial of the Right to Citizenship and the Right to Participate in Public Affairs’ (October 2020) 5.

compliance with the order and every six months thereafter until the case concludes.<sup>28</sup> Under the UN Charter, all member States must comply with ICJ decisions.<sup>29</sup> Critically assessing Myanmar's compliance with the order is therefore of the utmost importance.

To date, the State of Myanmar has not been under any legal obligation to make its reports public, despite consistent calls for this from a broad range of actors, including BROUK along with a coalition of Rohingya organisations. At the time of publication of BROUK's May 2023 briefing, two of Myanmar's compliance reports and The Gambia's observations on four of the reports had been made published on the Court's website. However, they are no longer available and may have been published in error.<sup>30</sup>

It is vital that all the reports are made readily available to the public at the time of submission to the Court. This is of the utmost importance to allow contemporaneous scrutiny of Myanmar's compliance with the order. The order is one of the few available mechanisms to protect the 'extremely vulnerable' Rohingya remaining in Myanmar. It must be viewed as an integral part of Myanmar's obligations to the international community as a whole to prevent and punish the crime of genocide.

BROUK once again reiterates its urgent call to the Court to amend the provisional measures order so that Myanmar is legally obliged to make its compliance reports public.

### ***Latest developments in the ICJ case***

On 15 November 2023, Canada, Denmark, France, Germany, the Netherlands and the United Kingdom filed a joint declaration of intervention in the case brought by The Gambia against Myanmar at the International Court of Justice. The countries' joint statement announcing the filing highlighted that, 'the Genocide Convention requires States Parties to prevent the crime of genocide and hold those responsible to account'.<sup>31</sup> Tun Khin, President of the Burmese Rohingya Organisation UK said, "We welcome this important step for justice for Rohingya from the British government and partners. The intervention of other countries in support of The Gambia strengthens the case, and increases the pressure on the Burmese military who are still committing genocide against Rohingya."<sup>32</sup> On 16 November 2023, the Republic of Maldives filed its declaration of intervention. The Maldives Minister of Foreign Affairs announced, "The decision of the Maldives to intervene stems from its support to ongoing efforts to secure accountability for the perpetrators of genocide against the Rohingya people, in line with the decision taken by the OIC [Organisation of Islamic Cooperation]. The Maldives firmly supports The Gambia in this endeavour."<sup>33</sup>

As State parties to the Genocide Convention, the Maldives, Canada, Denmark, France, Germany, the Netherlands and the United Kingdom have filed their declarations of intervention under Article 63(2) of the ICJ Statute. Read together with the Rules of the Court, this gives State parties to an international

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<sup>28</sup> *The Gambia v. Myanmar*, 'Application' (11 November 2019) *op. cit.* 46 [86] 58 [113].

<sup>29</sup> United Nations, Charter of the United Nations (1945) 1 UNTS XVI Art 94(1).

<sup>30</sup> The reports were previously mentioned but not linked on the main case page <<https://www.icj-cij.org/case/178/other-documents>>, and were previously available at the following links <<https://www.icj-cij.org/node/106112>> (Myanmar's first report); <<https://www.icj-cij.org/node/106113>> (The Gambia's observations on the first report); <<https://www.icj-cij.org/node/106115>> (The Gambia's observations on the second report); <<https://www.icj-cij.org/node/106117>> (The Gambia's observations on the third report); <<https://www.icj-cij.org/node/106118>> (Myanmar's fourth report only available in French); and <<https://www.icj-cij.org/node/106119>> (The Gambia's observations on the fourth report), accessed 23 May 2023.

<sup>31</sup> FCDO, 'Intervention by UK and partners in The Gambia v Myanmar ICJ case: joint statement' (16 November 2023) available at <<https://www.gov.uk/government/news/intervention-by-uk-and-partners-in-the-gambia-v-myanmar-icj-case-joint-statement>> accessed 17 November 2023.

<sup>32</sup> BROUK, 'BROUK Welcomes UK Intervention In Rohingya Genocide Case' (16 November 2023) available at <<https://www.brouk.org.uk/brouk-welcomes-uk-intervention-in-rohingya-genocide-case/>> accessed 17 November 2023.

<sup>33</sup> Doughty Street Chambers, Maldives File Declaration of Intervention in Myanmar Genocide Case at the International Court of Justice (16 November 2023) available at <<https://www.doughtystreet.co.uk/news/maldives-file-declaration-intervention-myanmar-genocide-case-international-court-justice>> accessed 18 November 2023.

convention the right to intervene in a case where it concerns the ‘construction’ of a convention, but the construction given by the judgment will be equally binding upon intervening States.<sup>34</sup> In brief, this means that intervening States can seek to clarify the interpretation of particular provisions of the Genocide Convention, and the Court’s findings will be binding on them.

Following the declaration of intervention filings under Article 63 of the ICJ Statute, The Gambia and Myanmar will be invited to respond in writing to the filings within a fixed time-limit set by the Court. Myanmar may file an objection to the proposed interventions, in which case the Court must hear the States seeking to intervene and both Myanmar and The Gambia before coming to a decision on whether to allow the interventions. If the Court finds in favour of the intervening States, a time-limit will be set for their written submissions, followed by oral submissions on the subject matter of the interventions during subsequent oral pleadings.<sup>35</sup> BROUK urges the Court to deal with such procedural matters as swiftly as possible.

Regarding the merits of the case, following the Court’s judgment on Myanmar’s preliminary objections, the Court ordered Myanmar to submit its written submission, known as the counter-memorial, by 24 April 2023.<sup>36</sup> The Agent for Myanmar U Ko Ko Hlaing (the designated representative of the Myanmar State in ICJ court proceedings) lodged a request on 14 March 2023 to extend the deadline until 24 February 2024.<sup>37</sup>

Initially, the Court granted a one-month extension of the time limit, until 24 May 2023.<sup>38</sup> However, on 21 April 2023 Myanmar’s Agent submitted a further request for an extension of the time-limit until 24 February 2024, citing the same reasons as in the original request. Despite The Gambia’s opposition to the request on the basis that Myanmar had offered no new justification for the extension, the Court extended the time-limit by an additional three months until 24 August 2023.<sup>39</sup>

Myanmar complied with the deadline and has submitted its counter-memorial. In accordance with the rules of the Court, in September the President of the Court met with both Agents to seek their views on whether a second round of written pleadings was necessary before proceeding to oral hearings. Both parties agreed it was necessary, and the Court subsequently fixed time-limits for The Gambia to submit its Reply (written submission in response to Myanmar’s Counter-Memorial) and Myanmar to submit its Rejoinder (written submission in response to The Gambia’s Reply) of 16 May and 16 December 2024 respectively.<sup>40</sup> This second round of written pleadings means that oral hearings as part of the merits phase of the case will not take place until 2025 at the earliest.

Until the case concludes and the final judgment is issued, the State of Myanmar is obliged to comply with and continue reporting on that compliance with the Court’s provisional measures every six months. The length of court proceedings mean that even greater scrutiny must be afforded to Myanmar’s compliance with the ICJ’s provisional measures order, given that its purpose is to protect the Rohingya.

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<sup>34</sup> Article 63(2) ICJ Statute available at <<https://www.icj-cij.org/statute>> and Article 82(3) ICJ Rules of Court, available at <<https://www.icj-cij.org/rules>> accessed 17 November 2023.

<sup>35</sup> For further discussion, see Essex Court Chambers, ‘Intervention Before the ICJ: A Practical Guide’ (22 September 2022) available at <<https://essexcourt.com/publication/intervention-before-the-icj-a-practical-guide/>> accessed 17 November 2023.

<sup>36</sup> ICJ order, ‘Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*)’ (22 July 2022) 3.

<sup>37</sup> ICJ order, ‘Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*)’ (6 April 2023) 3.

<sup>38</sup> *ibid.*

<sup>39</sup> ICJ order, ‘Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*)’ (12 May 2023) 2.

<sup>40</sup> *ibid.*

## Methodology

In preparing this briefing, BROUK collects first-hand information from the ground in Rakhine State and has carried out due diligence efforts to verify the incidents described herein. There are major security challenges with documenting serious violations of international law in Rakhine State. These are compounded by frequent telecommunications disruptions, including to internet services, especially since the renewed armed conflict in Rakhine State. As such, this briefing does not claim to provide a comprehensive account of violations and atrocity crimes that have taken place between the reporting period of May to November 2023 in Rakhine State.

This briefing documents and analyses key incidents which have caused irreparable harm to the Rohingya, who are the subject of the protective measures outlined in the Court's order. Rohingya individuals, families and communities who dare to speak out about the violations they have been experiencing are at grave risk of reprisal attacks from the Myanmar military, the Arakan Rohingya Salvation Army, and the Arakan Army. All potentially identifying information - including exact dates and location names - has therefore been redacted from this briefing to protect victims, their families, communities, and BROUK sources. Detailed information is held on file with BROUK and is referenced as such unless reliable information about the incident is already in the public domain.

The following section describes the current context in Rakhine State. The extremely vulnerable Rohingya community has been disproportionately affected by the humanitarian disaster of Cyclone Mocha, due to the conditions of life inflicted upon the group by the Myanmar State since 2012.<sup>41</sup> The Rohingya are also trapped in the middle of the rapidly intensifying armed conflict in Rakhine State, which resumed on 13 November after a year-long pause in hostilities. The Myanmar State is in serious breach of the ICJ's provisional measures order and is also failing in its duty to protect the Rohingya from abuses by non-State actors such as the Arakan Army and the Arakan Rohingya Salvation Army - acts of omission that can be attributed to the State.

## Rakhine State context<sup>42</sup>

*The current situation in Rakhine State is extremely volatile. The information in this section is up to date as of 17 November 2023.*

### ***The disproportionate impact of Cyclone Mocha on the Rohingya community***

Cyclone Mocha made landfall in Rakhine State on 14 May with winds of up to 150 miles per hour, making it one of the strongest cyclones on record to hit the country. Destructive winds damaged almost every home in the state capital Sittwe and the northern township of Rathedaung.<sup>43</sup> A storm surge several metres high inundated coastal areas of Rakhine State, especially Sittwe. An estimated 85 percent of shelters in Rohingya IDP camps, which were constructed alongside existing Rohingya fishing villagers next to the Sittwe shoreline, were destroyed.<sup>44</sup>

As reported by BROUK in its previous briefing, at least 400 Rohingya are believed to have died during Cyclone Mocha.<sup>45</sup> They lost their lives in Rohingya villages and IDP camps along Sittwe's shoreline and in

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<sup>41</sup> See section **Provisional measure (2) - Ensure that the military and others under its influence do not commit any of the acts punishable under Article III of the Genocide Convention** - Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (i) Eleven years of arbitrary indefinite detention for more than 140,000 Rohingya confined to camps.

<sup>42</sup> All information in this section on file with BROUK, unless otherwise referenced.

<sup>43</sup> UNOCHA, 'Myanmar: Cyclone Mocha Situation Report No. 1' (25 May 2023) 2.

<sup>44</sup> UNGA UN Doc A/78/527 *op. cit.* 12 [58].

<sup>45</sup> BROUK, 'At Least 400 Rohingya Feared Dead In IDP Camps – Humanitarian Aid Urgently Needed' (17 May 2023) available at <<https://www.brouk.org.uk/at-least-400-rohingya-feared-dead-in-idp-camps-humanitarian-aid-urgently-needed/>> accessed 5 November 2023.



coastal villages in Rathedaung.<sup>46</sup> Even by the regime's own admission, most people who died in the cyclone were Rohingya. The regime's official death toll was 145, including 117 'Bengalis' - the pejorative term for Rohingya people that implies they are foreign interlopers from Bangladesh. The junta warned that media outlets publishing a higher death toll would be sued.<sup>47</sup> Myanmar Now photojournalist Sai Zaw Thaike was arrested on 23 May in Sittwe while documenting the devastation caused by Cyclone Mocha. He has since been sentenced to 20 years in prison with hard labour over his media coverage.<sup>48</sup> Reports indicate that the regime also put pressure on Rohingya village administrators and IDP camp leaders not to share their lists of the dead.<sup>49</sup> As such, a complete and accurate death toll from Cyclone Mocha may never be known. What is known, however, is that these deaths were entirely preventable.

As documented by BROUK in its previous briefing, the junta's efforts to prevent loss of life among Rohingya communities in Sittwe were completely inadequate. In State media, the regime claimed that '[t]he Rakhine State government, Tatmadaw and departmental officials, in-charge persons of IDP camps and social welfare organizations gave warnings about Cyclone Mocha and conducted the evacuation' and further claimed that it 'accommodated 63,302 of the 125,789 Bengalis from 17 refugee camps who needed to be evacuated'.<sup>50</sup> This has been refuted by BROUK, Amnesty International, Human Rights Watch, and the UN Special Rapporteur on the human rights situation in Myanmar.<sup>51</sup>

Freedom of movement is restricted in the Rohingya IDP camps and villages. People are not allowed to move from those sites without express permission from the *de facto* authorities. The camps are surrounded by barbed wire, with military checkpoints. Only very limited information and support to find shelter or transportation was provided by the SAC. Buildings that were used as cyclone shelters were widely reported to have been overcrowded. The junta has callously blamed victims for their own deaths, claiming that they 'didn't comply with the authority's evacuation procedure and remained in their homes on their own accord'.<sup>52</sup>

In addition to images and video footage of the deceased, BROUK has also obtained footage of the extensive injuries sustained by Rohingya during the cyclone. These include serious head injuries and infected wounds. Rohingya communities reported outbreaks of diarrhoea and skin infections soon after the cyclone, particularly among children. In the immediate aftermath of the cyclone, the SAC did not provide any support to Rohingya communities for search-and-rescue operations, leaving traumatised survivors to search through the debris for the bodies of their loved ones while already struggling to cope with their own losses and injuries. Locally sourced aid barely trickled in to affected communities due to the scale of the damage to road infrastructure. Yet the regime's main concern was keeping a tight grip on the narrative around the death toll, with its threat to punish people issued just five days after the cyclone.

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<sup>46</sup> See for example this report by RFA, about 19 Rohingya who died in Nyaung Pin Gyi village in Rathedaung township: RFA, 'Rohingya boy grieves his mother's death to Cyclone Mocha' (13 June 2023) available at <[https://www.rfa.org/english/video?v=1\\_2zv93u9y](https://www.rfa.org/english/video?v=1_2zv93u9y)> accessed 6 November 2023.

<sup>47</sup> The Irrawaddy, 'Cyclone Mocha Kills 145 in Myanmar, Military Junta Says' (19 May 2023) available at <<https://www.irrawaddy.com/news/burma/cyclone-mocha-kills-145-in-myanmar-military-junta-says.html>> accessed 18 November 2023.

<sup>48</sup> The Guardian, 'Myanmar journalist jailed for 20 years for cyclone coverage' (7 September 2023) available at <<https://www.theguardian.com/world/2023/sep/07/myanmar-journalist-jailed-for-20-years-for-cyclone-coverage>> accessed 5 November 2023.

<sup>49</sup> Frontier Myanmar, 'They ignore us on purpose': Cyclone deepens Rohingya suffering' (15 June 2023) available at <<https://www.frontiermyanmar.net/en/they-ignore-us-on-purpose-cyclone-deepens-rohingya-suffering/>> accessed 5 November 2023.

<sup>50</sup> The Global New Light of Myanmar, 'MoBA Union Minister provides aid to cyclone victim Bengalis in Sittway Township' (18 May 2023) available at <<https://www.gnlm.com.mm/moba-union-minister-provides-aid-to-cyclone-victim-bengalis-in-sittway-township>>; RFA, 'Myanmar's junta threatens media that don't report official cyclone death numbers' (19 May 2023) available at <<https://www.rfa.org/english/news/myanmar/junta-death-toll-05192023162540.html>> accessed 5 November 2023.

<sup>51</sup> Amnesty International, 'Myanmar: Military authorities exacerbate the suffering caused by Cyclone Mocha', (14 June 2023) available at <<https://www.amnesty.org/en/documents/asa16/6875/2023/en/>> Human Rights Watch, 'Myanmar: Junta Blocks Lifesaving Cyclone Aid' (20 June 2023) available at <<https://www.hrw.org/news/2023/06/20/myanmar-junta-blocks-lifesaving-cyclone-aid>> accessed 5 November 2023 and UNGA UN Doc A/78/527 *op. cit.* 12 [58].

<sup>52</sup> RFA (19 May 2023) *op. cit.*

In addition to the extensive damage to shelters in the Sittwe camps, nine of the mobile clinics were destroyed, and one was partially damaged.<sup>53</sup> Four out of seven of the nutrition centres which treat malnourished children and breastfeeding mothers were destroyed.<sup>54</sup> Salt water contaminated many of the wells and water ponds used for drinking water, and fences were damaged leaving children vulnerable to drowning.<sup>55</sup> The vast majority of the latrines were destroyed, not only in the Sittwe camps but also at other Rohingya IDP sites in Kyaukphyu and Pauktaw.<sup>56</sup>

The regime has deliberately and consistently blocked humanitarian access to cyclone-impacted communities. The UN Special Rapporteur has reported that, ‘the SAC has weaponized aid by systematically restricting its delivery to the most vulnerable populations.’<sup>57</sup> In the weeks immediately following the storm’s landfall, UN agencies and INGOs struggled to secure travel authorisations in Rakhine State, preventing organisations from conducting comprehensive needs assessments. Only those organisations with prior travel authorisations had access - albeit limited - to deliver humanitarian aid. On 7 June 2023, the SAC suspended all travel authorisations in Rakhine State, including those that had been approved prior to the cyclone. The junta reportedly told humanitarian actors that all cyclone aid should be delivered to the SAC in Yangon. While organisations have largely been permitted to resume their pre-cyclone activities in Rakhine State, they have not been allowed to scale up operations as needed to address the devastation caused by the cyclone.<sup>58</sup>

Rohingya communities are still in urgent need of assistance, including food, clean water, proper sanitation facilities, medicines, medical care, and materials to build or repair shelters. For *six months* and still today, Rohingya IDPs must either wait in very long queues to use the remaining functioning latrines, or resort to defecating in open space. The denial of travel authorisations to INGOs has had far-reaching consequences, including preventing them from carrying out essential repairs to the latrines in the camps. In addition to being left to survive in increasingly squalid and degrading conditions, Rohingya have struggled to access medical care due to the destruction of the clinics, denial of humanitarian access, and discriminatory barriers. BROUK has documented additional preventable deaths of women and children since the cyclone as a result of the regime’s policies and practices. The devastating impacts of the regime’s denial of the basic necessities for survival are described in more detail under the section **Provisional measure (2) - Ensure that the military and others under its influence do not commit any of the acts punishable under Article III of the Genocide Convention** - Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

At the same time as the SAC has blocked life-saving humanitarian assistance, it has reconstructed much of its security apparatus in and around the Rohingya IDP camps and villages that was damaged during the cyclone. BROUK received reports that the military rebuilt its station at the monastery at Manzi junction immediately, followed by its military station at Baw Du Pha village, and replaced the barbed wire barricades at those checkpoints. So far it has stopped short of re-erecting barbed wire fencing around the damaged IDP camps and villages, but the area nonetheless remains a militarised zone.

Protection concerns highlighted by UN OCHA include the risk of children drowning in water ponds, child exploitation including trafficking, and risks of sexual abuse and harassment for women and girls, exacerbated by the inadequate provision of safe and accessible water and sanitation facilities and inadequate lighting.<sup>59</sup> BROUK has documented the deliberate targeting of vulnerable Rohingya by human traffickers in the camps and villages affected by the cyclone. In two separate incidents, two teenage boys

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<sup>53</sup> UNOCHA, ‘Myanmar Cyclone Mocha Situation Report No.3’ (1 June 2023), 3.

<sup>54</sup> UNOCHA, ‘Myanmar Cyclone Mocha Situation Report No.5’ (15 June 2023), 4.

<sup>55</sup> UNOCHA, ‘Myanmar Cyclone Mocha Situation Report No.4’ (8 June 2023), 5.

<sup>56</sup> Information on file with BROUK. See also UNGA UN Doc A/78/527 *op. cit.* 12 [62].

<sup>57</sup> *ibid* 10 [45].

<sup>58</sup> UNGA UN Doc A/78/527 *op. cit.* 12 [60].

<sup>59</sup> UNOCHA, ‘Myanmar: Cyclone Mocha Situation Report No. 2’ (29 May 2023) 5.

were subsequently killed by their human traffickers. These incidents are described in more detail under **Provisional measure (1) – prevent the commission of genocidal acts under Article II of the Genocide Convention.**

Five years ago, conditions in the camps were described by then-United Nations Assistant Secretary-General Ursula Mueller as “beyond the dignity of any people”.<sup>60</sup> As reported by BROUK in its fifth ICJ briefing ‘Slow death’: ten years confined to camps for 130,000 Rohingya in Myanmar’ published in May 2022, conditions had significantly deteriorated by then.<sup>61</sup> Now, they are almost unimaginable. UN OCHA has warned of significant post-cyclone mental health challenges, particularly among Rohingya women and children.<sup>62</sup> UN OCHA and the UN Special Rapporteur have reported suicide attempts within Rohingya communities, and BROUK has documented a specific case.<sup>63</sup>

### ***Myanmar and Bangladesh push ahead with pilot repatriation project***

Against this backdrop – and the intensifying armed conflict situation in Rakhine State, described below – the regime continues to push ahead with its pilot project to repatriate Rohingya from refugee camps in Bangladesh. The project is a bilateral arrangement between Myanmar and Bangladesh mediated by China. The UN’s refugee agency (UNHCR) has not been involved with the negotiations. UNHCR’s position is that current conditions are not conducive to the safe and sustainable return of Rohingya refugees. The regime claims that it can accommodate 7,000 returnees, and Myanmar and Bangladesh have indicated their intention to repatriate some 3,000 Rohingya refugees by the end of the year.<sup>64</sup>

In March and September of this year Union minister U Ko Ko Hlaing, a former Lieutenant Colonel and the appointed Agent for Myanmar for the case at the ICJ, led diplomatic visits to northern Rakhine State. These window-dressing efforts likely form an integral part of Myanmar’s reports to the ICJ on its compliance with the provisional measures order, due in May and November. State media coverage of the September trip described visits to the Hla Phoe Khaung ‘transit camp’ and Taung Pyo Letwa ‘reception camp’ in Maungdaw township, both of which were built on Rohingya land razed by the military during the 2017 clearance operations.<sup>65</sup>

In the most recent visit in September, U Ko Ko Hlaing also took the diplomatic delegation to Kyein Chaung village tract in Maungdaw, which is one of the publicly-announced locations where the regime plans to resettle the Rohingya refugees in 20 new ‘model villages’.<sup>66</sup> In both 2016 and 2017, the Myanmar military carried out particularly brutal clearance operations in Kyein Chaung village tract, known to the Rohingya as Boli Bazar, including gang-rapes and mass killings. The atrocity crimes perpetrated in Boli Bazar / Kyein Chaung village tract by the Myanmar military were extensively documented by the UN Fact-Finding Mission Myanmar.<sup>67</sup> Satellite imagery taken in late 2017 shows that terrain clearance was

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<sup>60</sup> See video available at <<https://twitter.com/uschimuller/status/981625075953782784?lang=fr>> accessed 6 November 2023.

<sup>61</sup> BROUK, ‘Slow death’: ten years confined to camps for 130,000 Rohingya in Myanmar’ (23 May 2022) available at <<https://www.brouk.org.uk/wp-content/uploads/2022/05/ICJ-Briefing-May-2022.pdf>> accessed 6 November 2023.

<sup>62</sup> UNOCHA, Sit. Rep. No. 3, *op. cit.* 4.

<sup>63</sup> *ibid.*, UNOCHA Sit. Rep. No. 4, *op. cit.* 5, UNOCHA Sit. Rep. No. 5, *op. cit.* 5, UNGA UN Doc A/78/527 *op. cit.* 12 [62].

<sup>64</sup> The Daily Star, Rohingya Repatriation: Likely to start in a few months (6 September 2023) available at <<https://www.thedailystar.net/rohingya-influx/news/rohingya-repatriation-likely-start-few-months-3411986>> accessed 16 November 2023.

<sup>65</sup> UNFFM 2018 report ‘Detailed findings of the Independent International Fact-Finding Mission on Myanmar’ (17 September 2018) UN Doc A/HRC/39/CRP.2 230 [971] 281-282 [1190, 1192] and UNFFM 2019 report *op. cit.* 41 [132].

<sup>66</sup> MITV ‘Diplomatic tour: Study visit to Rakhine State for repatriation process’ (2 September 2023) available at <<https://www.myanmaritv.com/news/diplomatic-tour-study-visit-rakhine-state-repatriation-process>> and The Global New Light of Myanmar, ‘Foreign diplomats visit Taungpyoletwal Reception Centre, Hlaphoekhaung Transit Camp in Rakhine State’ (3 September 2023) available at <<https://www.gnlm.com.mm/foreign-diplomats-visit-taungpyoletwal-reception-centre-hlaphoekhaung-transit-camp-in-rakhine-state/>> and the Daily Star, ‘Rohingyas willing to go home, not to model villages’ (7 November 2023) available at <<https://www.thedailystar.net/rohingya-influx/news/rohingyas-willing-go-home-not-model-villages-3463426>> accessed 16 November 2023.

<sup>67</sup> UNFFM 2018 report, *op. cit.* 206 [888], 207 [894], 213 [921], 258 [1091].

visible in the area.<sup>68</sup> The implications of the regime's announcement are analysed under **Provisional measure (3) – prevent the destruction of and ensure the preservation of evidence.**

### ***Rapidly escalating armed conflict in Rakhine State***

Rohingya communities find themselves trapped in the middle of an increasingly volatile situation in Rakhine State since the year-long humanitarian ceasefire broke down on 13 November. BROUK is gravely concerned for their safety and well-being, particularly for those Rohingya who are confined to IDP camps in the townships of Sittwe, Pauktaw, Kyauktaw, Kyaukphyu and Myebon and effectively trapped there with extremely limited means of escape from armed clashes.

Following the major offensive launched on 27 October by the Three Brotherhood Alliance, including the Arakan Army, armed conflict has intensified and escalated across the southeast and northwest of the country. On 13 November, the Arakan Army broke the ceasefire in Rakhine State by launching multiple attacks on police and military outposts in Rathedaung, Minbya, and Kyauktaw townships. The collapse of the ceasefire had seemed increasingly inevitable, after the junta brought in troop reinforcements and reportedly carried out weapons tests in the weeks preceding the AA's attack.<sup>69</sup> Further clashes have since been reported in Buthidaung, Maungdaw, Mrauk-U, Myebon, Ann, and Pauktaw townships.

The junta responded to the AA's attacks in Minbya with indiscriminate shelling, killing two Rohingya men and two Rohingya women in their village of Sin Gyi Pyin and injuring many others.<sup>70</sup> Other civilian casualties have been reported in Ann, Myebon, Mrauk-U, Kyauktaw, and Maungdaw townships.<sup>71</sup>

On 15 November, the AA briefly occupied the town of Pauktaw, 20 miles to the east of Sittwe. The junta deployed helicopter gunships and naval warships to retake control of the town. The area was under heavy bombardment for several hours. 19,000 Rakhine civilians are believed to have been displaced by the shelling.<sup>72</sup> More than 26,500 Rohingya IDPs confined to five camps in the area (Ah Nauk Ywe, Kyein Ni Pyin, Nget Chaung 1 and 2, and Sin Tet Maw) were trapped. During the initial assault by the AA, military and police personnel reportedly deserted their posts around the camps, which were briefly occupied by the AA. So far, no Rakhine or Rohingya casualties have been reported, but at the time of writing the situation remains unclear.

Sittwe residents report that the situation in the town is very tense. The regime has deployed tanks in the streets and imposed a curfew from 9pm – 6am. Fearing that armed clashes might spread to Sittwe for the first time, people have been panic-buying amid soaring prices for basic food items. BROUK is very concerned at reports that on 16 November, the Myanmar Army Rakhine Regional Battalion Commander summoned Rohingya village administrators and IDP camp leaders to the military cantonment in Sittwe and ordered them to report on any AA activity in their areas.

BROUK is also extremely concerned at the humanitarian impact of the regime's blockade of all major roads and waterways within Rakhine State and the main route between Sittwe-Yangon. Of particular

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<sup>68</sup> UNFFM 2018 report, *op. cit.* 289 [1221], 306 [1240].

<sup>69</sup> Myanmar Now, 'Western front opens in Operation 1027, as AA launches attacks in Rakhine State' (13 November 2023) available at <<https://myanmar-now.org/en/news/western-front-opens-in-operation-1027-as-aa-launches-attacks-in-rakhine-state/>> accessed 17 November 2023.

<sup>70</sup> Detailed information on file with BROUK. See also, Myanmar Now, 'Myanmar junta retakes town captured by AA near Rakhine capital' (17 November 2023) available at <<https://myanmar-now.org/en/news/myanmar-junta-retakes-town-captured-by-aa-near-rakhine-capital/>> accessed 17 November 2023.

<sup>71</sup> See Narinjara, '4 civilians killed, 10 injured on first day of renewed fighting in Rakhine State' (14 November 2023) available at <<https://www.narinjara.com/news/detail/6553155dee2ae8bf7d5f5c27>>, DMG, 'Over 1,000 Maungdaw residents flee homes out of fear for safety' (15 November 2023) available at <<https://www.dmediag.com/news/10mgflee.html>>, Narinjara, 'Junta fires heavy weapons on residential area killing many villagers' (16 November 2023) available at <<https://www.narinjara.com/news/detail/6555b7c2444a62cb27b637fd>>, DMG, 'Dozens of civilian casualties reported in latest Arakan State hostilities' (16 November 2023) available at <<https://www.dmediag.com/news/tsarr50kw.html>> accessed 17 November 2023.

<sup>72</sup> *Ibid* and UNOCHA, 'Flash Update #5 Escalating Hostilities - Rakhine and Southern Chin' (17 November 2023) 1.

concern is the situation of Rohingya confined to camps who have *already* been severely affected by the regime's restrictions on humanitarian access following Cyclone Mocha, described in detail under **Provisional Measure (2) - Ensure that the military and others under its influence do not commit any of the acts punishable under Article III of the Genocide Convention**. Similarly, the blockade will have a punishing impact on Rohingya in villages in northern Rakhine State, who are almost entirely dependent on humanitarian aid for their survival.

The armed conflict situation in northern Rakhine State is further complicated by the re-emergence of ARSA in Maungdaw and Buthidaung township areas, following the crackdown by Bangladesh authorities on ARSA's criminal activities in the refugee camps and the disputed no-man's-land territory between Bangladesh and Myanmar. Even before the latest armed clashes between the AA and the Myanmar Army, Rohingya communities in the northern townships of Buthidaung and Maungdaw were trapped in an increasingly volatile situation. The AA and ARSA clashed in the Mayu mountain range in Buthidaung township on 18-19 July, with casualties on both sides.<sup>73</sup>

Two Rakhine-based media outlets have claimed that ARSA have been sponsored and armed by the Myanmar military as part of a divide-and-rule strategy to pit the AA and ARSA against each other, paving the way for the junta to wrest control back of northern Rakhine State. Political commentators have pointed out that the Myanmar military has not clashed with ARSA, despite ARSA activities taking place in areas close to Myanmar Army bases.<sup>74</sup> The situation in northern Rakhine State warrants very close attention, particularly to the actions of the Myanmar military in potentially fomenting conflict between the AA and ARSA, leaving Rohingya communities caught in the crossfire.

Rohingya communities already find themselves in an impossible situation, caught in the power struggle between all three sides. Even before the most recent outbreak of armed conflict, members of the Rohingya group have been subjected to serious human rights violations possibly amounting to war crimes by both AA and ARSA, detailed below.

### ***International humanitarian law***

International humanitarian law, which governs armed conflicts, applies to the situation in Rakhine State, including during temporary cessation of hostilities.<sup>75</sup> One of the main purposes of international humanitarian law (IHL) is to protect non-combatants, people who are not taking part in hostilities – such as civilians, health workers and aid workers.<sup>76</sup> All parties to internal armed conflicts must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need and must ensure the freedom of movement of humanitarian aid workers.<sup>77</sup> Blocking access to humanitarian aid is a serious violation of international humanitarian law. Perpetrators of IHL violations may be held criminally liable under national and international law.

War crimes are serious violations of international humanitarian law. Specific acts which are prohibited in the context of an internal armed conflict are described in Articles 8(2)(c) and 8(2)(e) of the Rome Statute

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<sup>73</sup> Narinjara News, 'Hundreds of junta soldiers reinforced near the place where AA and ARSA fought' (24 July 2023) available at <<https://www.narinjara.com/news/detail/64bdfc89b17b0b38e6342ba9>> accessed 3 November 2023.

<sup>74</sup> The Transnational Institute, 'A New Dimension to Armed Conflicts in Arakan? Core Tactics of Myanmar Military's 'Divide and Contain' Strategy - a Myanmar commentary by Naing Lin' (20 September 2023) available at <<https://www.tni.org/en/article/a-new-dimension-to-armed-conflicts-in-arakan#note-18272-12>> accessed 3 November 2023.

<sup>75</sup> Common Article 3 of the 1949 Geneva Conventions sets out the rules applicable to non-international armed conflicts. See <<https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>>. Although the article does not provide a detailed definition of 'non-international armed conflicts', see <<https://casebook.icrc.org/glossary/non-international-armed-conflict>> and <[https://casebook.icrc.org/a\\_to\\_z/glossary/truce](https://casebook.icrc.org/a_to_z/glossary/truce)> accessed 12 November 2023. See also *Prosecutor v. Dusko Tadić*, ICTY, Case No. IT-94-1-AR72, Decision (Appeals Chamber), October 2, 1995 [70] and more recently, *Prosecutor v. Lubanga*, ICC T. Ch. I, Judgment, ICC-01/04-01/06, 14 March 2012 [533-538] and *Prosecutor v. Katanga*, ICC Tr. Ch. II, Judgement, ICC-01/04-01/07-3436, 7 March 2014 [1183-1187].

<sup>76</sup> ICRC, Customary International Humanitarian Law Rule 1. The Principle of Distinction between Civilians and Combatants. Rules 7. The Principle of Distinction between Civilian Objects and Military Objectives 8. Definition of Military Objectives and 9. Definition of Civilian Objects. See <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul)> accessed 15 November 2023.

<sup>77</sup> ICRC, Customary International Humanitarian Law Rule 55. Access for Humanitarian Relief to Civilians in Need and 56. Freedom of Movement of Humanitarian Relief Personnel. See <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule55>> accessed 15 November 2023.

of the International Criminal Court (ICC).<sup>78</sup> Such acts include (but are not limited to) murder, torture, cruel treatment, extrajudicial executions, sexual violence, rape, taking hostages, pillaging, attacking civilians, and attacking protected objects. When perpetrated in the context of an internal armed conflict and with the necessary intent and knowledge of both the act and context, these acts amount to war crimes.<sup>79</sup> When committed as part of a widespread or systematic attack directed against a civilian population with the requisite knowledge that the perpetrator's conduct was part of that widespread or systematic attack, such acts may also amount to crimes against humanity.

Moreover, acts of killing and causing serious bodily or mental harm may be qualified as genocidal when committed with the intent to destroy the Rohingya group in whole or in part. In its provisional measures order, the ICJ reiterated the Myanmar State's obligations to prevent and punish acts of genocide 'irrespective of... the fact that there may be an ongoing internal conflict between armed groups and the Myanmar military and that security measures are in place'.<sup>80</sup>

Customary international humanitarian law prohibits the use of weapons that are by nature indiscriminate.<sup>81</sup> Landmines are victim-activated weapons that cannot distinguish between civilians and combatants, and as such are inherently indiscriminate weapons. Although landmines are not yet enumerated as a specific prohibited weapon in the ICC Rome Statute, international human rights organizations are increasingly calling for the extensive use of landmines in civilian areas such as homes, villages, and farmland to be investigated as the war crime of directing attacks against civilians and civilian objects, a crime over which the ICC does have jurisdiction.<sup>82</sup>

Many areas of Rakhine State are already heavily contaminated by landmines and unexploded ordnances, particularly in townships such as Buthidaung and Maungdaw which were the site of fierce clashes between the Myanmar military and the AA during the four-month outbreak of hostilities in 2022. BROUK has also received reports that both the Myanmar Army and the AA have laid more landmines around Rohingya villages since the renewed outbreak of conflict on 13 November. On 16 November, a Rohingya schoolteacher was killed in Buthidaung township after stepping on a landmine while walking between two villages to the northwest of Buthidaung town.

### ***Human rights abuses by non-State actors the Arakan Army and ARSA***<sup>83</sup>

Human rights abuses perpetrated by the AA against Rohingya civilians documented by BROUK over the reporting period include abductions, extortion, arbitrary arrest and detention, ill-treatment amounting to torture, and restrictions on freedom of movement, preventing access to livelihoods. Human rights abuses perpetrated by ARSA against Rohingya civilians include murder, abductions, and extortion.<sup>84</sup>

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<sup>78</sup> Articles 8 (2) (c) (i-iv) and 8 (2) (e) (i-xv). Rome Statute of the International Criminal Court (Rome Statute), adopted July 17, 1998, 2187 UNTS 90, U.N. Doc. A/CONF.183/9 (2002).

<sup>79</sup> Rome Statute, Article 30. See also International Criminal Court, *Elements of Crimes*, (2011) Articles 8(2)(c) and 8(2)(e).

<sup>80</sup> *The Gambia v. Myanmar*, International Court of Justice Provisional Measures Order (23 January 2020) 22 [74].

<sup>81</sup> Rule 71. The use of weapons which are by nature indiscriminate is prohibited. See < [https://ihl-databases.icrc.org/en/customary-ihl/v1/rule71#Fn\\_8ACA2B68\\_00035](https://ihl-databases.icrc.org/en/customary-ihl/v1/rule71#Fn_8ACA2B68_00035)> accessed 13 November 2023.

<sup>82</sup> Karenni Human Rights Group, the Karenni National Women's Organization, the Kayan Women's Organization and the Kayah State Peace Monitoring Network, 'How can we survive in the future?' Atrocities crimes in Karenni State' (February 2023) 66; Human Rights Watch, 'Libya: Russia's Wagner Group Set Landmines Near Tripoli; ICC Prosecutor Should Investigate Use of Unlawful Mines, Booby Traps' (31 May 2022) available at < <https://www.hrw.org/news/2022/05/31/libya-russias-wagner-group-set-landmines-near-tripoli>> and Amnesty International, 'Myanmar: Military's use of banned landmines in Kayah State amounts to war crimes' (20 July 2022) available at < <https://www.amnesty.org/en/latest/news/2022/07/myanmar-militarys-use-of-banned-landmines-in-kayah-state-amounts-to-war-crimes/>> accessed 13 November 2023.

<sup>83</sup> All information in this section on file with BROUK, unless otherwise referenced.

<sup>84</sup> For incidents of abduction and extortion of Rohingya civilians by ARSA, see The Irrawaddy, 'ARSA Spreading Through Western Myanmar' (4 September 2023) available at <<https://www.irrawaddy.com/news/burma/arsa-spreading-through-western-myanmar.html>> and Development Media Group, 'One of two men abducted by ARSA in Maungdaw Twsp released, family says' (12 September 2023) available at <<https://www.dmediag.com/news/2-rls-md.html>>, Development Media Group, 'AA taking action to curb ARSA infiltration, villagers say' (25 September 2023) available at <<https://www.dmediag.com/news/aa-taking-action-to-curb-arsa-infiltration.html>> accessed 9 November 2023.

The AA-ARSA clash on 18-19 July took place in Gudarpayin village tract in southern Buthidaung township.<sup>85</sup> As documented by BROUK, this area was also the site of fierce fighting between the AA and the Myanmar Army one year ago, with Rohingya civilians again caught in the middle.<sup>86</sup> Since then, the situation in Maungdaw and Buthidaung township become increasingly volatile for Rohingya communities. A Rohingya villager in Maungdaw said in a media interview, “We are afraid of anyone armed, the Arakan Army [AA], Myanmar’s military and ARSA. Lately, ARSA members come and demand support. No villagers accept them but we are afraid. They demand we supply them with food.”<sup>87</sup>

By late August, the AA had imposed a curfew of 5am – 9pm in several Rohingya villages in the area under its control in southern Buthidaung. In early September, the AA summoned Rohingya village leaders and ordered them to report on ARSA activities, warning that if they did not do so the AA would assume that they were ARSA supporters and would take action against them under the AA’s legal system. Around the same time, ARSA murdered a Rohingya elder who was a ferry operator in northern Buthidaung. Armed members of the group visited his home and ordered him to stop providing transportation services to both the AA and the Myanmar Army. He explained that he could not refuse any armed group who wanted to use his services. He was later found stabbed to death, and ARSA members are widely believed to be responsible.

In late September, the AA ordered a lockdown of several Rohingya villages in southern Buthidaung and several hundred AA soldiers are reported to have been involved in house-to-house searches in those villages over a period of five days.<sup>88</sup> The AA abducted 10 Rohingya men and brutally beat them during this operation, falsely accusing them of supporting ARSA. For example, in one of the instances a household had been preparing food for a family celebration event to be held in their home. The amount of food was viewed as ‘evidence’ of their support for ARSA and the two men of the household were abducted. The whereabouts of the 10 men is currently unknown. BROUK has also received reports of extensive boat patrols by the AA along the banks of the river Mayu in this same period. During these AA operations, Rohingya villagers are not allowed to leave their homes, which prevents them from accessing their fishing and farming livelihoods.

In the first half of October, BROUK received additional reports of raids on several separate occasions conducted by dozens of AA soldiers, again targeting Rohingya villages in southern Buthidaung township. Rohingya men were arrested and detained by the AA on suspicion of supporting ARSA during each of these raids. One Rohingya man was repeatedly called ‘Bengali kalar’ [a racist slur], beaten and ill-treated over two days by AA soldiers, before being released. On another occasion, several Rohingya men from one village are reported to have been brutally beaten, roped together, and detained overnight before facing extortion demands to secure their release.

Just days after these incidents, the Myanmar military entered some of these same villages, arbitrarily arresting, detaining and torturing Rohingya men, accusing them of supporting both the AA and ARSA. Such acts of collective punishment by the Myanmar military are described in more detail under **Provisional measure (2) - Ensure that the military and others under its influence do not commit any of the acts punishable under Article III of the Genocide Convention.** In addition, the Myanmar State’s failure to protect the Rohingya from these human rights abuses by non-State actors the AA and ARSA should be viewed as acts of omission, attributable to the State.

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<sup>85</sup> Development Media Group, ‘Buthidaung locals spooked by fighting between ARSA, AA’ (20 July 2023) available at <<https://www.dmediag.com/news/arsa-aa-soeig.html>> accessed 9 November 2023.

<sup>86</sup> BROUK, ‘Prevent the unthinkable: The international community must leverage the International Court of Justice’s provisional measures order before it’s too late’ (1 December 2022) 9-10.

<sup>87</sup> The Irrawaddy, ‘ARSA Spreading Through Western Myanmar’, *op. cit.*

<sup>88</sup> See also Myanmar Now, ‘AA detains villagers in northern Rakhine State for alleged ‘criminal’ affiliations’ (26 September 2023) available at <<https://myanmar-now.org/en/news/aa-detains-villagers-in-northern-rakhine-state-for-alleged-criminal-affiliations/>> accessed 9 November 2023.

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

In its September 2019 report, the UNFFM found that the eight common risk factors for atrocity crimes and two specific risk factors for genocide set out by the UN Office on Genocide Prevention and the Responsibility to Protect were all present in Myanmar.<sup>89</sup> The two specific risk factors for genocide are 'intergroup tensions or patterns of discrimination against protected groups' and 'signs of an intent to destroy in whole or in part a protected group'. The following indicators of these two risk factors are particularly relevant in the current context:

1. History of atrocity crimes committed with impunity against protected groups.
2. Past or present serious tensions... with the State, with regards to access to rights and resources... participation in decision making processes... expressions of group identity or to perceptions about the targeted group.
3. Denial of the existence of protected groups or of recognition of elements of their identity.
4. Past or present serious discriminatory, segregational, restrictive or exclusionary practices, policies or legislation against protected groups.
5. Targeted physical elimination, rapid or gradual, of members of a protected group, including only selected parts of it, which could bring about the destruction of the group.
6. Widespread or systematic discriminatory or targeted practices or violence against the lives, freedom or physical and moral integrity of a protected group, even if not yet reaching the level of elimination.
7. Attacks against or destruction of homes, farms, businesses or other livelihoods of a protected group and/or of their cultural or religious symbols and property.<sup>90</sup>

The remainder of this briefing analyses breaches of the ICJ's provisional measures order by the Myanmar junta in accordance with the existing jurisprudence on genocide as well as the above risk factor indicators of genocide. In BROUK's view, the information compiled in this briefing demonstrates that the regime continues to commit genocidal acts: namely deliberately inflicting conditions of life calculated to bring about the physical destruction in whole or in part of the Rohingya group, causing serious bodily or mental harm, and killings.

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

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

- a) killing members of the group;
- b) causing serious bodily or mental harm to the members of the group;
- c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and

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<sup>89</sup> UNFFM 2019 report *op. cit.* 77 [240].

<sup>90</sup> The UN Office on Genocide Prevention and the Responsibility to Protect 'Framework of Analysis for Atrocity Crimes: a tool for prevention' (2014) 18-19.



d) imposing measures intended to prevent births within the group.<sup>91</sup>

Provisional measure (1) is focused on the *prevention* of genocide and the ICJ instructs the Myanmar State to take ‘all measures within its power’ to do so. Although the order does not specify what such measures should include, an important first step would be to recognise the Rohingya’s right to their group identity and grant the Rohingya citizenship as such.

However, the regime continues to deny citizenship to the Rohingya under the 1982 Citizenship Law and perseveres with its coercive practices to force the Rohingya to accept the National Verification Card (NVC) - documentation which denies their identity as Rohingya and forces them to accept the designation of ‘Bengali’, implying that the Rohingya are foreign interlopers from Bangladesh.<sup>92</sup>

BROUK routinely receives reports of Rohingya being coerced into accepting the NVC. In its last briefing in May, BROUK highlighted the case of more than 800 Rohingya boys, girls and young people aged 12-18 who were being held in youth rehabilitation centres in Yangon after being detained for attempting to flee Rakhine State. They were officially ‘released’ as part of the regime’s various amnesties this year but remained in detention while the SAC authorities made arrangements to return them to Rakhine State following Cyclone Mocha. In September, all 800 young people were returned to Rakhine State by ship, accompanied by representatives from the Ministry of Social Welfare, Relief and Resettlement, Ministry of Immigration, police, and military. The concerns raised by BROUK in May were well-founded, as the young people were all forced to accept the NVC by the SAC authorities before being handed over to community leaders in Sittwe, Buthidaung and Maungdaw. Although they were not ill-treated during their two-week journey by ship, BROUK is very concerned at reports that some of the young people were tortured while in police custody, before they were transferred to the youth rehabilitation centres.<sup>93</sup>

As described in detail in previous BROUK briefings, the regime has continued with its highly militarised and degrading ‘Swe Tin Sit’ map-record-check investigative process in northern Rakhine State, despite the provisional measures order.<sup>94</sup> In recent years it has been conducted by members of the military, immigration officers and Border Guard Police. The process involves photographing residents outside their homes, removing or adding family members to household registration lists, registering births, and checking whether buildings match records and maps held by the military authorities. Only parents who hold either a National Registration Card (an identity card held by some Rohingya) or NVC card can register births. Parents are thus constrained to apply for an NVC in order to register the birth of their child. BROUK’s earlier reports illustrate that the process has continued in the same way as described by the UNFFM in 2018: ‘[It provides] the authorities unfettered power to add or remove individuals from the list, with no recourse to appeal. Inspections are often accompanied by intimidation, coercion, arbitrary arrests and random deletions from the [household] list.’<sup>95</sup>

The junta has not taken *any* steps to lift the well-documented restrictions on freedom of movement, access to livelihoods, healthcare, or humanitarian aid for Rohingya communities over the reporting period. Far from *improving* access to life-saving humanitarian aid for Rohingya communities in the wake of Cyclone Mocha, the regime has done the opposite. Instead of granting unfettered humanitarian access to allow a coordinated emergency response to what was a major humanitarian disaster, the regime employed its bureaucratic apparatus to *further* restrict access. The 7 June suspension of travel authorisations for aid

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<sup>91</sup> *The Gambia v. Myanmar*, ICJ Provisional Measures Order (23 January 2020) *op. cit.* 25 [86].

<sup>92</sup> See BROUK’s seven previous briefings on Myanmar’s noncompliance with the ICJ’s provisional measures order, as well as ‘Annex 1 to the Report of the Special Rapporteur on the human rights situation in Myanmar to the UN General Assembly’ (2 September 2021) UN Doc A/76/314 4 [19].

<sup>93</sup> Information on file with BROUK.

<sup>94</sup> See BROUK, ‘Slow death’ (23 May 2022), ‘Prevent the unthinkable’ (2 December 2022), ‘Preventable deaths in Cyclone Mocha’ (23 May 2023), available at <<https://www.brouk.org.uk/category/report/>> accessed 10 November 2023.

<sup>95</sup> UNFFM 2018 report *op. cit.* 138-139 [583-588].

groups in Rakhine State defied both UN Security Council Resolution 2669, which urged ‘full, safe and unhindered humanitarian access’<sup>96</sup> and provisional measure (1) ordered by the ICJ.

Moreover, the regime’s continued leveraging of its complex bureaucratic apparatus (Memoranda of Understanding that must be negotiated by UN agencies; INGO and NGO legal registration and reporting requirements; ad hoc travel authorisation procedures) needs to be understood in very simple terms: it denies the basic necessities of life to members of the Rohingya group in Rakhine State who are almost entirely dependent on humanitarian aid for their survival.

The restrictions on freedom of movement, access to livelihoods, healthcare, and humanitarian assistance underpin the conditions of life inflicted on the Rohingya group, calculated to bring about its physical destruction in whole or in part. These conditions of life inflicted on Rohingya communities in Rakhine State were a significant factor in the preventable deaths of hundreds of vulnerable Rohingya – especially women and children – during Cyclone Mocha. The ongoing commission of the genocidal acts of deliberately inflicting conditions of life calculated to bring about the group’s physical destruction, and causing serious bodily or mental harm, are described in detail below, under **Provisional measure (2)**.

Since Cyclone Mocha, Rohingya in Rakhine State are extremely vulnerable and in an increasingly desperate situation. BROUK has received reports of vulnerable Rohingya minors being deliberately targeted by human trafficking gangs, and in some cases, forcibly taken against their will.

In July, four youths aged 16 and 17 from several of the Rohingya IDP camps and villages severely impacted by Cyclone Mocha were lured by the promise of jobs in Rathedaung township. They were then held for ransom, with the threat of death if their families did not pay the ransom in full. The families reported the case to the police and anti-trafficking authorities in Sittwe but did not receive timely assistance, even though they provided information about their likely location. One of the boys was subsequently murdered by the traffickers, while another was forced to bury his body. In a similar case in Kyein Ni Pyin IDP camp in Pauktaw later that month, three Rohingya youths were abducted by human traffickers. Their captors also threatened to kill them unless their families met their ransom demands. The families managed to raise the funds and the three were safely released.<sup>97</sup>

In a separate case in August, a vulnerable 15-year-old with mental health problems from another Rohingya village in the Sittwe area was targeted for recruitment and similarly held for ransom. He was brutally tortured over a period of two months while ransom demands were made to his family. He died at the hands of the traffickers, who then demanded money for the release of his body.<sup>98</sup>

The regime is responsible for creating the appalling conditions of life that leave the Rohingya particularly vulnerable to abduction and human trafficking. The Myanmar State as duty bearer is failing to protect the Rohingya from such crimes. The practices outlined above match several of the risk factor indicators for genocidal acts, namely denial of the group’s identity (indicator 3), and discriminatory, segregational, restrictive policies and legislation (indicator 4).

In an example of several of the other risk factor indicators for genocidal acts - namely attacks on expressions of group identity or perceptions about the targeted group (indicator 2) and attacks against cultural or religious symbols and property (indicator 7) – in August, armed police and staff from the General Administration Department entered Maungdaw city mosque and issued an order banning religious sermons and prayer gatherings until further notice, warning that Imams would face prosecution if they defied the order. The *de facto* authorities were acting on disinformation and propaganda alleging that Imams conduct recruitment activities for ARSA during worship services.

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<sup>96</sup> UN Doc S/RES/2669 (2022) *op. cit.*

<sup>97</sup> Detailed information on file with BROUK.

<sup>98</sup> Detailed information on file with BROUK.

Furthermore, the junta's outright refusal to take *any* measures – far less 'all measures within its power' – to prevent the commission of genocidal acts indicates its ongoing genocidal intent towards the Rohingya group.

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

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

This section of the briefing examines the conduct of the Myanmar military with regard to the genocidal acts of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, causing serious bodily or mental harm to members of the group, and killing members of the group under Article II of the Genocide Convention.

### **Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part<sup>99</sup>**

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

'Examples of such acts include, but are not limited to, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally **creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation**, or subjecting members of the group to excessive work or physical exertion [emphasis added].'<sup>100</sup>

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

'In the absence of direct evidence of whether the conditions of life imposed on the group were deliberately calculated to bring about its physical destruction, a chamber can be guided by the objective probability of these conditions leading to the physical destruction of the group in part. **The actual nature of the conditions of life, the length of time that members of the group were subjected to them, and the characteristics of the group such as its vulnerability are illustrative factors to be considered in evaluating the criterion of probability.** [emphasis added]'<sup>101</sup>

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<sup>99</sup> All information in this section on file with BROUK, unless otherwise referenced.

<sup>100</sup> ICTY, *Prosecutor v. Karadzic*, IT-95-5/18-T, Judgment, 24 March 2016, [547], with reference to the preceding cases ICTY, *Prosecutor v. Brdjanin*, IT-99-36-T, Judgment, 1 December 2004, [691]; ICTY, *Prosecutor v. Stakić*, IT-97-24-T, Judgment, 31 July 2003, [517]; ICTR, *Prosecutor v. Musema*, ICTR-96-13-T, Judgment, 27 January 2000, [157]; ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, [115–116]; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, [506].

<sup>101</sup> ICTY, *Prosecutor v. Karadzic*, *op. cit.* [548].

The ICJ, in its interpretation of the meaning of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction”, has held that forced displacements may occur in parallel to other acts prohibited by Article II of the Genocide Convention. Forced displacements may also be indicative of the specific intent to destroy a group in whole or in part behind those parallel genocidal acts.<sup>102</sup>

BROUK’s last briefing ‘Preventable deaths in Cyclone Mocha’ focused on the illustrative factors of the conditions of life imposed on members of the Rohingya group in light of the preventable deaths of hundreds of Rohingya internally displaced persons during Cyclone Mocha. In summary, these illustrative factors included the circumstances of the forced displacement of the Rohingya, their subsequent arbitrary and indefinite detention in camps, the location of and the conditions in those camps, the particular vulnerabilities of the group, as well as the lack of disaster preparedness and wilfully negligent response to Cyclone Mocha by the *de facto* authorities.<sup>103</sup>

Rohingya confined to camps are almost entirely dependent on humanitarian aid for their survival. This briefing focuses on the impact of the regime’s restrictions on humanitarian access in the wake of the cyclone on the *already* deplorable conditions of life inflicted on the Rohingya in the camps. This briefing re-examines the ‘circumstances that would lead to a slow death’ outlined by the ICTR and ICTY, namely: ‘lack of proper shelter’, ‘subjecting the group to a subsistence diet / lack of proper food’, ‘lack of water and proper sanitation facilities’ and ‘failing to provide adequate medical care.’

When BROUK first analysed these circumstances in May 2022, the evidence showed that the genocidal act of deliberately inflicting conditions of life calculated to bring about the physical destruction in whole or in part of the Rohingya group was ongoing.<sup>104</sup> This latest analysis provides further evidence of the ongoing commission of this genocidal act by the regime. It underscores the degrading, dehumanising, and dire conditions of life inflicted on Rohingya in the camps and the increasingly desperate situation they are facing.

**(i) Eleven years of arbitrary indefinite detention for more than 140,000<sup>105</sup> Rohingya confined to camps**

***Forced displacement of the Rohingya***

More than 140,000 Rohingya (of whom 112,000 are in rural Sittwe) have been subjected to arbitrary indefinite detention in camps across Central Rakhine State for more than eleven years, in violation of international law.<sup>106</sup>

It is important to recall the circumstances that led to the forced displacement of Rohingya and their confinement in camps. The State-orchestrated violence of 2012-13 marked a critical juncture in the military authorities’ treatment of the group. A false narrative of ‘intercommunal violence’ constructed by the military authorities was used as a pretext to introduce draconian restrictions on freedom of movement for the Rohingya across Rakhine State.<sup>107</sup> This false narrative that the 2012 violence was simply ‘intercommunal’ has unfortunately prevailed, both within Myanmar and internationally. The enduring impact of the violence of 2012-2013 is often overlooked in the wake of the mass killings and other

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<sup>102</sup> International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, ICJ Reports 2015, 72 [161-163].

<sup>103</sup> BROUK, ‘Preventable deaths in Cyclone Mocha’ *op. cit.* 21-23.

<sup>104</sup> BROUK, ‘Slow death’ *op. cit.*

<sup>105</sup> These numbers are based on the CCCM Cluster report, ‘CCCM Camp Profiles, Central Rakhine, Myanmar Q2 2023’ (June 2023). The precise figure given is 141,284.

<sup>106</sup> UNFFM 2018 report *op. cit.* [747-748] and Human Rights Watch, ‘An Open Prison without End’: Myanmar’s Mass Detention of Rohingya in Rakhine State (October 2020).

<sup>107</sup> For a more detailed description, see BROUK, ‘Slow death’ *op. cit.* 9-10.

atrocities that took place in 2016-2017. In fact, the State-orchestrated violence in 2012-2013 laid the groundwork for the brutal ‘clearance operations’ that were to follow. The UNFFM concluded,

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

... [This] Actively instigated violence between the ethnic Rakhine and the Rohingya, with the involvement of State institutions and other figures of authority, result[ed] in mass arrests of Rohingya, policies of segregation and the mass displacement and confinement of Rohingya into squalid and barb-wired “displacement” sites and camps in central Rakhine, where they have been arbitrarily detained.’<sup>108</sup>

Although best understood as detention camps, they are officially classified as temporary camps for internally displaced persons (IDPs) and as such international minimum humanitarian standards apply. The Humanitarian Charter and Minimum Standards in Humanitarian Response also provides guidance to humanitarian actors for setting targets for humanitarian response in protracted crises.<sup>109</sup>

In April 2017, the authorities announced that it would begin closing camps in response to the recommendations in an interim report from the Advisory Commission on Rakhine State led by the late Kofi Annan. Three camps (Kyein Ni Pyin, Nidin, and Taung Paw) were officially declared ‘closed’ in 2018 and Kyauk Ta Lone camp in Kyaukpyu was officially ‘closed’ in May 2023, with all IDPs ordered to relocate to the new adjacent relocation site by 15 May. As previously reported by BROUK, the ‘camp closure’ strategy is better understood as the permanent segregation and detention of Rohingya in flood-prone locations.

The Kyauk Ya Lone relocation site is heavily militarised and under curfew. There are two police checkpoints as well as a military checkpoint manned by soldiers from Infantry Battalion 542 right next to the new permanent site. Many of the IDPs shelters were severely damaged during Cyclone Mocha, and the site consistently floods whenever there is heavy rain. Almost all the latrines at the relocation site were destroyed. Although some have now been repaired by an INGO, until recently families had to defecate in open space. This was preferable to walking back to the original site to use the latrines there, due to the risks of violence at the hands of police and soldiers.<sup>110</sup>

Analysis of publicly available data for the Rohingya camps for the first six months of 2023 demonstrates the extent to which humanitarian actors are struggling to meet international minimum humanitarian standards and targets, in large part due to the restrictions on humanitarian access.<sup>111</sup> This analysis provides a snapshot of the scale of the devastation wrought by Cyclone Mocha, as well as the devastating impact of restrictions on humanitarian access.

### ***‘Lack of proper shelter’***

The 13 camps along the Sittwe coastline were already very overcrowded before Cyclone Mocha struck. Rohingya children make up more than half of the population in these sites. In March 2023 Thae Chaung camp had just 7m<sup>2</sup> per person, far short of the international standard of 45m<sup>2</sup> per person in camps for the internally displaced. Following Cyclone Mocha, this is now just 6m<sup>2</sup> per person. The available space in Basara, Baw Du Pha 2, Khaung Doke Khar 1, and Ohn Taw Gyi South in Sittwe has also significantly

<sup>108</sup> UNFMM 2018 report *op. cit.* [747-748].

<sup>109</sup> Sphere, ‘The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response’ (2018 edition).

<sup>110</sup> Information on file with BROUK. See also, UNOCHA ‘Sit. Rep. No. 3’ *op. cit.*

<sup>111</sup> Analysis is based on UN OCHA Cyclone Mocha situation reports, monthly humanitarian updates, and CCCM Camp Profiles, Central Rakhine, Myanmar March and June 2023 available at <<https://www.cccmcluster.org/where-we-work/myanmar>> accessed 11 November 2023. At the time of writing, reports for Q3 had not yet been published.

reduced. The largest reduction in available space in the Sittwe camps has been in Ohn Taw Gyi South, down to 14m<sup>2</sup> per person from 18m<sup>2</sup>. In Nget Chaung 2 camp in Pauktaw township, available space has fallen from 18m<sup>2</sup> per person to just 6m<sup>2</sup> per person. These numbers would appear to indicate significant damage caused by Cyclone Mocha.

The Rohingya confined to camps are largely living in cramped temporary bamboo structures known as 'longhouses', designed to last two years. As noted above, an estimated 85 percent of these shelters were destroyed during the cyclone.<sup>112</sup> According to UNOCHA's November 2023 humanitarian update, more than 57,000 Rohingya people are still living in compromised shelters in the camps, *six months* after Cyclone Mocha struck. Transport of materials from Yangon to Rakhine has been heavily affected by access restrictions, hindering efforts to rebuild the shelters.<sup>113</sup>

### ***'Subjecting the group to a subsistence diet / lack of proper food'***

Although the World Food Programme (WFP) and others were able to distribute some food aid to those affected by the cyclone before the junta suspended all travel authorisations in June, it was insufficient to meet the needs. Two weeks after the cyclone, UNOCHA reported that '[i]n camps, food ranks among the top priority needs' and children were seen begging for food.<sup>114</sup> The regime's restrictions on humanitarian access have also impacted distribution of cash-based assistance. UNOCHA's June Cyclone Mocha situation reports highlighted that partners (including WFP) were ready to provide cash-based assistance, pending approval from the regime.<sup>115</sup>

In Rakhine State, prices for basic food items have risen significantly since the cyclone. Even before Cyclone Mocha, Rohingya IDPs were struggling with the stipend-based system of assistance provided by the WFP. It is still insufficient to meet their needs.<sup>116</sup> In September, UNOCHA reported that increasing prices for basic food items had left many families in IDP camps 'resorting to eating just one meal per day or feeding only their children in order to survive.'<sup>117</sup>

Moreover, the junta's humanitarian access restrictions have undermined the treatment of severe or moderate acute malnutrition among Rohingya children. Severe acute malnutrition means that a person is extremely thin and at risk of dying; they need immediate treatment.<sup>118</sup> In June, UNOCHA reported that 'access remains a major challenge for implementing nutrition responses including permissions for organizations to carry out essential nutrition curative and preventive services for vulnerable malnourished children and their caregivers.'<sup>119</sup> In July, 77 new cases of Rohingya children with severe acute malnutrition and 97 with moderate acute malnutrition in the Sittwe and Pauktaw camps were reported by UNOCHA.<sup>120</sup> Yet by September, UNOCHA was reporting that access restrictions and delayed travel authorisations meant that essential stocks of therapeutic food for the treatment of severe acute malnutrition had not been replenished, and some acute malnutrition patients had not received timely treatment.<sup>121</sup>

The health impacts of malnutrition may include heightened risk of preventable deaths and deterioration of pre-existing conditions, especially among children. This risk is compounded by being confined in unsanitary conditions.

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<sup>112</sup> UNGA UN Doc A/78/527 op. cit. 12 [58].

<sup>113</sup> UNOCHA, 'Myanmar: Humanitarian Update No. 34' (10 November 2023) 10.

<sup>114</sup> UNOCHA, Sit. Rep. No. 2, *op. cit.* 3.

<sup>115</sup> UNOCHA, Sit. Rep. No. 4 & 5, *op. cit.*

<sup>116</sup> Information on file with BROUK.

<sup>117</sup> UNOCHA, 'Myanmar: Humanitarian Update No. 32' (8 September 2023) 8.

<sup>118</sup> World Health Organisation, 'Malnutrition: Emergencies and disasters' (20 January 2020) available at <<https://www.who.int/news-room/questions-and-answers/item/malnutrition-emergencies-and-disasters>> accessed 12 November 2023.

<sup>119</sup> UNOCHA, Sit. Rep. No. 4, *op. cit.* 5.

<sup>120</sup> UNOCHA, 'Myanmar: Humanitarian Update No. 31' (15 July 2023)

<sup>121</sup> UNOCHA, 'Humanitarian Update No. 32', *op. cit.* 7, 8.

### ***'Lack of water and proper sanitation facilities'***

As the Humanitarian Charter sets out,

‘An environment free of human excreta is essential for people’s dignity, safety, health and well-being. This includes the natural environment as well as the living, learning and working environments. Safe excreta management is a Water Supply, Sanitation, and Hygiene Promotion (WASH) priority. In crisis situations, it is as important as providing a safe water supply. All people should have access to appropriate, safe, clean and reliable toilets.’<sup>122</sup>

The Humanitarian Charter establishes a minimum standard of one shared toilet per 20 people.<sup>123</sup> BROUK’s analysis in May 2022 found that the average across all the Rohingya camps already fell short of this minimum standard. This was still the case in the first three months of this year, with 27 people per functioning latrine across all the camps. However, as noted above, most of the latrines were destroyed in Cyclone Mocha. The post-cyclone statistics make grim reading: on average, 284 must share a functioning latrine. In Baw Du Pha 2 camp the number rises to more than 1,300 people, and in Ohn Taw Gyi North, more than 1,100.<sup>124</sup> In November, UNOCA reported that, ‘In Rakhine, lengthy approval processes have delayed...renovation and construction of WASH facilities, and provision of WASH services for people in need. These delays have hampered the ability of humanitarian partners to provide an effective WASH response in some of the affected sites, leaving a significant gap in addressing the basic needs of the IDPs.’<sup>125</sup>

According to information received by BROUK in November, only an estimated 5 percent of the latrines in the Sittwe camps have been repaired. At the time of writing, *six months* after the cyclone, Rohingya IDPs either must wait for a long time to access a functioning latrine or are reduced to defecating in open space. Compounding this problem is insufficient access to water. The main source of water for drinking and bathing in the Sittwe camps is from boreholes. BROUK sources indicate that some 30 percent of these boreholes were contaminated with saltwater during the cyclone. People must wait in long queues to use the handpumps at the boreholes and they are facing water shortages, particularly in the most heavily populated camps of Say Tha Mar Gyi and Ohn Taw Gyi North and South.<sup>126</sup>

These conditions are not just demeaning and dehumanising - they pose a significant public health hazard. Outbreaks of acute watery diarrhoea, gastroenteritis, scabies, hepatitis A, dengue, malaria, and seasonal flu due to the unsanitary conditions and flooding in the camps have been reported to BROUK.

### ***'Failing to provide adequate medical care'***

As noted above, Cyclone Mocha destroyed nine of the mobile clinics and partially damaged one in the Sittwe camps.<sup>127</sup> The regime’s restrictions on humanitarian access have severely limited access to adequate medical care. In June, UNOCHA reported that, ‘Wider access is crucial to effectively extend health services, allocate resources, and carry out early warning and outbreak investigations. Health partners continue to face persistent challenges in accessing the most severely affected areas even three weeks after the cyclone.’<sup>128</sup>

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<sup>122</sup> Sphere *op. cit.* 113.

<sup>123</sup> Sphere *op. cit.* 116.

<sup>124</sup> CCCM Camp Profiles, Central Rakhine, Myanmar June 2023, *op. cit.* 4.

<sup>125</sup> UNOCHA, ‘Myanmar: Humanitarian Update No. 34’ *op. cit.* 11.

<sup>126</sup> Information on file with BROUK.

<sup>127</sup> UNOCHA, ‘Myanmar Cyclone Mocha Situation Report No.3’ (1 June 2023), 3.

<sup>128</sup> UNOCHA Sit. Rep. No. 4 (8 June 2023), *op. cit.* 4.

At the time of writing, it is unclear if any of these clinics have been repaired.<sup>129</sup> *Six months* after the cyclone, access to adequate medical care is still extremely limited due to the junta's ongoing restrictions. The few clinics in the camps which are operational are reported to be open only one or two days a week, for a few hours at a time.<sup>130</sup>

The small field hospital in Thet Kae Pyin village in Sittwe is operational and open 24 hours a day every day. It is run by the Ministry of Health, which provides staff only in the morning (with an INGO providing staff afternoon and night). Rohingya in the camps and villages in Sittwe depend on the field hospital for access to medicines, primary health care, and referrals to Sittwe General Hospital. According to information received by BROUK, the field hospital is currently lacking even the most basic medications for primary health care and has no surgical capabilities or life-saving equipment such as a defibrillator. Donors who have tried to donate equipment to this primary care health centre for Rohingya have reportedly been redirected to support Sittwe General Hospital instead. Due to the inadequate facilities, emergency cases are referred to Sittwe General Hospital.

BROUK has received information about the preventable deaths of eight Rohingya patients in September and October 2023 due to inadequate medical care and discriminatory treatment. This included two 8-year-old girls who died from acute gastroenteritis and three women who died during childbirth. They experienced complications during delivery and were referred to Sittwe General Hospital. They did not receive timely medical assistance and were denied blood transfusions from the hospital's blood bank, due to the hospital's long-standing policy that 'blood donated by Rakhine is for Rakhine'.<sup>131</sup> Rohingya emergency patients must make use of blood donor groups within the Rohingya community. Supplies are limited and arrangements cannot always be made in time.

## **(ii) Restrictions on movement, humanitarian access, and access to healthcare for Rohingya across Rakhine State<sup>132</sup>**

Aside from the more than 140,000 Rohingya men, women and children living in arbitrary indefinite detention in the camps, Rohingya communities across Rakhine State are effectively living in an open-air prison. They are subjected to severe restrictions on their movement across Rakhine State, imposed through a complex system of written and verbal orders, abusive practices, extortion, barbed-wire barriers, and militarised checkpoints. A World Food Programme report on northern Rakhine State in mid-2017 highlighted limited access to livelihoods, due largely to freedom of movement restrictions and the increased security presence, as being a main contributory cause of malnutrition.<sup>133</sup> Up-to-date information about rates of severe acute malnutrition in northern Rakhine State is not publicly available. However, in 2015 severe acute malnutrition rates were at 19 percent in Maungdaw and 15.1 percent in Buthidaung, above the World Health Organisation emergency threshold of 15 percent.<sup>134</sup>

These ongoing restrictions, coupled with the complex armed conflict situation, impact access to livelihoods. As a result, many rural Rohingya communities in northern Rakhine State are largely dependent on humanitarian aid for food and supplementary nutrition. As such, the regime's humanitarian access restrictions have a major impact on Rohingya communities in northern Rakhine State. In May – before the blanket ban on travel authorisations – UNOCHA reported that, 'In northern Rakhine, 8,000

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<sup>129</sup> The need to renovate the clinics was still being reported by UNOCHA in its September humanitarian update. The October and November updates do not mention the clinics.

<sup>130</sup> Information on file with BROUK. See also CCCM Camp Profiles, Central Rakhine, Myanmar June 2023, *op. cit.* 4.

<sup>131</sup> Internal humanitarian briefing from 2018 on file with BROUK. See also, Human Rights Watch, '“An Open Prison without End”: Myanmar's Mass Detention of Rohingya in Rakhine State' (October 2020) 87.

<sup>132</sup> All information in this section on file with BROUK, unless otherwise referenced.

<sup>133</sup> UNFPM 2018 report, *op. cit.* 128 [534].

<sup>134</sup> *ibid.*



people in need of food assistance remain difficult to reach due to lack of travel authorizations. They received a two-month ration in April and accessing these communities as soon as possible is critical.<sup>135</sup> In June, WFP was trying to negotiate access to some 11,000 people in northern Buthidaung township for food aid distribution. It is unclear to what extent these people were reached with food aid.<sup>136</sup>

In May, UNOCHA identified a need for anthropometric measurements tools for use by partners in Buthidaung and Maungdaw to scale up active screening for early referral and treatment of acute malnutrition.<sup>137</sup> As of October, delays in the issuance of travel authorisations in Rakhine State continued to limit timely nutrition responses.<sup>138</sup>

### **(iii) Criminalisation and imprisonment of Rohingya fleeing the conditions of life inflicted on them**

BROUK continues to receive reports of dozens of Rohingya, including children, arrested by the SAC authorities while attempting to flee the appalling conditions of life inflicted upon them.<sup>139</sup> The UN Special Rapporteur noted that 1,000 Rohingya had been arrested for travelling within Myanmar in the first seven months of 2023.<sup>140</sup>

Cases against the Rohingya are usually brought under the 1949 Residents of Burma Registration Act (and 1951 Resident of Burma Registration Rules), which carries a maximum penalty of two years in jail with hard labour, or under Article 13(1) of the 1947 Burma Immigration (Emergency Provisions) Act) for a jail term of five years.<sup>141</sup> Under international law, the statelessness of a person resulting from the arbitrary deprivation of nationality cannot be invoked by a State as a justification for the denial of other human rights, including freedom of movement.<sup>142</sup> The Myanmar State's complex web of discriminatory laws and movement restrictions applied solely to members of the Rohingya group violate international human rights laws. Furthermore, they criminalise the Rohingya for attempting to flee the appalling conditions of life they are subjected to in Rakhine State.

In summary, this section of the briefing has set out numerous examples of the acts underlying 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', otherwise known as 'slow death'. In line with the acts enumerated by the ICTY and ICTR, they include denial of proper shelter, subjecting the group to a subsistence diet / lack of proper food, lack of water and proper sanitation facilities, and failing to provide adequate medical care. Underpinning them all are the regime's discriminatory policies and practices targeted at members of the Rohingya group, as well as its apparatus to restrict humanitarian access.

With regard to the question of genocidal intent, the 2016 ICTY *Karadzic* judgment established that evaluating the criterion of probability should take into account the illustrative factors of the actual nature of the conditions of life, the length of time that members of the group were subjected to them, and the characteristics of the group, such as its vulnerability. These illustrative factors are arguably all present.

Firstly, the Myanmar authorities instigated and participated in the 2012 violence which forcibly displaced more than 140,000 already vulnerable Rohingya, then segregated them in overcrowded, flood-prone internment camps where they have remained in arbitrary indefinite detention in increasingly squalid

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<sup>135</sup> UNOCHA, Sit. Rep. No. 2 (29 May 2023), *op. cit.* 3.

<sup>136</sup> UNOCHA's July Humanitarian Update No. 31 doesn't address this issue. In September, UNOCHA reported that '17,000 people in Buthidaung and Maungdaw townships received cash for food'. UNOCHA, 'Humanitarian Update No. 32', *op. cit.* 6.

<sup>137</sup> UNOCHA, Sit. Rep. No. 2 (29 May 2023), *op. cit.* 3.

<sup>138</sup> UNOCHA, 'Myanmar: Humanitarian Update No. 33' (3 October 2023) 9.

<sup>139</sup> Information on file with BROUK.

<sup>140</sup> UNGA UN Doc A/78/527 *op. cit.* 15 [85].

<sup>141</sup> Rohingya Communities Worldwide, 'Joint UPR Submission 2020' 11 [30]. Burma Human Rights Network, 'Nowhere to Run in Burma: Rohingya trapped between an open-air prison and jail' (26 August 2020).

<sup>142</sup> UNFFM 2018 report *op. cit.* 119-120 [499-500].

conditions without adequate shelter for eleven years. Secondly, the remaining Rohingya population in Rakhine State effectively lives in an open-air prison, subjected to severe restrictions on movement and denied access to humanitarian aid and healthcare, designed to result in their ‘slow death’. Thirdly, the Myanmar authorities criminalise and imprison members of the Rohingya group who attempt to flee the conditions of life inflicted upon them. The proactive attempts by Myanmar authorities to *prevent* the Rohingya group from escaping these appalling conditions is arguably further indication of genocidal intent to destroy the group in whole or in part.

It is important to recall that the *Karadzic* judgment establishes that the genocidal act of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part ‘does not require proof that the conditions actually led to death or serious bodily or mental harm of members of the protected group. When **“such a result is achieved, the proper charge will be paragraphs (a) or (b)” [killing or serious bodily or mental harm].’** [emphasis added]<sup>143</sup>

### **Causing serious bodily or mental harm to members of the group<sup>144</sup>**

The 140,000 members of the Rohingya group held in internment camps – over half of whom are children – have been living under armed guard for more than eleven years. These conditions of life engender constant fear and a sense of hopelessness, causing serious mental harm to the men, women, and children detained in the camps.

Rohingya survivors of Cyclone Mocha in the camps and villages along the Sittwe coastline have endured immense suffering that could have been prevented by effective disaster preparedness and evacuation planning by the Myanmar authorities. Not only have they suffered preventable injuries, causing serious bodily harm, but they have witnessed the preventable deaths of their loved ones, which has also caused serious mental harm. This mental anguish has been compounded by the Myanmar authorities’ ongoing restrictions on humanitarian aid. Six months on, Rohingya in the camps have been abandoned to increasingly unsanitary, degrading conditions, without enough food to eat, water to drink, or shelter to keep them safe. Discriminatory policies and humanitarian restrictions prevent them from accessing timely medical care, leading to further preventable deaths. Reports of suicide among Rohingya men, women and children in the camps since Cyclone Mocha attest to the depths of desperation, sense of abandonment, and hopelessness within the community. Furthermore, the Myanmar authorities’ criminalisation and imprisonment of those attempting to flee the conditions of life inflicted on them in Rakhine State – including children – has also caused serious mental harm to untold numbers of Rohingya.

In addition, BROUK continues to receive reports of the SAC arbitrarily arresting and detaining Rohingya men. This is an ongoing discriminatory pattern of conduct systematically targeted at Rohingya, described in the 2018 UNFFM report.<sup>145</sup> At times, the arrests appear to have been made for the purpose of extortion demands. In other instances, Rohingya detainees were subjected to brutal beatings at the hands of soldiers, amounting to ill-treatment and torture; a pattern also described by the UNFFM.<sup>146</sup> Such violations may also constitute the genocidal act of causing serious bodily or mental harm to the members of the group when committed with genocidal intent.

In September, Rohingya villagers in Buthidaung township reported extortion and ill-treatment by soldiers from Infantry Battalion 552. Soldiers are reported to take cattle owned by the villagers into their compound, sometimes slaughtering the cattle for their own use and at other times making extortion

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<sup>143</sup> ICTY, *Prosecutor v. Karadzic*, op. cit. [546].

<sup>144</sup>All information in this section on file with BROUK, unless otherwise referenced.

<sup>145</sup> UN Human Rights Council, ‘Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar’, (17 September 2018) UN Doc. A/HRC/39/CRP.2 [607-611].

<sup>146</sup> UNFFM 2018 report *op. cit.* [612].

demands for their release. One Rohingya man was punched and beaten over several hours by soldiers, while negotiating the release of his cattle.

In October, Border Guard Police arrested a Rohingya village administrator in Maungdaw township on suspicion of providing support to ARSA. His current whereabouts are unknown, but he is believed to have been transferred to Maungdaw where he is at high risk of being tortured under interrogation. His family maintain that he was unjustly accused without any evidence and are very concerned for his well-being.<sup>147</sup>

Also in October, the Myanmar military entered Rohingya villages in southern Buthidaung a few days after the Arakan Army had raided them. Members of the Myanmar military arbitrarily arrested and tortured more than 30 Rohingya men, accusing them of supporting both the AA and ARSA in an apparent act of collective punishment for their perceived support for these groups. After the soldiers interrogated and tortured the Rohingya men, they released them.

### **Killing members of the group**

The conditions of life inflicted upon Rohingya in the camps and villages in Rakhine State have resulted in the preventable deaths of an estimated 400 or more members of the Rohingya group during Cyclone Mocha, including a high proportion of women, children, and the elderly. Furthermore, the regime's discriminatory policies and obstruction of humanitarian assistance has caused at least eight preventable deaths among extremely vulnerable Rohingya survivors, although the true figure may be significantly higher. As such, in accordance with the *Karadzic* case law, such killings may amount to genocidal acts when intent to destroy the group in whole or in part can be inferred from the context and the actions of the perpetrators.

The next section of the briefing examines the Myanmar State's compliance with **Provisional measures (3) and (4)**.

### **Provisional measure (3) – prevent the destruction of and ensure the preservation of evidence**

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

In May 2023, the regime publicly announced that 750 plots of land in 15 villages in the northern part of Maungdaw township had been prepared for the Rohingya repatriation pilot project with Bangladesh, supported by China. However, reports in the Bangladeshi media indicate that 20 'model villages' have been named by members of the Myanmar delegation during their late October visit to the refugee camps in Cox's Bazaar.<sup>148</sup>

In September, the regime announced in State media that Kyein Chaung (South) village was one of the resettlement sites.

Kyein Chaung village tract area is known as Boli Bazar in Rohingya. The junta carried out 'clearance operations' in this area in 2016 and 2017. Brutal gang-rapes carried out by soldiers from the Myanmar military against Rohingya women and girls were a hallmark of these operations in both 2016 and 2017 in Kyein Chaung/Boli Bazar village tract.<sup>149</sup> During the 2017 clearance operations, many Rohingya,

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<sup>147</sup> Development Media Group, 'Regime arrests Muslim administrator over alleged ARSA links' (2 October 2023) available at <<https://www.dmediag.com/news/aayyrote.html>> accessed 12 November 2023.

<sup>148</sup> Both China and India are reported to have supported the building of these villages. See the Daily Star, 'Rohingyas willing to go home, not to model villages', *op. cit.*

<sup>149</sup> UNFFM 2018 report, *op. cit.* 213 [921], 258 [1091].

including children, were reported to have been killed in the area. One survivor from the area told the UN Fact Finding Mission:

*I don't know how many people died that day. The military, they were just shooting at whomever. They were shooting at people whenever they saw them, on the streets or in the houses. When they were shooting, there was no time to look back and care for those who were shot. As people were running, they were shooting at them. That is how my daughter died. She was hit fleeing. I couldn't go back and carry her.<sup>150</sup>*

By late 2017, satellite imagery analysis showed that terrain clearance was visible around Kyein Chaung / Boli Bazar village tract. The UNFFM further reported that the land appeared to have been prepared for new construction, and a new road had been built connecting Kyein Chaung / Boli Bazar with Goke Pi on Buthidaung township.<sup>151</sup>

At the time of writing, it has not been possible to verify how much new construction has taken place in the area since the provisional measures were ordered. However, the whole Kyein Chaung village tract area should be treated as an international crime scene and further steps must be taken to preserve any remaining evidence.

BROUK has identified another of the 20 new 'model village' sites earmarked for construction in Maungdaw township, where atrocity crimes also took place during the 2016-2017 clearance operations. The regime has yet to publicly announce this site and BROUK is opting not to name it in an effort to protect survivors in the area from reprisal attacks. While many victims of the clearance operations were either killed or fled to Bangladesh, some survivors remain in their ancestral homes or are internally displaced within Maungdaw township.

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

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

At the time of writing, it is unclear whether the SAC has met the 23 November 2023 deadline to submit its latest report on compliance with the provisional measures order.

The extensive evidence and analysis of the junta's breaches of the ICJ's provisional measures order presented in this briefing underscore – yet again – the urgent need for international scrutiny and transparency in the reporting process on compliance with provisional measures to the Court in this case. As the situation currently stands, Myanmar can breach the provisional measures without facing any consequences.

Under the Rules of the Court, the ICJ may of its own accord either issue further provisional measures or amend the existing order by providing more specific instructions.<sup>152</sup> If Myanmar were legally obliged to

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<sup>150</sup> UNFFM 2018 report, *op. cit.* 206 [888], 207 [894].

<sup>151</sup> UNFFM 2018 report, *op. cit.* 289 [1221], 306 [1240].

<sup>152</sup> See International Court of Justice Rules of Court adopted on 14 April 1978 and entered into force on 1 July 1978, Rules 75 and 76. See also Prachiti Venkatraman and Ashley Jordana, UK Human Rights Blog, Myanmar's Compliance with the ICJ Provisional Measures Order & the Road Ahead (3 September 2020) available at <<https://ukhumanrightsblog.com/2020/09/03/myanmars-compliance-with-the-icj-provisional-measures-order-the-road-ahead/>> accessed 15 November 2023 and USHMM, Report#2, *op.cit.* 5. A change to the Internal Judicial Practice of the Court provided for the establishment of an ad hoc committee comprised of three judges to assist the Court in monitoring the implementation of provisional measures. The ad hoc committee reports periodically to the Court and can recommend potential options to the Court, which should include a recommendation to make Myanmar's reports public. ICJ Press Release, 'Adoption of a new Article 11 of the Resolution concerning the Internal Judicial Practice of the Court, on procedures for monitoring the implementation of provisional measures indicated by the Court' (21 December 2020) No. 2020/38.

make its compliance reports public as part of its *erga omnes* obligations to the international community on the prevention and punishment of genocide, this would give UN member states compelling reason to urge the UN Security Council to exercise its Chapter VII mandate and adopt a binding resolution on Myanmar in pursuit of peace and security in the country and wider region.<sup>153</sup> Such a resolution should include referring the situation in Myanmar to the International Criminal Court.

## Conclusion

Almost four years have now passed since the International Court of Justice instructed the Myanmar State to ‘take all measures within its power’ to prevent the commission of genocidal acts against the Rohingya in its provisional measures order. Tragically, the disproportionate impact of Cyclone Mocha on the extremely vulnerable Rohingya confined to camps resulted in the senseless loss of hundreds of lives. The regime’s restrictions on humanitarian access following the cyclone have served to inflict ever-worsening conditions of life upon those confined to the camps. Conditions that were described by a senior UN official as “beyond the dignity of any people” five years ago are now virtually indescribable. There is a growing sense of hopelessness, despair, and of having been abandoned to their fate amongst Rohingya communities remaining in Myanmar.

The Court must urgently amend or issue further provisional measures to order Myanmar to allow international, national, and local humanitarian actors immediate, unrestricted, and sustained access to Rakhine State and the rest of the country.

In light of the concerning reports about ‘model villages’ for the Myanmar-Bangladesh pilot repatriation project being built in areas where killings and other genocidal acts are reported to have taken place during the 2016-2017 clearance operations - potentially compromising evidence of atrocity crimes at those sites, in breach of provisional measure 3 - the Court should also order Myanmar to immediately cease and desist from any such construction projects in northern Rakhine State and to immediately take steps to ensure the preservation of evidence in these locations.

For its part, the international community must give generously to meet the urgent humanitarian needs of the Rohingya and people across Myanmar. The situation in Myanmar was already one of the most underfunded crises in the world before Cyclone Mocha hit. The combined US\$887 million Humanitarian Response Plan and Cyclone Mocha Flash Appeals remain critically underfunded, with just 28 per cent of the required funding received.<sup>154</sup>

The international community must also find concrete ways to leverage the provisional measures to ensure they fulfil their purpose, including by making concerted efforts to secure public hearings at the UN Security Council on the junta’s compliance with the order and coordinating follow-up actions. The UN Security Council resolution passed in December 2022 urged safe and unfettered humanitarian access, but made no reference to the legally binding provisional measures order on Myanmar to ‘take all measures within its power’ to protect the Rohingya. Any future resolution must recognise that enduring peace and security in Myanmar and justice for the Rohingya are intertwined, and either refer the situation in Myanmar to the International Criminal Court or establish an ad hoc international tribunal for Myanmar.

The evidence documented by BROUK and presented in this latest briefier (together with seven previous briefings) demonstrates that the Myanmar military’s conduct continues to cause irreparable harm to the

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<sup>153</sup> Article 77 of the Rules read with Article 41(2) of the Court’s Statute provides that any provisional measures ordered by the Court are to be communicated to the UNSC. To date there is no indication that the reports on compliance with the orders have been provided to the UNSC. Erin Farrell Rosenberg, John Packer, Fernand de Varennes, ‘Provisional Measures in The Gambia v. Myanmar Case Before the ICJ: The Case for Making Myanmar’s Report Public’ (22 May 2021), 11.

<sup>154</sup> UNOCHA, ‘Myanmar: Humanitarian Update No. 34’ *op. cit.* 1.

Rohingya group. The evidence points to the ongoing commission of the genocidal act of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. The junta continues to defy the provisional measures order and it must be held accountable for the atrocity crimes it perpetrates with impunity. Rohingya communities in Myanmar must not be abandoned to their inevitable fate at the hands of the regime.

### **Recommendations to the International Court of Justice**

- Urgently review Myanmar's compliance with the provisional measures and formally communicate its findings to the UN Security Council.
- To prevent further irreparable harm to members of the Rohingya group, urgently amend the existing provisional measures order or issue further provisional measures to include (but not limited to) requirements that:
  - Myanmar immediately cease and desist from all State-sponsored construction projects in the northern Rakhine State townships of Buthidaung, Rathedaung, and Maungdaw that risk destroying evidence of atrocities committed in these locations;
  - Myanmar makes its reporting public, to ensure transparency and rigorous scrutiny of its compliance with the order;
  - Myanmar implement policy and legislative changes as part of concrete measures it must take to comply, including the restoration of full citizenship to the Rohingya as a vital first step;
  - Myanmar end all arbitrary restrictions on freedom of movement, access to health and other resources indispensable for survival for the Rohingya and allow international, national, and local humanitarian actors immediate, unrestricted, and sustained access to Rakhine State and the rest of the country;
  - Myanmar cooperate with United Nations bodies and other international investigative mechanisms that seek to investigate the acts that are the subject of this case.

### **Recommendations to UN member states**

- Urgently exert maximum pressure on Myanmar to allow international, national, and local humanitarian actors immediate, unrestricted, and sustained access to Rakhine State and the rest of the country and end all arbitrary restrictions on freedom of movement, access to health and other resources indispensable for survival for the Rohingya.
- Give generously to meet the urgent humanitarian needs of the Rohingya and people across Myanmar, including via flexible funding mechanisms that enable direct support to local civil society organisations already working under extremely difficult and dangerous conditions to meet the needs of displaced communities and those affected by Cyclone Mocha.
- Coordinate efforts to secure public hearings at the UN Security Council to evaluate Myanmar's compliance with provisional measures.
- Publicly support calls from Rohingya communities for the International Court of Justice to make Myanmar's reports on compliance with the provisional measures order publicly available.
- Exert maximum pressure on Myanmar to cooperate with the International Criminal Court investigation and provide access to Rakhine State to ICC and Argentinian investigators.
- Publicly support the referral of the situation in Myanmar to the International Criminal Court or support the creation of an ad hoc international tribunal.
- Exercise universal and other forms of jurisdiction to investigate any individual from Myanmar – irrespective of position or rank - who may be responsible for committing genocide, war crimes, and

crimes against humanity under international law. Ensure such individuals are brought to justice in fair trials.

- Propose a UN Security Council resolution that imposes a comprehensive arms embargo on Myanmar, including on the transfer of aviation fuel to the military; imposes targeted economic sanctions on the Myanmar military, its leaders, and its sources of revenue, and refers the situation in Myanmar to the International Criminal Court. The prospect of a veto by a Member State in the UN Security Council should not deter other Member States from placing a resolution before the Council for consideration, debate and a vote.
- Coordinate multilateral efforts to impose arms embargoes on Myanmar, including on the transfer of aviation fuel to the military as well as targeted economic sanctions on the Myanmar military, its leaders, and its sources of revenue.

*Editorial guidance kindly provided by Erin Farrell Rosenberg, Visiting Scholar, Urban Morgan Institute for Human Rights at the University of Cincinnati Law.*

