

Prevent the unthinkable: The international community must leverage the International Court of Justice’s provisional measures order before it’s too late

Executive summary

On 22 July, the International Court of Justice issued its judgment on Myanmar’s four preliminary objections to the Gambia’s genocide case against Myanmar, rejecting them all. This means that the case will now proceed to the merits phase on the substance of the case: whether the Myanmar State has committed genocide against the Rohingya people. Until the case reaches its conclusion, the Myanmar State must continue to submit reports to the Court every six months on its compliance with the Court’s order to ‘take all measures within its power’ to protect the Rohingya from further harm.

Over the past six months, armed conflict has significantly escalated in Rakhine State; a microcosm of the rest of the country. By the end of September, more than 17,400 people had been newly displaced since August as a result of armed clashes between the Arakan Army and the Myanmar military in Rakhine State and Paletwa township in southern Chin State. The Myanmar military has committed atrocity crimes against the Rakhine, Rohingya and other ethnic minority communities in the region in brutal fashion.

However, what is unique about the situation in Rakhine State is the applicability of the ICJ’s provisional measures order. The purpose of the order is to protect the Rohingya, a group described by the Court as ‘extremely vulnerable’.

Rohingya communities continue to be caught in the middle of the power struggle between the Arakan Army and the Myanmar military, particularly in Maungdaw, Buthidaung and Kyauktaw townships. As set out in this briefing, Rohingya have been killed, seriously injured, and displaced by the fighting. Rohingya homes and mosques have been damaged and destroyed.

There have been fierce clashes waged around the area of Gudar Pyin village tract in Buthidaung township, where the Myanmar military carried out several massacres during the 2016-2017 clearance operations. Four Rohingya IDPs and one Rakhine were injured in an attack by a Myanmar military-operated combat drone while they were seeking shelter in a Rohingya village.

In a different area of Buthidaung township, the junta shelled a Rakhine village, destroying many homes and forcing the villagers to flee. Rohingya in a nearby village were caught up in the fighting. Artillery shells landed in the area, killing a 7-year-old Rohingya boy. Soldiers entered the village and attacked Rohingya as they were fleeing, stabbing at least one man in the head and arm, in conduct reminiscent of the 2016-2017 clearance operations.

BROUK has also received reports that seven Rohingya, including women and children, were killed en masse in July when Border Guard Police opened fire on their small boat as it attempted to enter the Maungdaw township area from Bangladesh. Survivors were reportedly taken into military custody.

The escalating hostilities have already impacted vulnerable Rohingya IDPs confined to camps for the past decade. In early November, an historic mosque in Nidin ‘closed’ camp in Kyauktaw township was destroyed in shelling by the Myanmar military. 25,000 Rohingya IDPs in camps in Pauktaw township are becoming harder to reach with humanitarian assistance due to tight security at checkpoints, while Taung Paw camp in Myebon is currently completely cut off from humanitarian assistance.

The junta continues to exacerbate the circumstances that have contributed to the ‘slow death’ of the Rohingya group in Rakhine State. The regime denies Rohingya their basic rights through a complex set of restrictions on their movement, access to healthcare and humanitarian aid. It also persists with its routine

practices of forced labour and extortion, which undermine livelihoods and impoverish the Rohingya group. The indefinite detention of around 138,000 Rohingya in camps under deplorable conditions for more than a decade has resulted in the preventable deaths of at least 42 young children and 10 women since the provisional measures were ordered. Moreover, the regime continues to criminalise Rohingya who try to flee these appalling conditions of life inflicted on them. At least 800 Rohingya have been arrested and detained over the reporting period, while dozens have lost their lives at sea.

The evidence documented by BROUK and presented in this latest briefer (together with five previous briefings) demonstrates that the Myanmar military's conduct continues to cause irreparable harm to the Rohingya group. All the evidence points to the ongoing commission of the genocidal act of killings – including at least one mass killing in the past six months – as well as causing serious bodily or mental harm to members of the group, and 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.

BROUK is gravely concerned about the rapidly deteriorating, extremely volatile situation in Rakhine State. There is a terrible risk that Rohingya will once again experience the unthinkable: a repeat of the mass killings and other atrocities that characterised the 'clearance operations' of 2016-2017, driving hundreds of thousands of Rohingya out of their homeland.

The international community must find ways to leverage the provisional measures order, 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.

Decisive, urgent action is needed now to prevent the unthinkable.

Introduction

Since BROUK's last briefing in May 2022 on the military junta's noncompliance with the provisional measures ordered by the International Court of Justice (ICJ or Court), the Rohingya community has observed two sombre anniversaries. June 2022 marked a decade since the start of the State-orchestrated violence that expelled Rohingya from their homes in central Rakhine State, leading to the indefinite detention of around 138,000 Rohingya in squalid camps for internally displaced persons that continues to this day. August 2022 marked the five-year anniversary of the Myanmar military's genocide in 2017, which killed thousands of Rohingya men, women and children and forced more than 700,000 to flee to Bangladesh.

A human rights and humanitarian catastrophe continues to unfold in Myanmar. In July, the Myanmar military executed four political prisoners, including prominent activist Ko Jimmy and Phyo Zeyar Thaw, a former member of parliament for the National League for Democracy. In September, helicopter gunships fired on a school in Sagaing Region before soldiers entered the village and opened fire. Eleven children were reported to have been killed in the attack.¹ In October, the Myanmar military murdered a high school teacher in Magway Region and burned down his school. The headless body of the teacher was left on the ground in front of the school gate and his head was impaled on top of it.² Later that month, the military carried out an airstrike on a Kachin Independence Organisation (KIO) anniversary gathering, killing at least

¹ UN General Assembly, 'Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews' (3 October 2022) UN Doc A/77/494.

² Associated Press, 'Myanmar villagers say army beheaded high school teacher' (21 October 2022) available at <<https://apnews.com/article/aung-san-suu-kyi-myanmar-813a18fd0ab77cd6ccdaaa36a0bf8965>> accessed 29 November 2022.

80 people, the vast majority of them civilians. Many others were seriously injured, with soldiers on the ground blocking exit routes and access to medical care, contributing to the fatalities.³ These incidents are emblematic of the brutality and cruelty of the current military regime.

Across the country, the junta has killed hundreds of civilians in shelling by heavy artillery and airstrikes by helicopters and fighter jets. The military's conduct has included bombing temporary shelters inhabited by internally displaced persons. Soldiers have also opened fire on unarmed civilians, a continuation of the military's long-standing "shoot-on-sight" policy in areas controlled by opposition armed groups. The military has used landmines extensively in civilian areas, often placing them in locations that indicate an intention to cause civilian casualties.⁴ Armed conflict between the Myanmar military and the Arakan Army has significantly escalated in Rakhine State over the reporting period, with similar incidents described in detail below.

The UN Office for the Coordination of Humanitarian Affairs (UNOCHA) has estimated that more than 1.1 million people have been displaced across the country since the junta seized power on 1 February 2021. Despite the scale of this human rights and humanitarian catastrophe, the Humanitarian Response Plan for Myanmar remains drastically underfunded with a shortfall of 78 percent reported at the end of October.⁵

Against this horrific backdrop, there were however some positive developments for the pursuit of justice and accountability for the Rohingya community. On 22 July, the International Court of Justice rejected the preliminary objections advanced by Myanmar in the Gambia's genocide case against Myanmar, meaning that the case moves ahead to the merits phase. In August, speaking at an online event to mark the 5th anniversary of the genocide against the Rohingya, the National Unity Government's (NUG) Minister of Human Rights Aung Myo Min said that the NUG was committed to abolishing Myanmar's 1982 Citizenship Law and restoring citizenship rights to the Rohingya, as well as facilitating the safe and dignified return of Rohingya refugees to Rakhine State.

With this briefing, BROUK highlights the rapidly deteriorating situation on the ground in Rakhine State amidst a major escalation in hostilities between the Myanmar military and the Arakan Army. The briefing examines the conduct of the Myanmar military and assesses compliance with the provisional measures ordered by the International Court of Justice in the Gambia's genocide case against Myanmar, which are intended to protect the 'extremely vulnerable' Rohingya.⁶

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 among the Rohingya.⁷ These included mass rape of

³ Al Jazeera, 'Death toll from air raids in Myanmar's Kachin reported to hit 80' (25 October 2022) available at <<https://www.aljazeera.com/news/2022/10/25/horrific-air-raids-in-myanmars-kachin-kills-80-reports>> accessed 29 November 2022.

⁴ UN General Assembly, 'Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews' (3 October 2022) UN Doc A/77/494 [32] [34].

⁵ UNOCHA Myanmar Humanitarian Update No. 23 | 31 October 2022, 1.

⁶ *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].

⁷ 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

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.⁸

In March 2017, the Independent International Fact-Finding Mission on Myanmar (UNFFM) was established by the UN Human Rights Council.⁹ 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.¹⁰ 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.¹¹

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.¹²

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.¹³ In doing so, the Gambia has emphasised the importance of the legal concepts of *erga omnes* obligations (owed to the

Done to Us”: The Chut Pyin Massacre: Forensic Evidence of Violence against the Rohingya in Myanmar’ (19 July 2018).

⁸ 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.

⁹ 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.

¹⁰ 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.

¹¹ 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].

¹² *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].

¹³ 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.

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.¹⁴

Latest developments in the ICJ case

On 22 July, the Court issued its judgment on Myanmar's four preliminary objections to the case.¹⁵ In brief, Myanmar had argued that the Gambia was not bringing the case in its own right as a State, but rather as a proxy for the Organisation of Islamic Cooperation. Arguing that only States (and not organisations) can bring a case, Myanmar submitted that the Gambia's application was inadmissible or that the Court lacked jurisdiction. Secondly, it argued that there was no link between the Gambia and the facts of the case, and that therefore the Gambia did not have standing (the right to bring an action) before the Court. Thirdly, it argued that Myanmar's reservation to Article VIII of the Genocide Convention should be interpreted as referring to the International Court of Justice. Finally, it argued that there was no "dispute" between the Gambia and Myanmar at the time the Gambia instituted proceedings.¹⁶ The Court rejected all four of Myanmar's preliminary objections.¹⁷

The judgment in the Gambia's favour means that the case will now proceed to the merits phase on the substance of the case. The Court ordered Myanmar to submit its counter-memorial (written submission defending the allegations of genocide) by 24 April 2023. Public hearings on the merits of the case will follow at a later date. While the ICJ judgment was widely expected to be in favour of the Gambia, it is nonetheless historic. Responding to the judgment, BROUK's President Tun Khin said, "This decision is a great moment for justice for Rohingya, and for all people of Burma. This ruling shows that there is a possibility to challenge the military's impunity."¹⁸

Until the case concludes, the State of Myanmar is obliged to continue reporting on its compliance with the provisional measures ordered by the Court every six months.

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.¹⁹ 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.'²⁰

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

¹⁴ 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].

¹⁵ ICJ judgment, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*)' (22 July 2022).

¹⁶ 'Preliminary objections of the Republic of the Union of Myanmar in the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide at the International Court of Justice' (20 January 2021).

¹⁷ The Court unanimously rejected Myanmar's first, third and fourth objections, and rejected the second by 15-1 (against – Judge Xue). ICJ judgment, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*)' (22 July 2022) 38 [115].

¹⁸ BROUK, 'BROUK Welcomes Decision By ICJ – British Government Must Now Join The Case' (22 July 2022) available at <<https://www.brouk.org.uk/brouk-welcomes-decision-by-icj-uk-government-must-now-join-the-case/>> accessed 29 November 2022.

¹⁹ 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).

²⁰ *The Gambia v. Myanmar*, ICJ 'Application Instituting Proceedings and Request for Provisional Measures' (11 November 2019) [113].

Genocide Convention.²¹ 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.²²

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 compliance with the order and every six months thereafter until the case concludes.²³ Under the UN Charter, all member States must comply with ICJ decisions.²⁴ Critically assessing Myanmar's compliance with the order is therefore of the utmost importance.

However, to date the State of Myanmar is not under any legal obligation to make its reports public. In June 2020, 30 Rohingya organisations including BROUK submitted an open letter to the ICJ requesting that the reports be made available to allow for full public scrutiny of Myanmar's compliance with the order and to avoid undermining Rohingya confidence in the ICJ proceedings.²⁵ There has been no response from the ICJ.

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 challenges with documenting serious violations of international law in Rakhine State, particularly as armed conflict between the Myanmar military and the Arakan Army has significantly escalated over the reporting period. 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 and November 2022 in Rakhine State.

This briefing highlights key thematic issues and emblematic incidents which have caused irreparable harm to the Rohingya, who are the subject of the ICJ's protective measures outlined in its provisional measures 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 both the Myanmar military 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 rapidly deteriorating security situation in Rakhine State and atrocity crimes which have been perpetrated against the Rohingya by both the Myanmar military and the Arakan Army in the context of the internal armed conflict. In this increasingly hostile environment, the Myanmar State is in serious breach of the ICJ's provisional measures order and is also failing in its duty to protect the

²¹ *The Gambia v. Myanmar*, ICJ provisional measures order *op. cit.* 22 [73].

²² 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.

²³ *The Gambia v. Myanmar*, 'Application' (11 November 2019) *op. cit.* 46 [86] 58 [113].

²⁴ United Nations, Charter of the United Nations (1945) 1 UNTS XVI Art 94(1).

²⁵ The European Rohingya Council, 'Joint letter to ICJ: Myanmar's obligation to comply with the provisional measures' (17 June 2021) available at <<https://www.theerc.eu/joint-letter-to-icj-myanmars-obligation-to-comply-with-the-provisional-measures/>> accessed 18 November 2022.

Rohingya from abuses by non-State actors such as the Arakan Army. This act of omission can be directly attributed to the State.

Internal armed conflict in Rakhine State²⁶

Over the reporting period, armed hostilities between the Myanmar military and the Arakan Army have significantly escalated and intensified in Rakhine State particularly in Maungdaw, Buthidaung, Rathedaung, Kyauktaw, Ponnagyun, Mrauk U and Minbya townships. At the end of September, UNOCHA reported that more than 17,400 people had been newly displaced since August as a result of armed clashes between the Arakan Army and the Myanmar military in Rakhine State and Paletwa township in southern Chin State.²⁷

International humanitarian law (known as the rules of war) applies to the internal armed conflict in Rakhine State.²⁸ One of the main purposes of international humanitarian law (IHL) is to protect non-combatants, people who are not taking part in hostilities – specifically, civilians, health workers and aid workers. Fundamental rules applicable in internal armed conflicts include the principle of distinction between combatants and civilians and between military and civilian objects. Attacks against civilians and civilian objects are prohibited.²⁹ Indiscriminate attacks (attacks which strike military objectives and civilians or civilian objects without distinction) are also prohibited.³⁰ All parties to internal armed conflicts must comply with IHL. 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 of the International Criminal Court.³¹ Such acts include (but are not limited to) murder, torture, cruel treatment, extrajudicial executions, sexual violence, rape, taking hostages, 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.³²

²⁶ All information in this section on file with BROUK, unless otherwise referenced.

²⁷ UNOCHA ‘Myanmar: Escalation of conflict in Rakhine and Southern Chin, Flash Update’ (30 September 2022) 1.

²⁸ 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’, commentary by the International Committee of the Red Cross sets out two requirements for a situation to be classified as such. Firstly, the hostilities must reach a minimum level of intensity. For example, in a situation where a State is obliged to use military force against a non-state armed group rather than its police force. Secondly, non-state armed groups involved in the conflict must be considered as “parties to the conflict”, meaning that they possess organised armed forces. For example, these forces have to be under a certain command structure and have the capacity to sustain military operations. See <https://casebook.icrc.org/glossary/non-international-armed-conflict> accessed 17 November 2022. 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].

²⁹ 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 accessed 17 November 2022.

³⁰ ICRC, Customary International Humanitarian Law Rules 11. Indiscriminate Attacks and 12. Definition of Indiscriminate Attacks and 14. Proportionality in Attack, *op. cit.*

³¹ 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).

³² Rome Statute, Article 30. See also International Criminal Court, *Elements of Crimes*, (2011) Articles 8(2)(c) and 8(2)(e).

Escalation of hostilities between the Arakan Army and the Myanmar military

As previously reported by BROUK, the informal ceasefire which had been in place between the Arakan Army (AA) and the Myanmar military since November 2020 was already hanging by a thread in May. Sporadic armed clashes had taken place in northern Rakhine State at the beginning of the year, as well as in central Rakhine State in April. Rhetoric between the two sides became increasingly hostile and in June, the regime's second in command Vice Senior-General Soe Win called on his troops in Rakhine State to be ready to fight.³³

This coincided with Myanmar military troop reinforcements arriving by land and sea, visibly increasing the military presence in the northern Rakhine townships of Rathedaung, Maungdaw and Buthidaung, as well as Ann, Minbya, Kyauktaw, Kyaukphyu and Myebon townships. In urban areas, local people reported intrusive house-to-house checks by the SAC authorities.³⁴ Additional military checkpoints on main roads and the use of drones for surveillance in the evening time were reported to BROUK. Restrictions on movement were also tightened in Rathedaung and Maungdaw townships, described in more detail below.³⁵ Myanmar military troop reinforcements have continued to be deployed to Rakhine State over the reporting period.³⁶

Rohingya communities continue to be caught in the middle of the power struggle between the Arakan Army and the Myanmar military. As set out in more detail below, Rohingya have been killed, seriously injured, and displaced by the fighting. Rohingya homes and mosques have been damaged and destroyed. Movement and food access restrictions have severely impacted Rohingya communities' ability to work and feed themselves and their families.

Maungdaw township

BROUK has documented at least 15 armed clashes between the AA and the Myanmar military in Maungdaw township from mid-July to mid-November, with fighting particularly intense in August. Data collected by BROUK shows that more than 13,000 Rohingya in at least nine villages have been affected by fighting nearby, almost 20 percent of the estimated Rohingya population left in Maungdaw.³⁷ Although they have not been displaced, their livelihoods have been undermined as it is not safe to work on their farms or go fishing due to the risk of being caught in the crossfire of conflict. The roads have also been blocked by the Myanmar military. As humanitarian access has been restricted since mid-September until further notice (detailed below), Rohingya communities in conflict-affected areas of Maungdaw are facing food shortages.³⁸

³³ Development Media Group, 'Junta deputy tells troops in Arakan to maintain combat readiness; AA spox says regime preparing for war' (14 June 2022) available at <<https://www.dmediag.com/news/4598-2ic-sw>> accessed 29 November 2022.

³⁴ Soon after seizing power on February 1, the military reinstated a law requiring households to register overnight guests that had been revoked by the ousted civilian government. On 12 June 2021, a new order was issued reiterating that all overnight guests must be registered with the authorities. Myanmar Now, 'Regime aims to resume late-night household inspections' (14 July 2021) available at <<https://myanmar-now.org/en/news/regime-aims-to-resume-late-night-household-inspections>> accessed 29 November 2022.

³⁵ 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** (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (i) Restrictions on movement, humanitarian access, and access to healthcare.

³⁶ For example, in late July 300 soldiers arrived by boat in Rathedaung and were transferred to 20 military vehicles, which departed along the Ah Ngu Maw-Maungdaw road. See also Myanmar Now, 'Military uses waterways to step up Maungdaw operations as Arakan Army seizes territory' (16 September 2022) available at <<https://myanmar-now.org/en/news/military-uses-waterways-to-step-up-maungdaw-operations-as-arakan-army-seizes-territory>> accessed 29 November 2022.

³⁷ Estimated at around 70,000 by BROUK.

³⁸ The restrictions are set out in 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**

More than 400 ethnic Mro and Daignet in northern Maungdaw township were displaced by nearby clashes in August and in mid-November, a Mro village was reportedly shelled by the Myanmar military, killing 11 and injuring 24.³⁹

The AA has captured several Myanmar military outposts and bases in the Maungdaw area. In September the AA reportedly overran the Kyein Chaung tactical base in Maungdaw. The junta retaliated by launching air strikes to the east of the captured base, very close to Rohingya and Rakhine villages. Several bombs landed in Doe Tan, a large Rohingya village whose inhabitants fled to Bangladesh during the clearance operations of 2017. A mosque in the village was destroyed in the attack.⁴⁰ Another attack by junta forces in November damaged two Rohingya homes in another village in the area.

In October, the AA seized a Border Guard outpost in northern Maungdaw in a pre-dawn attack. Border Guard Police together with soldiers from LID 22 and LID 33 retaliated with attack helicopters and heavy artillery from Border Guard Police station no. 7 and Maungdaw region base no. 4. BROUK received reports that the Myanmar military's shelling in retaliation was reckless and indiscriminate, killing one 37-year-old Rohingya man and injuring two others. Two Rohingya homes in the village were destroyed and a mosque was damaged.

Buthidaung township

Buthidaung township is home to the largest remaining Rohingya population in Rakhine State, estimated at 260,000 people. The AA has built up a strong presence in the area since the provisional measures were ordered. Rohingya communities frequently find themselves trapped between the two warring sides and experience violations perpetrated both by the Myanmar military and the AA. In the months leading up to renewed armed clashes beginning in August, BROUK documented a series of abuses by the AA.

In May, more than 120 AA members visited several Rohingya village tracts in Buthidaung township and ordered local people to cooperate with the AA by reporting on Myanmar military operations and paying taxes to the AA. In June, AA soldiers occupied a mosque in a village in Buthidaung township and prohibited local people from worship. That same month, around 80 AA soldiers arrived in another village tract area and abducted three Rohingya men. They were detained for more than a week, during which time they were brutally beaten. They were eventually released after meeting the AA's extortion demands.

In August, AA soldiers demanded that Rohingya households in a village tract of Buthidaung township pay monthly taxes in both cash and rice rations. That same month, two attempted gang-rapes by AA soldiers were reported in different villages in Buthidaung township within days of each other. In the first incident, a Rohingya woman was seriously injured. In the second incident, a Rohingya man intervened and was beaten by the soldiers.

There have been fierce clashes waged around the area of Gudar Pyin village tract, where the AA are reported to have set up camp in May 2020. The Myanmar military carried out several massacres in the area during the 2016-2017 clearance operations.⁴¹ The junta's Light Infantry Battalion (LIB) 210 has taken up position

Convention (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (i) Restrictions on movement, humanitarian access, and access to healthcare.

³⁹ Development Media Group, 'Military denies shelling Jeitchaung Village, where 11 people were killed' (17 November 2022) available at <<https://www.dmediag.com/news/5412-10-kill-md>> accessed 29 November 2022.

⁴⁰ Myanmar Now, 'AA captures another Myanmar military base in Maungdaw' (12 September 2022) available at <<https://myanmar-now.org/en/news/aa-captures-another-myanmar-military-base-in-maungdaw>> accessed 29 November 2022.

⁴¹ Associated Press, 'AP Exclusive: AP confirms 5 unreported Myanmar mass graves' (1 February 2018) available at <<https://apnews.com/article/6d15cd2b61de4ce5ac7c8965c64333a6>> accessed 29 November 2022.

in Gudar Pyin village itself.⁴² The first clash in the village tract took place in late August, damaging 25 Rohingya homes, and have increased in intensity since then.

In late September, the Myanmar military's LIB 551 fired heavy artillery towards a Rohingya village, killing a Rohingya boy and forcing all 3,000 Rohingya villagers to flee to Buthidaung. The following day, the junta shelled a Rakhine village, destroying many homes and forcing the villagers to flee. Rohingya in a nearby village were also caught up in the fighting. Artillery shells landed in the village, injuring two people, including a 7-year-old boy who later died from his injuries. Soldiers from Light Infantry Division 22 entered the village and attacked Rohingya as they were fleeing, stabbing at least one man in the head and arm, in conduct reminiscent of the 2016-2017 clearance operations. Around 150 households were forced to seek temporary shelter in nearby villages. The following day a further clash broke out between the AA and the Myanmar military in Gudar Pyin village tract, forcing villagers from two Rohingya villages to flee to another village tract for shelter.

BROUK has documented a number of serious abuses carried out by the AA in October and November in Rohingya villages in Buthidaung township. Two Rohingya women were widely reported to have been gang-raped by six AA soldiers in their village in Buthidaung township.⁴³ The AA reportedly called a Rohingya fisherman a 'Bengali Kalar [a racist slur]' and accused him of stealing from Rakhine villages before shooting him dead. In a separate incident, five AA soldiers brutally beat another Rohingya fisherman while he was fishing in a small stream near his village. The AA also abducted three Rohingya herdsmen, accusing them of being informants for the Myanmar military. Their current whereabouts are unknown. In mid-November, a Rohingya taxi driver was forced to deliver rations to Border Guard Police station no. 8 by the Myanmar military. He was abducted by the AA on his way home and his whereabouts are also currently unknown.

In early and mid-October, further clashes took place between the AA and Myanmar military in Gudar Pyin village tract, displacing more Rohingya who sought temporary refuge in nearby Rohingya villages. One of those displaced was Rohingya teacher and scholar Shekul Islam, who was shot and killed on 8 October when he briefly returned to Gudar Pyin village to feed his livestock. The AA is widely believed to be responsible for his killing, although they have disputed this.⁴⁴ Shekul Islam's family members have faced harassment from both sides.

Later in October, a Rohingya farmer was killed by a wayward shell fired from Border Guard Police station no. 8 while working on his farm. In what appears to be a targeted attack, four Rohingya men and one Rakhine were injured by bullets fired from a Myanmar military-operated combat drone.⁴⁵ The Rohingya men were IDPs staying with relatives in a nearby Rohingya village following the armed clashes in the Gudar Pyin area, while the Rakhine IDPs were taking shelter in the school in the village. The Rohingya and Rakhine IDPs were targeted while repairing the roof of the school. The Rakhine families have since left the village and are taking shelter in the monastery and other places in downtown Buthidaung.

In late October, a Rohingya man was shot and seriously injured while on his way to the local mosque. The bullet came from the direction of Gudar Pyin village, where LIB 210 are stationed and are believed to have been responsible. In a similar incident two days later, a Rohingya man was shot and seriously wounded by

⁴² Reported to BROUK and in the public domain. Myanmar Now, 'Family of murdered Rohingya teacher calls for investigation' (14 October 2022) available at <<https://myanmar-now.org/en/news/family-of-murdered-rohingya-teacher-calls-for-investigation>> accessed 29 November 2022.

⁴³ On 20 October, the AA announced that it had sentenced two of its soldiers to 20 years with hard labour for raping a Muslim woman in Buthidaung township.

⁴⁴ Myanmar Now, 'Family of murdered Rohingya teacher calls for investigation' (14 October 2022) *op. cit.*

⁴⁵ At a press conference in January, the SAC confirmed its use of combat drones. Myanmar Now, 'Elderly man, child killed as Myanmar junta launches mortar shells at Rakhine State village' (5 November 2022) available at <<https://www.myanmar-now.org/en/news/elderly-man-child-killed-as-myanmar-junta-launches-mortar-shells-at-rakhine-state-village>> accessed 29 November 2022.

LIB 210 while trying to secure his cattle on the outskirts of his village, due to both the Arakan Army and the Myanmar military routinely killing the villagers' livestock for their own use.

In early November, the AA launched an attack on the headquarters of MOC 15 in Buthidaung township. The Myanmar military responded with heavy artillery. A 42-year-old Rohingya teacher died on the spot when he was hit by shrapnel in his abdomen. A 5-year-old child, a woman and two men were also injured. Many homes are reported to have been destroyed by the shelling. Later in November, two Rohingya men were injured in shelling by LIB 210, in two separate incidents. A 27-year-old man was injured while working on his farm, while a 65-year-old man was injured in his village.

Rathedaung township

Following the Myanmar military's attacks on Rohingya communities in 2016-2017, there are less than 10,000 Rohingya remaining in Rathedaung township. Armed clashes have taken place between the AA and Myanmar military since August in the township. The AA and Myanmar military clashed near Chein Ka Li village in Rathedaung Township on 26 October, prompting around 700 Rakhine villagers to flee their homes. Earlier in October, a young Rakhine girl was killed and another child was injured when junta forces stationed Yae Soe Chaung tactical base, located about 20km north of the town of Rathedaung, shelled Rakhine villages. No clashes were reported in the area at the time.⁴⁶

Kyauktaw township

An estimated 65,000 Rohingya live in Kyauktaw township, which has also seen an increase in militarisation over the reporting period. At the end of May, soldiers from Military Operation Command 9 (MOC 9) based at Maha Muni pagoda in downtown Kyauktaw fired mortar shells at Maha Muni and Nyaung Chaung Rakhine displacement camps, terrifying the IDPs who fled the area or tried to take cover. 1,000 Rakhine IDPs are taking shelter at Maha Muni camp near the pagoda, while another 3,000 Rakhine IDPs are at Nyaung Chaung camp, less than a mile away from the pagoda. It is unclear if any IDPs were killed or injured in the attack.⁴⁷

Rohingya living in the Kyauktaw area are also trapped in an impossible situation between the AA and the Myanmar military. In late September, four Rohingya taxi drivers were ordered by the Myanmar military to deliver rations to one of their locations. On their return, the men were abducted by the AA and taken to an unknown location in the mountains. They were held there for five days, during which time AA soldiers beat them with wooden sticks, called them 'kalar', and denied them access to a toilet. They were eventually released.

Armed clashes in the area have increased in intensity since October. Rakhine and Rohingya civilians have been killed and injured in indiscriminate attacks by MOC 9, as well as what appear to be direct attacks on civilians. In mid-October, a 30-year-old Rohingya mother of two was killed and her home was destroyed when MOC 9 launched a mortar attack on her village from Kispnadi bridge, even though there was no fighting taking place or AA presence nearby. Five other Rohingya villagers were seriously injured in the

⁴⁶ Myanmar Now, 'Girl killed, boy injured by Myanmar army shelling in Rakhine State's Rathedaung Township (20 October 2022)' available at <<https://myanmar-now.org/en/news/girl-killed-boy-injured-by-myanmar-army-shelling-in-rakhine-states-rathedaung-township>> accessed 29 November 2022.

⁴⁷ The Irrawaddy, 'Myanmar Junta Troops Fire on Rakhine Displacement Camps' (1 June 2022) available at <<https://www.irrawaddy.com/news/burma/myanmar-junta-troops-fire-on-rakhine-displacement-camps.html>> accessed 29 November 2022 and Myanmar Now, 'Myanmar military fires heavy artillery at IDP camps in northern Rakhine' (1 June 2022) available at <<https://www.myanmar-now.org/en/news/myanmar-military-fires-heavy-artillery-at-idp-camps-in-northern-rakhine>> accessed 29 November 2022.

attack, including a 12-year-old boy. A similar attack on a Rakhine village in late October killed a family of three, including a 13-year-old girl.⁴⁸

In late October, hundreds of Rohingya were caught in the crossfire of fighting between the AA and the Myanmar military in one village tract. According to media reports, the AA conducted a house-to-house check and then took up positions in Rohingya homes, forcing Rohingya residents to seek shelter with relatives in another part of the village tract. When the Myanmar military learned that the AA were positioned there, they began shelling the area.⁴⁹ BROUK has received unconfirmed reports of injuries to Rohingya residents during the attack.

In early November, a Rohingya man and a 12-year-old Rohingya boy were injured in shelling by MOC 9 on their village. In a separate incident on the same day, a Rohingya woman was injured in shelling by MOC 9 on her village. Shelling by the Myanmar military destroyed the roof of an historic mosque in Nidin ‘closed’ camp, while gunfire from the AA damaged the wall of the mosque. The mosque is a prominent landmark in the area and was more than 100 years old. Fortunately, no IDPs were injured or killed in the attack on the mosque.

Mrauk U township

Mrauk U township is home to an estimated 40,000 Rohingya. Armed clashes resumed in the area at the end of August, displacing hundreds of Rakhine families from six villages.⁵⁰ In July, four Rohingya boys aged 13 to 16 years old were seriously injured when a landmine exploded as they were grazing their cattle in a field. One of the boys lost a leg in the explosion, while another sustained chest injuries.⁵¹

Grave violations of international humanitarian law and international human rights law have been perpetrated by both the Myanmar military and the Arakan Army over the reporting period. Such violations amount to probable war crimes, including the war crimes of murder, sexual violence, rape, attacking civilians, and attacking protected objects. 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’.⁵² The following section of this briefing sets out the indicators of risk factors for ongoing genocidal acts. It analyses the conduct of the Myanmar military vis-à-vis the Rohingya community with reference to these indicators.

⁴⁸ Myanmar Now, ‘Myanmar army artillery hits Rakhine State village, killing a family of three’ (2 November 2022) available at <<https://myanmar-now.org/en/news/myanmar-army-artillery-hits-rakhine-state-village-killing-a-family-of-three>> accessed 29 November 2022.

⁴⁹ The Chindwin, ‘Hundreds of Rohingya caught in a crossfire fight in northern Rakhine; Report’ (31 October 2022) available at <<https://www.thechindwin.com/hundreds-of-rohingya-caught-in-a-crossfire-fight-in-northern-rakhine-report/>> accessed 29 November 2022.

⁵⁰ UNOCHA ‘Myanmar: Escalation of conflict in Rakhine and Southern Chin, Flash Update’ (5 September 2022), 2.

⁵¹ BNI Multimedia Group, ‘Four Muslim youths injured in Mrauk-U mine blasts; Two killed, 5 injured in Rakhine mine blasts within eight days’ (12 July 2022) available at <<https://www.bnionline.net/en/news/four-muslim-youths-injured-mrauk-u-mine-blasts-two-killed-5-injured-rakhine-mine-blasts-within>> accessed 29 November 2022.

⁵² *The Gambia v. Myanmar*, International Court of Justice Provisional Measures Order (23 January 2020) 22 [74].

Analysis of breaches of the ICJ's provisional measures 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.⁵³ 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.⁵⁴

In the current context of Myanmar, genocidal acts have already been perpetrated against the Rohingya with total impunity in the 'clearance operations' of 2016 and 2017 and, in BROUK's view, continue to this day. The first genocidal risk indicator is thus clearly present. The Myanmar military's conduct towards the Rohingya community outlined above in the **Internal armed conflict in Rakhine State** section matches several of the other risk factors, specifically the targeted attacks on Rohingya individuals and communities which have killed at least six Rohingya and injured another 30 (risk factors 5 and 6) and the attacks which have damaged or destroyed at least three Rohingya mosques as well as dozens of Rohingya homes (risk factor 7), forcing hundreds of Rohingya to flee.

The remainder of this briefing examines the Myanmar military's breaches of the ICJ's four provisional measures in detail, demonstrating that the regime continues to commission ongoing genocidal acts: namely killings, causing serious bodily or mental harm, and deliberately inflicting conditions of life calculated to bring about the physical destruction in whole or in part of the Rohingya group.

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;

⁵³ UNFFM 2019 report *op. cit.* 77 [240].

⁵⁴ The UN Office on Genocide Prevention and the Responsibility to Protect 'Framework of Analysis for Atrocity Crimes: a tool for prevention' (2014) 18-19.

- 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
- d) imposing measures intended to prevent births within the group.⁵⁵

Provisional measure (1) is all about 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. Citizenship is often referred to as ‘the right to have rights’ as it usually confers a host of other rights.

The junta 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.⁵⁶

In January 2022, the regime resumed its intrusive and degrading ‘Swe Tin Sit’ map-record-check investigative process in the northern townships of Buthidaung, Maungdaw and Rathedaung. This intimidating investigation is conducted by members of the military, immigration officers and Border Guard Police and is unique to Northern Rakhine State. The process involves photographing residents outside their homes, removing or adding family members to household registration lists, 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 accordance with immigration procedures in order to register the birth of their child. This briefing documents extortion practices in connection with the Swe Tin Sit process below.⁵⁷

Rohingya in Kyauktaw, Minbya and Pauktaw townships have also continued to report being coerced into accepting the NVC to BROUK.⁵⁸

In Pauktaw, Rohingya IDPs in two of the camp settings and several villages in Pauktaw described being called ‘Bengali’ by General Administration Department and immigration officials. They were coerced into accepting the NVC under threat of being denied food assistance, access to education, travel authorisation, and paid work.

In Minbya township, Rohingya from several villages reported being coerced into accepting the NVC through similar threats to deny their basic rights, including access to healthcare. Officials explicitly told them, ‘You are kalar. If you do not accept the NVC, we will not allow you to survive in this country.’ A group of Rohingya from Minbya township described being denied release from prison (and the opportunity

⁵⁵ *The Gambia v. Myanmar*, ICJ Provisional Measures Order (23 January 2020) *op. cit.* 25 [86].

⁵⁶ See BROUK’s five 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].

⁵⁷ See **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** (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (ii) Forced labour and extortion.

⁵⁸ Detailed information on file with BROUK. A June 2022 report by Fortify Rights documents similar incidents. See Fortify Rights, ‘*Genocide by Attrition: The Role of Identity Documents in the Holocaust and the Genocides of Rwanda and Myanmar*’.

to return home) unless they accepted the NVC. They were told, ‘You kalar are banned from travelling by our government unless you accept the NVC.’

In Kyauktaw township, Rohingya villagers reported being coerced into accepting the NVC through the specific threat of being denied travel authorisation. Those who need to travel for their livelihoods or are facing a health emergency have no other option but to apply for an NVC. Immigration officials in Kyauktaw town have also repeatedly called Rohingya ‘Bengali’ and ‘kalar’.

In addition, the junta has not taken any steps to lift restrictions on freedom of movement, access to healthcare, or access to humanitarian aid. In fact, these restrictions have been tightened during the reporting period. The denial of these basic rights underpins the conditions of life inflicted on the Rohingya group, calculated to bring about its physical destruction in whole or in part. The ongoing commission of this genocidal act is described in detail below, under **Provisional measure (2)**.

The practices outlined here match several of the other risk factor indicators for genocidal acts, namely racist language directed at the group (risk factor 2), denial of their identity (risk factor 3) and discriminatory policies and legislation (risk factor 4). Moreover, 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 killing members of the group, causing serious bodily or mental harm to members of the group and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part under Article II of the Genocide Convention.

(a) Killing members of the group⁵⁹

In late July, BROUK received reports that seven Rohingya, including women and children, were killed when Border Guard Police opened fire on their small boat when it attempted to enter the Maungdaw township area. They were trying to return to the places of origin after spending five years under very difficult conditions in the refugee camps in Bangladesh. Some survivors were reportedly taken into military custody.

BROUK has also documented the killings of three Rohingya men in the Rakhine State capital Sittwe in separate incidents. Soldiers from LIB 354 are implicated in two of the cases, while a policeman from battalion no.35 is believed to be responsible for the third killing.

In September, a 20-year-old Rohingya man was travelling by motorbike from Dar Paing village to Bumay quarter in Sittwe when he was stopped at a police checkpoint. Police demanded that he show his driving licence and a recommendation letter from his village administrator. When he was unable to produce the recommendation letter, a policeman from battalion no. 35 shot him dead on the spot.

⁵⁹ All information in this section on file with BROUK, unless otherwise referenced.

In October, two Rohingya men were killed within days of each other in separate incidents. A 26-year-old Rohingya man was shot dead by a soldier near the LIB 354 base in Sittwe. A few days later, the body of a 27-year-old Rohingya man from Maw Ti Ngar IDP camp in Sittwe was found by fishermen under a bridge located nearby LIB base 354. He is believed to have been killed by soldiers from LIB 354 and his body dumped under the bridge near their base.

Such killings may amount to genocidal acts when genocidal intent to destroy the group in whole or in part can be inferred from the context and the actions of the perpetrator.

(b) Causing serious bodily or mental harm to members of the group⁶⁰

The junta has continued to arbitrarily arrest and detain Rohingya men over the reporting period. This is an ongoing discriminatory pattern of conduct systematically targeted at Rohingya, described in the 2018 UNFFM report.⁶¹ At times soldiers addressed Rohingya men in their custody by the derogatory term ‘kalar’ and made 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.⁶² Such violations may constitute the genocidal act of ‘causing serious bodily or mental harm to the members of the group’ when committed with genocidal intent.

In late May, junta soldiers conducted late-night raids in two village tracts of Buthidaung Township and detained three Rohingya men. At the time of writing, their whereabouts are unknown. In July, four young Rohingya men were arrested and detained at Sai Din bridge in Buthidaung Township by soldiers from LID 22 on the false accusation of being connected to ARSA. The four young men were visiting villages in the area for Eid Qurbani. While in military custody, soldiers called the four men ‘son-of-a-bitch kalar’ and brutally beat them, causing internal injuries. The men were finally released after more than ten days in military custody, after meeting the Myanmar military’s extortion demands.

In August, soldiers from LIB 234 under the Strategic Operational Command based in Buthidaung arrested and detained two village administrators from the Buthidaung Township area, one of whom is Rohingya. They were taken into military custody and brutally tortured. As well as being beaten, they were burnt on parts of their bodies and subjected to water torture. They were subsequently charged under Section 17/1 of the Unlawful Associations Act for allegedly having ties with the Arakan Army and transferred to the custody of Border Guard Police station no. 13. They have recently been sentenced to 3 years in prison with hard labour.

In a separate incident in October, at least 20 people including seven Rohingya men were arbitrarily arrested and detained in the central market and jetty area of Buthidaung town. The men were daily labourers and tea shop owners. They were reported to have been taken away in military vehicles to the junta’s Strategic Operational Command no. 1. base in Buthidaung. At the time of writing, the families of the detainees have not been able to visit their relatives.

At the end of October, two Rohingya men were arbitrarily arrested in the Sittwe Township area and detained by soldiers from LIB 350. They were falsely accused of illegally crossing into Myanmar from Bangladesh, but both men are from Rohingya villages in the Sittwe area. The two men were taken to the LIB 350 base, where the soldiers repeatedly punched and kicked them for a whole night. The following morning the soldiers instructed the police to open a case of illegal immigration against the two men. They

⁶⁰All information in this section on file with BROUK, unless otherwise referenced.

⁶¹ 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].

⁶² UNFFM 2018 report *op. cit.* [612].

were released later that day, after meeting extortion demands made by the soldiers and police. The two men are believed to have sustained internal injuries due to the torture they endured while in military custody.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part⁶³

The genocidal act of ‘deliberately inflicting conditions of life on the group intended to bring about its physical destruction’ 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.’⁶⁴

This section of the briefing examines the particular ways in which the junta has created circumstances that are contributing to the ‘slow death’ of the Rohingya group in Rakhine State. Firstly, it outlines a complex set of restrictions imposed by the junta on movement, humanitarian access, and access to healthcare for the Rohingya, which deny their basic rights. Secondly, it describes routine practices of forced labour and extortion by the junta, which undermine livelihoods and impoverish the Rohingya group. Thirdly, it details the indefinite detention of around 138,000 Rohingya in camps under deplorable conditions for more than a decade, resulting in the preventable deaths of at least 42 young children and 10 women since the provisional measures were ordered. Lastly, it sets out how the regime criminalises Rohingya who try to flee these appalling conditions of life inflicted on them. At least 800 Rohingya have been arrested and detained over the reporting period, while dozens have lost their lives at sea.

(i) Restrictions on movement, humanitarian access, and access to healthcare⁶⁵

Rohingya people continue to be routinely 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. As the UNFFM noted, ‘Their [Rohingya] ability to move between villages in the same township, between townships and outside Rakhine State is severely curtailed, adversely impacting every aspect of life.’⁶⁶

As conflict has intensified in Rakhine State, the junta has ordered the closure of supply routes including major roads and waterways in the northern townships of Maungdaw, Buthidaung and Rathedaung, as well as Kyauktaw in central Rakhine State. Since mid-August, a travel ban has been imposed by the SAC on the Ah Ngu Maw-Maungdaw Road - the main road linking the northern townships with Sittwe.⁶⁷ In the southern part of Maungdaw township and northwest area of Rathedaung township, the SAC has prohibited Rakhine and Rohingya residents from leaving their villages, citing security reasons. Rohingya villagers in

⁶³ All information in this section on file with BROUK, unless otherwise referenced.

⁶⁴ 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. Stakic*, 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].

⁶⁵ All information in this section on file with BROUK, unless otherwise referenced.

⁶⁶ UNFFM 2018 *op. cit.* 119 [500].

⁶⁷ UNOCHA Flash Update 5 September 2022 *op. cit.* 2.

Maungdaw township have reported facing tighter security checks and increased extortion demands at checkpoints following extensive Myanmar military troop deployment in northern Rakhine State in July. Night curfews from 10pm – 5am have been extended in various townships, including Maungdaw, Buthidaung, Sittwe and Kyauktaw.

In July, the regime introduced an additional layer of bureaucracy for UN agencies, international and local nongovernmental organisations working in northern Rakhine State, with travel authorisation subject to approval from the Minister of Security and Border Affairs.⁶⁸ Restrictions on humanitarian access as a result of physical and bureaucratic obstacles, such as the closure of roads and waterways between Sittwe and other townships; installation of additional checkpoints with lengthy wait times and tight scrutiny; and refusal of or delays in issuing Travel Authorizations have significantly hampered humanitarian operations.⁶⁹

By September, Rohingya communities in Maungdaw township were reporting food shortages due to the regime cutting off supply routes to the area. In mid-September, the junta ordered UN agencies, INGOs and NGOs to halt operations altogether in the three northern townships of Rathedaung, Buthidaung and Maungdaw as well as Minbya, Mrauk-U and Myebon, ‘until further notice’.⁷⁰ UN OCHA reports that all other conflict-affected townships remain inaccessible outside of urban areas (with the exception of Sittwe) due to security concerns.⁷¹ Tight scrutiny is being imposed at the navy checkpoint in Sittwe, which is directly impacting the ability to deliver assistance to more than 25,000 Rohingya IDPs in the five Pauktaw camps.⁷²

The restrictions on movement and humanitarian access outlined above significantly undermine Rohingya access to healthcare services.

In Kyauktaw township, there is one district hospital in a village that Rohingya patients are allowed to attend, but it is only open once or twice a month. For emergency patients requiring treatment in Sittwe General Hospital, Rohingya have to pay 20,000 MMK (about US\$9) to get a permission letter from the township immigration department and 20,000 MMK for the transportation charge. On the way, there is an additional charge of 5,000 MMK (just over US\$2) at each checkpoint operated by either SAC soldiers or the Arakan Army.⁷³

Rohingya in Rathedaung township are forbidden from accessing the downtown hospital and must instead seek permission from the Myanmar military to travel to Buthidaung for medical treatment. Alternatively, they must pay 50,000 MMK (about US\$24) to apply for an NVC and the necessary travel authorisations to seek treatment at Sittwe hospital.⁷⁴ The hospital in Buthidaung has limited facilities and sometimes patients need to be referred to Maungdaw hospital for care. Emergency patients in Maungdaw need to apply for an NVC and the necessary travel authorisations to seek treatment at Sittwe hospital.

Even when Rohingya are able to access SAC-run healthcare facilities in Rakhine State, they face neglect and discriminatory treatment - a pattern also identified by the UNFFM.⁷⁵ Rohingya patients – including a

⁶⁸ BNI Multimedia Group, ‘Regime imposes travel restrictions on nongovernmental organisations in Arakan State’ (19 July 2022) available at <<https://www.bnionline.net/en/news/regime-imposes-travel-restrictions-nongovernmental-organisations-arakan-state>> accessed 29 November 2022.

⁶⁹ UNOCHA ‘Myanmar Humanitarian Update no.23’ (31 October 2022) 4.

⁷⁰ The Irrawaddy, ‘Myanmar Junta Blocks UN and Humanitarian Access in Northern Rakhine State’ (16 September 2022) available at <<https://www.irrawaddy.com/news/burma/myanmar-junta-blocks-un-and-humanitarian-access-in-northern-rakhine-state.html>> accessed 29 November 2022.

⁷¹ UNOCHA Humanitarian Update no. 23 *op.cit.* 11

⁷² UNOCHA ‘Myanmar Humanitarian Update no.22’ (1 October 2022) 12.

⁷³ Information on file with BROUK; correct as of 15 September 2022.

⁷⁴ Information on file with BROUK; correct as of 15 September 2022.

⁷⁵ UNFFM 2018 report *op. cit.* 131-132 [551-555].

pregnant woman - at both Buthidaung and Maungdaw hospitals reported being slapped and verbally abused by nurses and security staff.⁷⁶

UN OCHA has reported that due to the ongoing movement restrictions imposed in Minbya, Mrauk-U, Myebon, Maungdaw, Buthidaung, and Rathedaung townships since mid-September, the operation of 22 out of 44 mobile clinics has been suspended.⁷⁷ This suspension due to junta-imposed restrictions further limits access to healthcare for Rohingya living in northern Rakhine State as well as more than 3,500 Rohingya IDPs in Taung Paw camp in Myebon township.

Moreover, in September the regime reportedly imposed strict prohibitions on the delivery of medical supplies and medicines to northern Rakhine State. The military has been conducting searches at the main points of entry into Rakhine State to enforce the restrictions by confiscating supplies. By October, pharmacies across Rakhine State were reporting severe shortages.⁷⁸

(ii) Forced labour and extortion⁷⁹

The Myanmar military has made repeated demands for forced or compulsory labour from Rohingya in Kyauktaw and in Sittwe. The forced or compulsory labour is typically physically exhausting. Time spent labouring for the Myanmar military detracts from time available for the Rohingyas' own livelihoods when access to livelihoods is already severely curtailed by restrictions on movement. Similarly, extortion demands leave extremely vulnerable Rohingya communities further impoverished.

Kyauktaw is an area of Rakhine State that has seen fierce fighting between the Myanmar military and Arakan Army, particularly in recent weeks. In July, September and November soldiers under the command of Military Operation Command 9 (MOC 9) based in Kyauktaw ordered village administrators from Rohingya villages to provide labourers to work on farmland controlled by the Myanmar military. Each village administrator is ordered to provide 20-30 labourers on a rotational basis from each village, usually for around three days at a time. This is a long-standing practice by the Myanmar military that has been perpetrated against these villages for years. Typically, Rohingya villagers are forced to plough the paddy fields or harvest rice for the soldiers.

Some Rohingya men recounted being punched and beaten with wooden sticks by the soldiers and called by the derogatory term 'kalar'. Most recently in November, soldiers from MOC 9 threatened to launch an artillery attack on one of the villages if the village administrator did not provide workers as demanded.

In July, soldiers from LIB 354, IB 270 and Signal Battalion 818 ordered Rohingya in all IDP sites and villages around Sittwe to construct guard houses and provide night sentry duty to monitor for Arakan Army activity. The order reportedly came from the head of the Regional Operations Command. The Rohingya were forced to use their own financial resources to construct the guard houses, at a cost of around 200,000 MMK (US\$94) for each guard house. One person from each household is required to provide sentry duty on a rotational basis, to cover the hours between 8pm and 5am. The camp management committees and village administrators are ordered to fulfil the quota; failure to do so will incur fines imposed by the soldiers.

In addition to the extortion demands in the context of arbitrary arrest and detention outlined above, BROUK has documented extensive extortion demands made by SAC officials in Maungdaw. The anti-

⁷⁶ Incidents from May and November on file with BROUK.

⁷⁷ UNOCHA Humanitarian Update no. 23 *op. cit.* 8.

⁷⁸ Myanmar Now, 'Doctor arrested as healthcare workers targeted in Rakhine State' (3 October 2022) available at <<https://www.myanmar-now.org/en/news/doctor-arrested-as-healthcare-workers-targeted-in-rakhine-state>> and BNI Multimedia Group, 'Every pharmacy is almost out of medicine in Rakhine due to the Military Council's blockade' (21 October 2022) available at <<https://www.bnionline.net/en/news/every-pharmacy-almost-out-medicine-rakhine-due-military-councils-blockade>> accessed 29 November 2022.

⁷⁹ Detailed information in this section on file with BROUK unless otherwise referenced.

trafficking police routinely arrest and extort money from Rohingya who come to the market in Maungdaw town for shopping, by falsely accusing them of trying to leave for Malaysia by boat. During the Swe-Tin-Sit process earlier this year (described above under **Provisional measure (1)**), Rohingya residents in villages in Maungdaw township reported having to pay extortion fees for birth registrations and updating household registration lists. These fees were collected by village administrators and passed on to immigration officials and Border Guard Police. As the SAC officials were leaving each village after completing their investigation, the relevant village administrator as well as elders were forced to sign a document claiming that no money had been collected during the verification process.

(iii) A decade of indefinite detention for 138,000 Rohingya confined to camps

Due to the escalating hostilities in Rakhine State and restrictions on access, it is very difficult to collect information from the camps. For this reporting period, BROUK was able to gather updated first-hand data from 8 out of the 21 sites. BROUK is extremely concerned about the impact of escalating hostilities on Rohingya IDPs confined in the camps, detailed below.

Background

2022 marks a decade of indefinite detention in appalling conditions for around 138,000 Rohingya confined to camps across Central Rakhine State, in violation of international law.⁸⁰

Although the Rohingya had already faced decades of what the UNFFM has described as ‘severe, systemic and institutionalised oppression, from birth to death’⁸¹, the State-orchestrated violence in 2012-13 marked a critical juncture in the military authorities’ treatment of the group. The 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. This narrative was wholly discredited by the UNFFM’s 2018 report, which demonstrated that the violence against the Rohingya was planned and instigated by government officials and state security forces.⁸² Rohingya displaced by the violence in central Rakhine State were segregated and confined to camps.

The authorities decided on the locations of camps and denied the majority of humanitarian agency requests for sufficient land and resources to construct camps that would comply with international humanitarian standards, resulting in overcrowded, unsanitary sites prone to flooding.⁸³ Many of the camps are surrounded by barbed wire, military camps, security guards and checkpoints, including inside the camps. Access to the camps and sites remains restricted.

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 UN Secretary-General Kofi Annan. Three camps (Kyein Ni Pyin, Nidin, and Taung Paw) were officially declared ‘closed’ in 2018 with a fourth (Kyauk Ta Lone) since earmarked for closure. These camp closure processes violate international human rights law. Rohingya have been denied the right to return to their places of origin, against their express wishes. They have received no compensation or reparation for their lost homes and property, and much of their land has been taken over by ethnic Rakhine.

The only change within the camps declared ‘closed’ has been the construction of poor-quality individual housing in the same locations or adjacent sites. There have been no changes to freedom of movement and severe restrictions on access to basic services remain in place. A decade after the violence and more than

⁸⁰ 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).

⁸¹ UNFFM 2018 report *op. cit.* [622].

⁸² UNFFM 2018 report *op. cit.* [696-716], [724-728].

⁸³ Human Rights Watch, (October 2020), *op. cit.* 91-93.

two years after the ICJ's provisional measures order, the Rohingya remain confined in dire conditions in the camps.

Against this backdrop, the escalating hostilities have already impacted vulnerable Rohingya IDPs confined in the camps. As noted above, a Rohingya IDP is believed to have been killed by soldiers from LIB 354. In early November a mosque in Nidin 'closed' camp in Kyauktaw township was destroyed in shelling by the Myanmar military. 25,000 Rohingya IDPs in camps in Pauktaw township are becoming harder to reach with humanitarian assistance due to tight security at checkpoints. Taung Paw camp in Myebon is completely cut off from humanitarian assistance at the time of writing.

BROUK is very concerned about the possibility of Rohingya IDPs in the Myebon and Pauktaw areas being caught in the crossfire of armed conflict. Both the Myanmar military and the Arakan Army have bases close to the Nget Chaung camps in Pauktaw and Rohingya IDPs routinely face extortion demands from both sides.⁸⁴

Lack of proper shelter, food, water, sanitation, and healthcare

Within the camp settings, the military authorities in Myanmar are responsible for numerous examples of 'creating circumstances that would lead to a slow death': i.e. lack of proper shelter, food, water, sanitation and healthcare. The conditions in the officially 'closed' camps of Kyein Ni Pyin in Pauktaw, Taung Paw in Myebon, Nidin in Kyauktaw and Kyauk Ta Lone in Kyaukpyu (earmarked for imminent 'closure') are of particular concern, as the segregation and confinement of Rohingya seems intended to be permanent.

Although best understood as detention camps, the sites are officially classified as temporary camps for internally displaced persons (IDPs) and as such international minimum humanitarian standards apply.⁸⁵

The publicly available data for the 21 camps and camp-like settings for displaced Rohingya in Central Rakhine State from the past nine months demonstrates that humanitarian actors are struggling to meet international minimum humanitarian standards, in large part due to the restrictions imposed by the military regime.⁸⁶

Over the past decade, overcrowding in the camps has been a significant issue. On average, there is just 23m² per person across the 21 camps and camp-like settings, far short of the international minimum standard of 45m² of camp area per person. The vast majority of Rohingya in the camps continue to be housed in shared temporary shelters known as longhouses. In August, UN OCHA reported that, '241 longhouses remain structurally unsound and require immediate action for the safety of the IDPs.'⁸⁷

The restrictions on freedom of movement for Rohingya in camps – amounting to indefinite arbitrary detention - severely impact livelihoods. In the context of a 78 percent shortfall in funding for the Myanmar Humanitarian Response Plan for 2022, UN OCHA notes, 'Rohingya IDPs lack livelihoods opportunities; this, compounded with restrictions on freedom of movement, only entrenches their reliance on assistance at a time when funding for assistance is declining.'⁸⁸ Rohingya IDPs in the Sittwe camps are struggling to

⁸⁴ Detailed information on file with BROUK.

⁸⁵ The Humanitarian Charter and Minimum Standards in Humanitarian Response (known as the Sphere Handbook) provides guidance to humanitarian actors for setting targets for humanitarian response in protracted crises. Sphere, 'The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response' (2018 edition).

⁸⁶ CCCM Camp Profiles, Central Rakhine, Myanmar December 2021, March 2022 and September 2022 available at <<https://sheltercluster.org/rakhine/pages/cccm-camp-profile-infographics-summary-tables-2014-2022>> accessed 11 November 2022.

⁸⁷ UNOCHA 'Myanmar Humanitarian Update no.21' (2 September 2022) 12.

⁸⁸ UNOCHA 'Myanmar Humanitarian Update no.19' (28 June 2022) 3.

survive on only 21,000 MMK (less than US\$10) per person per month in cash assistance, provided by the World Food Program.⁸⁹

As detailed above, the ongoing forced labour demands for night sentry duty from Rohingya IDPs in Sittwe camps seriously undermine livelihoods. One resident reported, “The people are very poor and most of them are daily wage earners. If they have to keep a vigil for the whole night, how will they work next day? If it continues for a longer period, they will only starve.”⁹⁰ IDPs in Basara camp reported being harassed by police from the nearby police station, who have been arresting IDPs around 9pm (before the nightly curfew of 10pm) and making demands for extortion before releasing them.

Water and sanitation facilities fall short of international standards in the camps, and the recent humanitarian access restrictions have compounded these problems. Rohingya IDPs in several of the camps describe long delays in emptying and/or repairing latrine pits in many of the camps, which can lead to flooding and contamination. In October, a Rohingya IDP resident at ‘closed’ Taung Paw camp in Myebon told BROUK, ‘It has been one year that the WASH team is not providing any assistance. The latrines are not emptied and the [sewage] pits are overflowing. The children are suffering from skin infections. The ration distribution stopped two months ago, as the Myebon IDP camp is included in the list of humanitarian assistance restrictions by the junta.’⁹¹

The combination of inadequate sanitation facilities and suspension of mobile clinics in Myebon due to the humanitarian access restrictions raises the bleak prospect of an outbreak of acute watery diarrhoea and other water-borne illnesses; preventable diseases that can kill children if left untreated. There are similar concerns for the five camps in Pauktaw, given that the navy checkpoint in Sittwe is obstructing humanitarian access to those sites.

Conditions of life: genocidal intent

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]⁹²

More than 138,000 members of the Rohingya group, over half of whom are children, *continue* to be subjected to the squalid conditions of life in prolonged arbitrary detention as outlined above. Rohingya in the camps have already endured a decade of such treatment after being expelled from their homes in State-orchestrated violence in 2012. In its 2020 provisional measures order, the ICJ recognised the Rohingya remaining in Myanmar as ‘extremely vulnerable’.⁹³ Since the measures were ordered, the military authorities in Myanmar have progressively tightened restrictions on those in the camps rather than easing them, severely limiting

⁸⁹ Radio Free Asia, ‘Rohingya refugees are stuck in limbo a decade after violence forced them to flee’ (17 June 2022) available at <<https://www.rfa.org/english/news/myanmar/rakhine-idp-camps-06172022165752.html>> accessed 29 November 2022.

⁹⁰ Narinjara, ‘Muslim villages in Sittwe forced to build guard posts to keep watch AA activities’ (22 July 2022) available at <<https://www.narinjara.com/news/detail/62dab53921f2d423422dc7b6>> accessed 29 November 2022.

⁹¹ Interview on file with BROUK.

⁹² ICTY, *Prosecutor v. Karadzic*, *op. cit.* [548].

⁹³ *The Gambia v. Myanmar*, ICJ Provisional Measures Order (23 January 2020) *op. cit.* 23 [72].

humanitarian access. These factors indicate an *ongoing* genocidal act calculated to bring about the physical destruction in whole or in part of the Rohingya group.

The jurisprudence further establishes that, “[T]his provision does not require proof of that a result was attained; as such, it 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]⁹⁴

Data collected by BROUK show that the conditions of life inflicted on the Rohingya in detention camps have in fact led to preventable deaths in the past two years since the provisional measures were ordered by the ICJ.

Preventable deaths in the camps

Due to the challenges of collecting information from the camps, BROUK has not been able to conduct a comprehensive assessment of preventable deaths in all the camps over the past two years. To date, BROUK has received information about the preventable deaths of 42 young children, and 10 women during childbirth. The true figures are likely to be higher.

BROUK has documented that in Basara camp in Sittwe township, at least seven children aged between 2 months and 2 years have died from diarrhoea in the past two years, and a 23-year-old woman died in childbirth in October. In Say Tha Mar Gyi camp in Sittwe at least seven children (aged 1 to 5 years old) have died from various causes including diarrhoea, malnutrition, fever, and infectious disease, and a 4-year-old boy drowned in a nearby lake. At least one woman died in childbirth.⁹⁵

BROUK has documented seven preventable deaths in ‘closed’ Nidin camp in Kyauktaw over the past two years. One 24-year-old Rohingya woman died in childbirth and six infants aged between 3-13 months died due to severe diarrhoea.⁹⁶ As previously reported by BROUK in May 2021, nine Rohingya infants and young children died in the rural hospital at Thek Kay Pyin camp in Sittwe during a previous outbreak of diarrhoea. More recently, an 11-month-old boy died from encephalitis and a 2-year-old girl died due to severe diarrhoea, while a 32-year-old and a 45-year-old woman are also reported to have died during childbirth in the camp.⁹⁷ In ‘closed’ Kyein Ni Pyin camp in Pauktaw, ten children are reported to have died due to severe diarrhoea and lack of treatment for severe acute malnutrition, as well as five women during childbirth.⁹⁸

(iv) Criminalisation of Rohingya fleeing the conditions of life inflicted on them

BROUK has collected information about at least 800 Rohingya who have been arrested and detained in Myanmar over the past six months while trying to flee the appalling conditions of life inflicted on them. Some have been arrested within Rakhine State, while others are detained in other coastal areas such as Ayeyarwaddy or Bago Regions, or in parts of Karen State or Mon State bordering Thailand.⁹⁹

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

⁹⁴ ICTY, *Prosecutor v. Karadžić, op. cit.* [546].

⁹⁵ Data collected by BROUK in June and November 2022.

⁹⁶ All biographical data of the deceased on file with BROUK.

⁹⁷ All biographical data of the deceased on file with BROUK.

⁹⁸ Information on file with BROUK.

⁹⁹ More than 800 Rohingya arrested and detained in 21 separate incidents. Monthly breakdown and incident details on file with BROUK. Due to the challenges with collecting such information in Myanmar, the true figure is likely to be higher.

labour, or under Article 13(1) of the 1947 Burma Immigration (Emergency Provisions) Act).¹⁰⁰ 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.¹⁰¹ The Myanmar State's complex web of discriminatory laws and movement restrictions applied solely to the Rohingya violate international human rights standards. Furthermore, they criminalise the Rohingya for attempting to flee the appalling conditions of life they are subjected to in Rakhine State.

Such cases are frequently reported in the local media, accompanied by photos released by the military authorities of those arrested. This furthers the junta's narrative that Rohingya are 'illegal Bengali' and a threat to national security. The criminalisation and dehumanisation of the Rohingya in this way is another example of the genocide risk factor indicator of 'widespread or systematic discriminatory or targeted practices or violence against the lives, freedom or physical and moral integrity of a protected group'.

An emblematic incident in May highlights the dangers that Rohingya face when attempting to flee the appalling conditions of life in Rakhine State and the dehumanising response from the military authorities. At least two boats that were reportedly carrying 150 Rohingya people capsized in Patheingyi and Gwa townships on 18 and 21 May respectively. An estimated 20 people or more are known to have died, dozens are missing, and those who survived have been detained.¹⁰² 14 bodies washed ashore in Patheingyi, including many children. At least 23 survivors were taken into police custody. Responding to the incident, junta spokesperson Major-General Zaw Min Tun said, "A search was carried out and found 14 Bengalis dead. The rest will be deported as usual."¹⁰³

In October, a report emerged about the particularly harsh conditions faced by around 150 Rohingya men and women detained in Taung Kalay prison in Karen State, arrested while trying to escape the conditions of life inflicted on them in Rakhine State. Former prisoners at the facility described how Rohingya detainees had to resort to foraging leaves to eat with their meagre rice rations. Many are suffering from malnutrition and related health conditions, exacerbated by the lack of medical care.¹⁰⁴ The report raises the prospect of similar treatment of Rohingya detainees in prisons and detention facilities across the country.

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.'

As previously reported by BROUK, after the clearance operations in 2017 the whole of Myo Thu Gyi village tract in Maungdaw township was confiscated. More than 100 Rohingya are estimated to have been killed there, with some bodies reportedly buried in Myo Thu Gyi cemetery and others removed by the

¹⁰⁰ 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).

¹⁰¹ UNFFM 2018 report 119-120 [499-500].

¹⁰² UNOCHA Humanitarian Update No. 19 *op.cit.* 11.

¹⁰³ Radio Free Asia, 'More than a dozen Rohingya die when boat capsizes off Myanmar coast' (23 May 2022) available at <<https://www.rfa.org/english/news/myanmar/rohingya-boat-sinks-05232022164756.html>> accessed 29 November 2022.

¹⁰⁴ Myanmar Now, 'Rohingya held in Karen State prison suffering from malnutrition' (13 October 2022) available at <<https://myanmar-now.org/en/news/rohingya-held-in-karen-state-prison-suffering-from-malnutrition>> accessed 29 November 2022.

Myanmar military. The area has been fenced off by the military and a large Border Guard Police station no. 3 as well as a two-storey District Court building are under construction there.

A recent investigation by media outlet *Myanmar Now* found that the junta is preparing to officially transfer ownership of more than 700 acres of land in Maungdaw and Buthidaung previously owned by Rohingya to its current occupiers, Border Guard Police under the military-controlled Border Guard Police Division Office no. 1. Five years after killing and violently forcing the rightful owners - who had lived there for generations - off the land, the regime is formalising its appropriation. The 700 acres includes 120 acres in Myo Thu Gyi, as well as 200 acres in Myin Hlut, 205 acres in Aung Sit Pyin, 103 acres in Zin Paing Nyar, and 9.98 acres in Ah Lel Chaung. The same investigation reveals that Border Guard outposts occupy more than 180 acres of land in Inn Din village in Maungdaw, the site of a well-documented massacre during the 2017 ‘clearance operations’.

According to the report, the move by the junta seeks to overturn a directive issued on 15 February 2020 by the Maungdaw GAD - under the instruction of the National League for Democracy (NLD) government - barring “individuals not associated with [the affected land] from living, growing crops, and farming there.”¹⁰⁵ Given the timing of that directive, soon after the provisional measures were ordered by the ICJ, it may have been an attempt by the NLD government to show compliance with this particular provisional measure, or perhaps Provisional measure (1) on preventative measures.

However, neither the former NLD government or the current regime appear to have made any genuine efforts to prevent the destruction of and ensure the preservation of evidence relating to the genocidal acts described by the UNFFM.

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 the previous reporting deadline to the ICJ in May of this year, both the State Administration Council and the National Unity Government were believed to have submitted reports on the implementation of the provisional measures to the Court. At the time of writing, it is unclear whether both entities have again submitted reports to the Court.

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.

There is no legal impediment in its Statute or the Rules of the Court which prevent the ICJ from making Myanmar’s reports on compliance with provisional measures public. 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.¹⁰⁶ If the compliance reports were made public, this would compel UN member

¹⁰⁵ Myanmar Now, ‘Myanmar junta strips Rohingya of ownership of land they were forced to flee in 2017’ (25 October 2022) available at <<https://myanmar-now.org/en/news/myanmar-junta-strips-rohingya-of-ownership-of-land-they-were-forced-to-flee-in-2017>> accessed 29 November 2022.

¹⁰⁶ 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 21 November 2022 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

States to press the UN Security Council to adopt a resolution on Myanmar.¹⁰⁷ Such a resolution should include referring the situation in Myanmar to the International Criminal Court.

Myanmar's compliance reports must be made public. As BROUK's President Tun Khin has repeatedly emphasised, 'Rohingya should not be kept in the dark about our own fate.'¹⁰⁸

Conclusion

Almost three years have passed since the International Court of Justice ordered 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. Since then, the Myanmar military has seized power in an attempted coup and the country has descended into chaos and renewed civil war. The regime has continued its commission of war crimes, crimes against humanity and genocide with total impunity. To date the international community has seemed impervious to the suffering of the people of Myanmar, apparently unable to move beyond 'statement diplomacy' to generate the necessary political will to coordinate effective actions to cut off the regime's access to the revenue and weapons fuelling its brutality and end the cycle of impunity.

Over the past six months, armed conflict has significantly escalated in Rakhine State; a microcosm of the rest of the country. The Myanmar military has committed atrocity crimes against the Rakhine, Rohingya and other ethnic minority communities in the region in brutal fashion. However, what is unique about the situation in Rakhine State is the applicability of the ICJ's provisional measures order. The purpose of the order is to protect the Rohingya, a group described by the Court as 'extremely vulnerable'. The international community must find ways to leverage the provisional measures order, 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 evidence documented by BROUK and presented in this latest brief (together with five previous briefings) demonstrates that the Myanmar military's conduct continues to cause irreparable harm to the Rohingya group. All the evidence points to the ongoing commission of the genocidal act of killings – including at least one mass killing in the past six months – as well as causing serious bodily or mental harm to members of the group, and 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.

BROUK is gravely concerned about the rapidly deteriorating, extremely volatile situation in Rakhine State. There is a terrible risk that Rohingya will once again experience the unthinkable: a repeat of the mass killings and other atrocities that characterised the 'clearance operations' of 2016-2017, driving hundreds of thousands of Rohingya out of their homeland.

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.

¹⁰⁷ 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.

¹⁰⁸ BROUK, 'Rohingya genocide continues unabated as Myanmar ignores the "World Court's" provisional measures' (25 May 2020).

In the *Bosnia v. Serbia* genocide case, the ICJ ordered similar provisional measures in 1993, but without the reporting requirement. The genocide at Srebrenica took place two years *after* those provisional measures were ordered. Considering the extremely volatile situation in Rakhine State, the Court must urgently review Myanmar's compliance with the provisional measures and formally communicate its findings to the UN Security Council. It must also act decisively and without further delay to strengthen the protective function of the provisional measures order. This should include a requirement that Myanmar make its reporting public to ensure transparency and rigorous scrutiny of its compliance. Decisive, urgent action is needed now to prevent the unthinkable.

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 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 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

- Coordinate efforts to secure public hearings at the UN Security Council to evaluate Myanmar's compliance with provisional measures.
- Provide support – including legal, financial, technical – to the Gambia. In particular, States parties to the Genocide Convention should coordinate with the Gambia's legal team when preparing to lodge a Declaration of Intervention in the case with the ICJ. Publicly announce support for the Gambia's genocide case against Myanmar.
- 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.
- 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.

- 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.
- Exert maximum pressure on Myanmar to end all arbitrary restrictions on freedom of movement, access to health and other resources indispensable for survival for the Rohingya and allow humanitarian actors immediate, unrestricted, and sustained access to Rakhine State and the rest of the country.
- Increase funding support for the 2022 Humanitarian Response Plan for Myanmar as soon as possible to bridge the current massive shortfall.¹⁰⁹

¹⁰⁹ The plan requires US\$826 million to reach 6.2 million people across Myanmar in need of life-saving support. According to UNOCHA, only 22 per cent of required funds have been received. UNOCHA Humanitarian Update No. 23 *op. cit.* 1.