



A Report by Burmese Rohingya Organisation UK

Preventable deaths in Cyclone Mocha and the Rohingya genocide

The genocidal act of deliberately inflicting conditions of life calculated to bring about the destruction of the Rohingya

Executive summary

On 14 May, Cyclone Mocha struck the coastal region of Myanmar's Rakhine State. At least 400 Rohingya people have died, many of them women and children. The victims had been living for more than a decade in internment camps in the rural area of Sittwe, Rakhine State's capital. The camps were constructed in close proximity to the sea and were surrounded by barbed wire, police and military checkpoints.

The impact of Cyclone Mocha on Rohingya villages in Rathedaung, Buthidaung and Maungdaw townships and other parts of Rakhine State is not yet clear due to power outages, and the death toll is likely to rise.

In Sittwe, many victims drowned in the storm surge caused by the cyclone, which swept bodies out to sea. High winds also carried people away in the floodwaters. Others were reported to have been killed by branches and zinc roofing dislodged by the strong winds.

Cyclone survivors from the affected Rohingya communities in Sittwe have been retrieving the bodies of their loved ones and neighbours from the debris and burying them immediately, in accordance with Islamic tradition. One survivor reported, "We are digging graves with our own hands. I myself have counted more than 400 bodies in the first two days... I cannot even describe what I saw after the cyclone. I counted 83 bodies, mostly of children, on the first day."



Tragically, the disproportionate impact of Cyclone Mocha on the extremely vulnerable Rohingya has resulted in the senseless loss of hundreds of lives and has laid bare the appalling conditions of life inflicted upon those confined to squalid camps for over a decade by the military regime.

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

The Myanmar authorities instigated and participated in the 2012 violence which forcibly displaced more than 140,000 already vulnerable Rohingya, then segregated them to overcrowded, flood-prone internment camps where they have remained in arbitrary and indefinite detention in squalid conditions without adequate shelter for over a decade.

The Rohingya who are not in these internment camps in Rakhine State effectively live in an open-air prison, subjected to severe restrictions on movement and denied access to humanitarian aid and healthcare, designed to result in their 'slow death'. Furthermore, the Myanmar authorities criminalise and imprison Rohingya who attempt to flee the conditions of life inflicted upon them, including children. The proactive attempts by Myanmar authorities to prevent the Rohingya from escaping these appalling conditions is indicative of genocidal intent to destroy the group in whole or in part.

At the time of writing, the regime has refused to grant unrestricted access to the international humanitarian community, 9 days after the cyclone struck. The conditions of life inflicted upon the Rohingya community in the camps along the Sittwe coastline have already resulted in the preventable deaths of at least 400 Rohingya. The regime's obstruction of humanitarian aid may cause additional preventable deaths among extremely vulnerable Rohingya survivors. The Rohingya community in Thet Kay Pyin camp in Sittwe are already reporting an outbreak of diarrhoea among children in the camp due to unclean water sources, which can quickly spread and prove fatal if left untreated.

The Gambia's genocide case against Myanmar before the International Court of Justice is ongoing. On 12 May, the Court extended the time-limit for the submission of Myanmar's counter-memorial (the written case for the defence) until 24 August 2023. It seems likely that the regime will submit a further request to extend the time-limit, citing the disruption caused by Cyclone Mocha. Until the case concludes, the State of Myanmar is obliged to comply with the provisional measures ordered by the Court to 'take all measures within its power' to prevent irreparable harm against the Rohingya. The State of Myanmar is also obliged to continue reporting to the Court, each 6 months, on its compliance with the provisional measures order. The seventh such report was due on 23 May 2023.

BROUK renews its call to the Court to amend or issue further provisional measures to order Myanmar to allow all humanitarian actors immediate, unrestricted, and sustained access to Rakhine State and the rest of the country. This would benefit not only Rohingya survivors of Cyclone Mocha, but also the Rakhine and all the people of Myanmar who are suffering due to the regime's obstruction of humanitarian aid.

BROUK calls on the international community to give generously to meet the urgent humanitarian needs of the Rohingya and people across Myanmar. The international community must also find concrete ways to leverage the provisional measures to ensure they fulfil their purpose, including by making concerted efforts to secure public hearings at the UN Security Council on the junta's compliance with the order and coordinating follow-up actions.

The UN Security Council resolution passed in December expressed ‘deep concern’ no less than five times but made no reference to the legally binding provisional measures order on Myanmar to ‘take all measures within its power’ to protect the Rohingya. Any future resolution must recognise that enduring peace and security in Myanmar and justice for the Rohingya are intertwined, and either refer the situation in Myanmar to the International Criminal Court or establish an ad hoc international tribunal for Myanmar.

Introduction

On Sunday, 14 May, Cyclone Mocha struck Myanmar, leaving a trail of destruction and 1.6 million people in need of urgent assistance.¹ Rakhine State was hit hardest and the extremely vulnerable Rohingya community was disproportionately affected, with more than 400 Rohingya feared dead – many of them women and children. The Rohingya community in Thet Kay Pyin camp in Sittwe are already reporting an outbreak of diarrhoea among children due to unclean water sources, which can quickly spread and prove fatal if left untreated.²

As of 23 May 2023, Myanmar’s military regime has still not granted unrestricted access to the international humanitarian community, a full 9 days after the cyclone struck. The regime’s intransigent response echoes the situation post-Cyclone Nargis in 2008 when humanitarian access was only granted by the ruling junta two weeks after the disaster that claimed 140,000 lives.³ At that time, many UN agencies and INGOs were not yet operational in the country and international humanitarian staff were on standby while they waited for access to be granted and visas to be issued.

Humanitarian access to regions considered to be particularly ‘sensitive’, like Rakhine State, has continued to be severely restricted; what has changed has simply been the apparatus used to impose such restrictions. The regime is using its carefully constructed web of laws and bureaucratic obstacles to restrict life-saving humanitarian aid and access to the affected areas, with callous disregard for life. To date, the junta has not waived its requirement for aid agencies to apply for travel authorisations one month in advance, even in the face of the large-scale humanitarian disaster of Cyclone Mocha.



1 UNOCHA, ‘\$333M humanitarian appeal to support communities hit by Cyclone Mocha in Myanmar’ (23 May 2023).

2 UNOCHA, ‘Myanmar: Cyclone Mocha Flash Update #10’ (23 May 2023).

3 Gregory Gottlieb in *The Conversation*, ‘10 years after, Cyclone Nargis still holds lessons for Myanmar’ (2 May 2018) available at <<https://theconversation.com/10-years-after-cyclone-nargis-still-holds-lessons-for-myanmar-95039>> accessed 18 May 2023.

The people of Myanmar were already facing a humanitarian catastrophe caused by the illegal coup and subsequent armed conflict, with 1.5 million people internally displaced since February 2021.⁴ Many of those displaced by conflict have been directly impacted by Cyclone Mocha, particularly in Rakhine, Chin, Kachin States and Magway and Sagaing Regions. Hundreds of thousands of already vulnerable people have been left without shelter as the monsoon season approaches.⁵

In December 2022, the UN Security Council passed a resolution demanding an immediate end to all forms of violence throughout Myanmar and urging restraint and de-escalation of tensions.⁶ Instead, the regime has ramped up its use of airstrikes against civilian populations. In April, its attack on Pa Zi Gyi village in Sagaing Region massacred more than 170 civilians, including children.

Even before Cyclone Mocha, the humanitarian crisis in Myanmar was grossly underfunded. Last year, only 35 percent of the response plan for Myanmar was funded.⁷ The 2023 humanitarian response plan is less than ten percent funded to date, which does not yet include the cost of responding to Cyclone Mocha. Rohingya, Rakhine and other survivors of Cyclone Mocha desperately need shelter, clean drinking water, food and medical attention.

This latest briefing from BROUK examines the circumstances which led to the preventable deaths of hundreds of Rohingya in Cyclone Mocha, in the context of the ongoing Rohingya genocide. Its publication coincides with Myanmar's latest reporting deadline on its compliance with the provisional measures ordered by the International Court of Justice in the Gambia's genocide case against Myanmar, which aim to protect the 'extremely vulnerable' Rohingya.⁸

The briefing focuses in particular on the regime's ongoing commission of the genocidal act of deliberately inflicting conditions of life calculated to bring about the destruction of the Rohingya group.



4 UNOCHA, 'Myanmar Humanitarian Update no. 29' (6 May 2023).

5 UNOCHA, 'Myanmar: Cyclone Mocha Flash Update #10' (23 May 2023).

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

7 The New Humanitarian, 'Myanmar's neglected crisis demands a different response' (1 February 2023) available at <<https://www.thenewhumanitarian.org/opinion/2023/02/01/Myanmar-coup-Ukraine-cross-border-aid>> accessed 23 May 2023.

8 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].

The Gambia v. Myanmar genocide case at the ICJ

Background to the ICJ case

In 2016 and 2017, BROUK and many other human rights organisations documented gross human rights violations perpetrated by the Myanmar military and its proxies during ‘clearance operations’ in Myanmar’s Rakhine State, resulting in significant loss of life and severe mental and physical harm to the Rohingya.⁹ These included mass rape of Rohingya women, children burned alive, machete attacks, shooting at fleeing villagers, the use of rocket launchers to raze entire Rohingya villages to the ground, coordinated massacres, as well as landmines laid at the border to target those fleeing the violence.¹⁰

In March 2017, the Independent International Fact-Finding Mission on Myanmar (UNFFM) was established by the UN Human Rights Council.¹¹ 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.¹² 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.¹³

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

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

10 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.

11 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.

12 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.

13 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].

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.¹⁴

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.¹⁵ In doing so, the Gambia has emphasised the importance of the legal concepts of *erga omnes* obligations (owed to the international community as a whole) and *erga omnes partes* obligations (owed by any State party to all the other States parties to a convention), both of which apply to the crime of genocide.¹⁶

Latest developments in the ICJ case

On 22 July 2022, the Court issued its judgment on Myanmar's four preliminary objections to the case.¹⁷ 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.¹⁸ The Court rejected all four of Myanmar's preliminary objections.¹⁹

The judgment in the Gambia's favour meant that the case proceeded to the merits phase on the substance of the case. On the same day as the judgment was issued, the Court ordered Myanmar to submit its counter-memorial (written submission defending the allegations of genocide) by 24 April 2023. The Agent for Myanmar waited until 14 March 2023 to lodge a request with the Court to extend the time-limit until 24 February 2024. The Agent cited a number of reasons for the request, including the 'voluminous' nature of the Gambia's memorial, the minimal resources at Myanmar's disposal to conduct the case, the substantial demands placed on those resources by the provisional measures reporting requirement, and the need for more time in order to take statements from witnesses who were presently living in camps in Bangladesh or would soon be repatriated to Myanmar. In response, on 6 April 2023 the Court extended the time-limit by one month to 24 May 2023.²⁰ On 21 April 2023, the Agent for Myanmar submitted a further request for an extension of the time-limit until 24 February 2024,

14 [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 \[114\].](#)

15 [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.](#)

16 [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 \[31\].](#)

17 [ICJ judgment, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide \(The Gambia v. Myanmar\)' \(22 July 2022\).](#)

18 ['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' \(20 January 2021\).](#)

19 [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 \[115\].](#)

20 [ICJ order, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide \(The Gambia v. Myanmar\)' \(6 April 2023\) 2.](#)

citing the same reasons. This time the Court extended the time-limit until 24 August 2023.²¹

It seems likely that the regime's Agent will submit a third request to the Court to extend the time-limit for submission of its counter-memorial, citing the disruption caused by Cyclone Mocha.

Before the cyclone struck Rakhine State, the regime had already begun its own investigations into the Chut Pyin massacre in preparation for submitting its counter-memorial to the Court. An investigative report by Frontier Myanmar found that the regime had been using 'questionable methods to collect testimony from Rohingya', including allegations of pressuring individuals to change their testimony. Rohingya and Hindu witnesses were reportedly summoned by military and intelligence officers and told to say that the military did not burn down Rohingya homes; that in fact the Rohingya burned down their own homes before fleeing to Bangladesh.²² The brutality of the current military regime and the omnipresent threat of arrest, torture, and extrajudicial killing has created a highly coercive environment in Myanmar. It would be virtually impossible for any potential Rohingya or other witness to refuse such a military summons or resist pressure to tell a particular version of events that disputes the facts.

After Myanmar submits its counter-memorial in the case the Gambia may wish to request a second round of written pleadings, which could take another year. The case would then proceed to oral hearings as part of the merits phase. Until the case concludes, the State of Myanmar is obliged to comply with and continue reporting on that compliance with the Court's provisional measures every six months.

The 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.²³ 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.'²⁴

On 23 January 2020, the ICJ issued a relatively rare unanimous order on provisional measures. The Court described the Rohingya remaining in Myanmar as 'extremely vulnerable'. As part of its rationale for issuing the order, the ICJ made it clear that, 'Myanmar has not presented to the Court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention.'²⁵ 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.²⁶

Without prejudging the merits of the case - i.e. whether or not genocide has already taken

21 ICJ order, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)' (12 May 2023) 2.

22 Frontier Myanmar, 'Myanmar junta sets its sights on Rohingya ahead of UN court deadline' (7 April 2023) available at <<https://www.frontiermyanmar.net/en/myanmar-junta-sets-its-sights-on-rohingya-ahead-of-un-court-deadline/>> accessed 22 May 2023.

23 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).

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

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

26 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.

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.²⁷ Under the UN Charter, all member States must comply with ICJ decisions.²⁸ Critically assessing Myanmar’s compliance with the order is therefore of the utmost importance.

To date, the State of Myanmar has not been under any legal obligation to make its reports public, despite consistent calls for this from a broad range of actors, including BROUK along with a coalition of Rohingya organisations. At the time of writing, two of Myanmar’s compliance reports and the Gambia’s observations on four of the reports have been made available on the Court’s website.²⁹ While this is a positive development, it is vital that all the reports are made readily available to the public at the time of submission to the Court. This is of the utmost importance to allow contemporaneous scrutiny of Myanmar’s compliance with the order. The order is one of the few available mechanisms to protect the ‘extremely vulnerable’ Rohingya remaining in Myanmar. The order must also be viewed as an integral part of Myanmar’s obligations to the international community as a whole to prevent and punish the crime of genocide. BROUK therefore renews its call to the Court to amend the provisional measures order so that Myanmar is legally obliged to make its reports public.

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, which have been compounded by telecommunications interruptions in the wake of Cyclone Mocha. 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 November 2022 and May 2023 in Rakhine State.

This briefing documents and analyses key incidents which have caused irreparable harm to the Rohingya, who are the subject of the protective measures outlined in the Court’s order. Rohingya individuals, families and communities who dare to speak out about the violations they have been experiencing are at grave risk of reprisal attacks from 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 current context in Rakhine State, including the devastating impact of Cyclone Mocha. The extremely vulnerable Rohingya community has been

²⁷ *The Gambia v. Myanmar*, ‘Application’ (11 November 2019) op. cit. 46 [86] 58 [113].

²⁸ United Nations, Charter of the United Nations (1945) 1 UNTS XVI Art 94(1).

²⁹ The reports are mentioned but not linked on the main case page <<https://www.icj-cij.org/case/178/other-documents>>, but are available at the following links <<https://www.icj-cij.org/node/106112>> (Myanmar’s first report); <<https://www.icj-cij.org/node/106113>> (the Gambia’s observations on the first report); <<https://www.icj-cij.org/node/106115>> (the Gambia’s observations on the second report); <<https://www.icj-cij.org/node/106117>> (the Gambia’s observations on the third report); <<https://www.icj-cij.org/node/106118>> (Myanmar’s fourth report only available in French); and <<https://www.icj-cij.org/node/106119>> (the Gambia’s observations on the fourth report), accessed 23 May 2023.

disproportionately affected by this humanitarian disaster, due to the conditions of life inflicted upon the group by the Myanmar State since 2012.³⁰ The Myanmar State is in serious breach of the ICJ's provisional measures order and is also failing in its duty to protect the Rohingya from abuses by non-State actors such as the Arakan Army - an act of omission that can be attributed to the State.

Rakhine State context ³¹

New information continues to become available on a daily basis. The information in this section is up to date as of 23 May 2023.

Cyclone Mocha hit the coastal area of Rakhine State near the capital Sittwe in the afternoon of Sunday, 14 May local time. The full extent of the devastation caused by one of the strongest cyclones on record in Myanmar will likely not be known for months. Winds of up to 150 miles per hour knocked out power lines and telecommunications towers, while a storm surge several metres high inundated coastal areas of Rakhine State, especially Sittwe.³²

For more than a decade, over 112,000 Rohingya people forcibly displaced by State-orchestrated violence in 2012 have been confined to camps along the Sittwe coastline, in temporary shelters constructed from bamboo. More than 50 percent of Rohingya in the camps are children.³³ Many of the camps used to indefinitely detain forcibly displaced Rohingya are surrounded by barbed wire, with police and military checkpoints. They were constructed near existing Rohingya fishing villages and other settlements, in close proximity to the shoreline.³⁴

Due to communication challenges, information is emerging slowly from the disaster zone and is incomplete. Preliminary reports from the ground indicate widespread destruction in the camps along the Sittwe coastline, with very few structures left standing.³⁵

According to information received by BROUK, at least 400 Rohingya are believed to have died.³⁶ Brad Hazlett, president of the NGO Partners Relief and Development, which has supported Rohingya communities in the camps for many years, reported “a large-scale loss of life in the camps.” The NGO’s team members counted 110 dead in just seven of the Rohingya villages and camps they visited in Sittwe.³⁷

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

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

32 UNOCHA, 'Myanmar: Cyclone Mocha Flash Update #3' (14 May 2023).

33 IDP numbers for Sittwe drawn from CCCM Cluster, 'CCCM Camp Profiles, Central Rakhine, Myanmar Q1 2023' (March 2023) 4. Another 31,000 + Rohingya internally displaced persons are confined to camps in Kyauktaw, Kyaukphyu, Myebon and Pauktaw townships in central Rakhine State, for a total of 143,670.

34 Available maps indicate that the camps are between 0.3 and 2 miles from the shoreline.

35 UNOCHA Myanmar: 'Cyclone Mocha Flash Update #4' (15 May 2023).

36 BROUK, 'At Least 400 Rohingya Feared Dead In IDP Camps – Humanitarian Aid Urgently Needed' (17 May 2023) available at <<https://www.brouk.org.uk/at-least-400-rohingya-feared-dead-in-idp-camps-humanitarian-aid-urgently-needed/>> accessed 18 May 2023.

37 CNN, 'Hundreds feared dead in Myanmar after Cyclone Mocha' (16 May 2023) available at <<https://edition.cnn.com/2023/05/16/asia/cyclone-mocha-death-toll-loss-of-life-intl-hnk/index.html>>; Christianity Today, For Years, 'This Christian NGO Worked with Muslims in Myanmar. Then Came Cyclone Mocha' (18 May 2023) available at <<https://www.christianitytoday.com/news/2023/may/myanmar-cyclone-mocha-rohingya-burma-christian.html>> accessed 19 May 2023.

Cyclone survivors from the affected Rohingya communities have been retrieving the bodies of their loved ones and neighbours from the debris and burying them immediately, in accordance with Islamic tradition.³⁸ A Rohingya resident of Dar Paing village reported, “We are digging graves with our own hands. I myself have counted more than 400 bodies in the first two days... In Basara, we counted 50 dead bodies. In Bogadip [Bayda], we counted 110. In my village, there are at least 200 dead. In Futiladil, 50 and so on.... I cannot even describe what I saw after the cyclone. I counted 83 bodies, mostly of children, on the first day.”³⁹

On 19 May, the regime announced that the death toll had reached 145 including 117 ‘Bengalis’ - the pejorative term for Rohingya people that implies they are foreign interlopers from Bangladesh. The junta warned that media outlets publishing a higher death toll would be sued.⁴⁰

Survivors reported that many victims drowned in the storm surge, which swept bodies out to sea. High winds also carried people away in the floodwaters. Others were reported to have been killed by branches and zinc roofing dislodged by the strong winds.⁴¹ The affected area remains difficult to reach as several bridges have collapsed and roads are blocked by debris.⁴²

According to UNOCHA, the SAC authorities issued evacuation advice for low-lying and coastal areas in Buthidaung, Maungdaw, Myebon, Pauktaw, and Sittwe townships. UNOCHA noted that it was ‘following up with the local authorities to ensure all communities are relocated *before* the cyclone makes landfall.’⁴³

However, early reports indicate that cyclone preparedness was wholly inadequate to prevent loss of life among Rohingya communities in Sittwe. Information was reportedly only provided in Burmese and Rakhine languages, not in the Rohingya language. The SAC authorities instructed people to evacuate by issuing orders to village administrators, but provided very limited information and assistance. BROUK is aware of only minimal efforts to relocate Rohingya internally displaced persons (IDPs) to safety by the de facto authorities. Military trucks are reported to have been used to move some Rohingya IDPs from Ohn Taw Chay camp to Thet Kay Pyin school and from Thae Chaung camp to a nearby cyclone shelter. However, these and other facilities that may have been used as cyclone shelters had limited capacity and would not have been able to accommodate all 112,000 IDPs. Survivors reported that the cyclone shelters were overcrowded.⁴⁴

Freedom of movement is restricted in the camps for Rohingya IDPs – there is barbed wire fencing in place around those camps and people are not allowed to move from those sites.

38 Multiple video clips on file with BROUK.

39 The National, ‘Bodies of Rohingya piling up in Myanmar after Cyclone Mocha’ (20 May 2023) available at <<https://www.thenationalnews.com/world/asia/2023/05/20/bodies-of-rohingya-piling-up-in-myanmar-after-cyclone-mocha/>> accessed 22 May 2023.

40 The Irrawaddy, ‘Cyclone Mocha Kills 145 in Myanmar, Military Junta Says’ (19 May 2023) available at <<https://www.irrawaddy.com/news/burma/cyclone-mocha-kills-145-in-myanmar-military-junta-says.html>> accessed 21 May 2023.

41 AFP, ‘Rohingya community particularly affected as Cyclone Mocha’s death toll rises in Myanmar’ (16 May 2023) available at <<https://www.france24.com/en/asia-pacific/20230516-cyclone-mocha-s-death-toll-rises-in-myanmar-as-villagers-wait-for-aid>>; Myanmar Now, ‘“No one would have died if we were not forced to stay in our homes” – Rohingya cyclone survivor’ (17 May 2023) available at <<https://myanmar-now.org/en/news/no-one-would-have-died-if-we-were-not-forced-to-stay-in-our-homes-rohingya-cyclone-survivor/>>; Radio Free Asia, ‘Death toll seen rising in Myanmar’s Rakhine state in aftermath of Cyclone Mocha’ (17 May 2023) available at <<https://www.rfa.org/english/news/myanmar/mocha-rakhine-rohingya-05172023160638.html>> accessed 18 May 2023.

42 UNOCHA, ‘Myanmar: Cyclone Mocha Flash Update #6’ (17 May 2023).

43 *ibid* 1. [Emphasis added].

44 The Irrawaddy, ‘Cyclone Mocha Dead Refused Evacuation: Myanmar Junta Boss’ (22 May 2023) available at <<https://www.irrawaddy.com/news/burma/cyclone-mocha-dead-refused-evacuation-myanmar-junta-boss.html>> accessed 22 May 2023.

Without express permission and assistance to leave the area, it would have been impossible for them to leave. Survivors reported that they didn't understand how serious the situation was, due to the lack of effective awareness-raising. When they were instructed to evacuate, they were not told where to go. Even when evacuation assistance was provided by the military, it is likely that some Rohingya IDPs were reluctant to leave on military trucks without understanding why or where they were going, given that they have already suffered decades of persecution at the hands of the Myanmar military.

The regime's propaganda offensive has already begun. In an official statement released via the State television channel MRTV, the junta stated that it evacuated the Rakhine population before the storm, and 'accommodated 63,302 of the 125,789 Bengalis from 17 refugee camps who needed to be evacuated'. The regime then went on to blame the victims, stating that, 'Those who died in the storm were people who didn't comply with the authority's evacuation procedure and remained in their homes on their own accord.'⁴⁵

The Union Minister for Border Affairs Lt-Gen Tun Tun Naung, Rakhine State Chief Minister U Htein Lin and other senior military personnel visited Thet Kay Pyin IDP site. On 18 May, the junta's English-language mouthpiece the Global New Light of Myanmar reported 'MOBA Union Minister provides aid to cyclone victim Bengalis in Sittway township'. The article claims that, 'The Rakhine State government, Tatmadaw and departmental officials, in-charge persons of IDP camps and social welfare organizations gave warnings about Cyclone Mocha and conducted the evacuation.'⁴⁶ BROUK has received credible information that the food assistance and tarpaulin provided as aid was actually paid for by Rakhine and Rohingya businessmen, not the regime.

Other parts of Rakhine State were also reported to have been badly affected, including Rathedaung, Maungdaw, Buthidaung, Kyauktaw, Mrauk-U, Kyauk Phyu, Ponnagyun, and Pauktaw. Casualties have been reported in Rathedaung.⁴⁷ At the time of writing, detailed information is not yet available, but coastal villages along the Ah Ngu Maw-Maungdaw road in Rathedaung and Maungdaw townships are reported to have suffered severe damage.⁴⁸ In Kyauk Ta Lone Rohingya IDP camps in Kyauk Phyu, many shelters were flattened or severely damaged but no deaths have so far been reported. BROUK received video footage and reports from one Rohingya village tract in Kyauktaw township, showing that around 90 percent of the 1,200 homes were destroyed or heavily damaged. Most homes had their roofs torn off by the high winds, and a high proportion have been left structurally unsound and in urgent need of rebuilding.

Rather than acknowledging the scale of the disaster and the urgent need for a coordinated response from the international humanitarian community, the regime continues to restrict life-saving humanitarian aid and access to the affected areas. The junta has continued to enforce its complex and obtuse travel authorisations process, allowing for only a piecemeal response by individual agencies rather than a much-needed carefully coordinated multilateral effort. In early May, UNOCHA expressed concern that humanitarian access in Rakhine State had 'significantly deteriorated' as the travel authorisation application process was now linked to each organisation's Memorandum of Understanding (MoU) status with the regime. Before Cyclone Mocha was even on the horizon, according to UNOCHA, 'This new administrative obstacle

45 RFA, 'Myanmar's junta threatens media that don't report official cyclone death numbers' (19 May 2023) available at <<https://www.rfa.org/english/news/myanmar/junta-death-toll-05192023162540.html>> accessed 20 May 2023.

46 The Global New Light of Myanmar, 'MoBA Union Minister provides aid to cyclone victim Bengalis in Sittway Township' (18 May 2023) available at <<https://www.gnlm.com.mm/moba-union-minister-provides-aid-to-cyclone-victim-bengalis-in-sittway-township>> accessed 18 May 2023.

47 UNOCHA, 'Myanmar: Cyclone Mocha Flash Update #6' (17 May 2023) and information on file with BROUK.

48 UNOCHA, 'Myanmar: Cyclone Mocha Flash Update #9' (21 May 2023).

has affected numerous humanitarian actors providing assistance to hundreds of thousands of displaced and vulnerable people, including heavy impact on the transportation of medical supplies.’⁴⁹ In the days before the cyclone made landfall, UNOCHA stepped up its calls on the authorities to relax restrictions on travel authorisations.⁵⁰

The wilful negligence of the SAC authorities and the devastating impact on the displaced Rohingya communities confined to ‘open air prisons’ is described in more detail below under the section **Provisional measure (2) - Ensure that the military and others under its influence do not commit any of the acts punishable under Article III of the Genocide Convention** - Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (ii) Restrictions on movement, humanitarian access, and access to healthcare for Rohingya across Rakhine State.

Fragile ceasefire since November 2022

The humanitarian disaster unfolding in Rakhine State in the wake of Cyclone Mocha requires a concerted humanitarian emergency response. It is imperative that the current fragile ceasefire between the Arakan Army and the Myanmar military holds. Following months of fierce fighting between the two sides which claimed the lives of hundreds of civilians in Rakhine State, including Rohingya, in late November 2022 the AA announced that an informal temporary truce had been brokered by Yohei Sasakawa, the chair of Japan’s Nippon Foundation. At the time, the AA’s spokesperson Khaing Thukha emphasised the temporary nature of the ceasefire and claimed that his group had agreed to the deal for ‘humanitarian’ reasons. He warned that hostilities could quickly resume if the Myanmar military failed to lift travel restrictions and supply blockades in Rakhine State.⁵¹ If the regime continues to refuse to allow unfettered humanitarian access to areas affected by the cyclone or blocks humanitarian assistance by other means, this could prove to be a flashpoint for renewed hostilities in Rakhine State.

At the time of writing the informal ceasefire is holding, but over the reporting period the UN Office for the Coordination of Humanitarian Affairs (UNOCHA) has consistently characterised the truce as ‘fragile’.⁵² The junta reopened main roads and waterways in Rakhine State in the month following the temporary ceasefire, although multiple checkpoints from both sides remain in place. However, in Kyauktaw township the Myanmar military maintained a punitive travel blockade in at least one Rohingya village tract until mid-April, described below.⁵³ UNOCHA reported that humanitarian access restrictions remained in place for rural areas, particularly in the northern townships of Rathedaung, Buthidaung and Maungdaw, citing new administrative obstacles to obtaining travel authorisations.⁵⁴ The regime’s blockade on medical supplies to

49 UNOCHA, ‘Myanmar Humanitarian Update no.29’ (6 May 2023) 5.

50 UNOCHA, ‘Myanmar: Cyclone Mocha Flash Update #2’ (13 May 2023).

51 Myanmar Now, ‘Informal ceasefire with Myanmar military ‘not permanent’ solution, Arakan Army says’ (28 November 2022) available at <<https://myanmar-now.org/en/news/informal-ceasefire-with-myanmar-military-not-permanent-solution-arakan-army-says/>> accessed 11 May 2023.

52 UNOCHA, Myanmar Humanitarian Updates no.25 (30 December 2022), 26 (2 February 2023), 28 (6 April 2023) UNOCHA, Myanmar Humanitarian Updates no.25 (30 December 2022), 26 (2 February 2023), 28 (6 April 2023) available at <<https://www.unocha.org/myanmar>> accessed 11 May 2023.

53 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) Restrictions on movement, humanitarian access, and access to healthcare for Rohingya across Rakhine State.

54 UNOCHA, ‘Myanmar Humanitarian Update no. 29’ (6 May 2023) 5, available at <<https://www.unocha.org/myanmar>> accessed 12 May 2023.

Rakhine State has also continued, despite the temporary ceasefire.⁵⁵ The impacts of these ongoing restrictions are described in detail below.⁵⁶

International humanitarian law

International humanitarian law, which governs armed conflicts, applies to the situation in Rakhine State, including during temporary cessation of hostilities.⁵⁷ One of the main purposes of international humanitarian law (IHL) is to protect non-combatants, people who are not taking part in hostilities – such as civilians, health workers and aid workers.⁵⁸ All parties to internal armed conflicts must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need and must ensure the freedom of movement of humanitarian aid workers.⁵⁹ Blocking access to humanitarian aid is a serious violation of international humanitarian law. Perpetrators of IHL violations may be held criminally liable under national and international law. 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'.⁶⁰

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 (ICC).⁶¹ Such acts include (but are not limited to) murder, torture, cruel treatment, extrajudicial executions, sexual violence, rape, taking hostages, pillaging, attacking civilians, and attacking protected objects. When perpetrated in the context of an internal armed conflict and with the necessary intent and knowledge of both the act and context, these acts amount to war crimes.⁶²

Customary international humanitarian law prohibits the use of weapons that are by nature indiscriminate.⁶³ Landmines are victim-activated weapons that cannot distinguish between

55 BNI Multimedia Group, 'Rakhine State medical supplies still blocked by the Junta after 8 months' (8 April 2023) available at <<https://www.bnionline.net/en/news/rakhine-state-medical-supplies-still-blocked-junta-after-8-months>> accessed 11 May 2023.

56 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 - Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part ii) Restrictions on movement, humanitarian access, and access to healthcare for Rohingya across Rakhine State.

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

58 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 15 May 2023.

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

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

61 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).

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

63 Rule 71. The use of weapons which are by nature indiscriminate is prohibited. See <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule71#Fn_8ACA2B68_00035> accessed 13 May 2023.

civilians and combatants, and as such are inherently indiscriminate weapons. Although landmines are not yet enumerated as a specific prohibited weapon in the ICC Rome Statute, international human rights organizations are increasingly calling for the extensive use of landmines in civilian areas such as homes, villages, and farmland to be investigated as the war crime of directing attacks against civilians and civilian objects, a crime over which the ICC does have jurisdiction.⁶⁴

Many areas of Rakhine State are heavily contaminated by landmines and unexploded ordnances, particularly in townships such as Buthidaung and Maungdaw which were the site of fierce clashes between the Myanmar military and the AA during the four-month outbreak of hostilities in 2022.

In December 2022, a 35-year-old Rohingya man stepped on a landmine nearby his village in Buthidaung township. He lost his right leg in the blast and is unable to continue his work as a casual labourer. The following month, an 11-year-old Rohingya boy was killed and three other boys were seriously injured by a landmine explosion just outside their village in a different area of Buthidaung township. It is unclear which side was responsible for planting these landmines, as both the Myanmar military and the AA are based in the area. Rohingya communities rely heavily on the nearby forests for firewood and farming for their livelihoods and are forced to run the risk of serious injury and death due to landmine contamination in the area, as they have no alternative.⁶⁵ Cyclone Mocha has compounded explosive ordnance risks, as landmines are likely to have shifted from known mined areas during flooding. In addition, cyclone-affected communities are on the move more than usual, to seek shelter, water, food, and materials to rebuild their destroyed homes.

Human rights violations by the Arakan Army ⁶⁶

Rohingya communities continue to be caught in the middle of the power struggle between the Arakan Army and the Myanmar military. Human rights violations perpetrated by the AA against Rohingya civilians documented by BROUK over the reporting period include killings, ill-treatment amounting to torture, attempted rape, theft, and arbitrary taxation and extortion.

In late March, a 14-year-old Rohingya youth disappeared while on his way to his small shop in a nearby village in an area of Rathedaung township under the control of the AA. He is reported to have been abducted by associates of the AA and tortured overnight. Early the following morning, his decapitated body was found half-buried near a river. In early May, the AA were implicated in the killing of a Rohingya man in Kyauktaw township. The man was invited to a nearby Rakhine village, then falsely accused of stealing money. He was set upon by a mob of Rakhine people who beat him heavily before handing him over to the custody of the AA. While in their custody, he was brutally beaten again and subsequently died from his injuries.

In late November 2022, five fully armed AA soldiers entered a Rohingya village tract in Buthidaung township. They brutally beat one Rohingya man and stole money from him, before forcing their way into six different homes in the area and stealing chickens from each

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

65 Detailed information on these two landmine cases on file with BROUK

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

household. The soldiers also attempted to rape a woman and a 16-year-old girl. In a separate incident in the Buthidaung area, the commander of AA area 8 confiscated firewood from 40 Rohingya woodcutters and ordered them to stop cutting wood from this area, blocking them from their means of livelihood.

The AA have also made repeated arbitrary taxation and extortion demands. In December in the Kyauktaw area, the AA ordered Rohingya to report to their offices to pay tax or face arrest and a fine of double the tax demand. The AA has also ordered Rohingya village leaders to compile and submit detailed lists of household members and properties, including farmyards, multiple times during the reporting period. In January, the AA extorted money from pharmacies in Rohingya villages amid a Rakhine State-wide shortage of medicines due to the junta's blockade. Pharmacies operating in Rakhine villages were left alone by the AA. Such demands by the AA compound the suffering of the Rohingya as they continue to be subjected to the Myanmar State's policies of persecution.

The junta's quest for political legitimacy

Prior to the devastation wrought by Cyclone Mocha, the junta used the opportunity afforded by the cessation of hostilities in Rakhine State to attempt to re-assert political control over the region. Senior-General Min Aung Hlaing visited Rakhine State several times over the reporting period, an indication of the importance he attributes to the region in his quest for political legitimacy both domestically and internationally.⁶⁷

The junta had been pushing ahead with preparations for national elections in Rakhine State, reportedly conducting a household population census in January with a view to compiling voter lists.⁶⁸ Senior-General Min Aung Hlaing underlined his intention to hold the election throughout Rakhine State in a public address in Sittwe.⁶⁹ The regime may decide it is more expedient to extend the State of Emergency beyond August 2023 rather than stage planned elections. However, the widely derided 2008 constitutional referendum held by the former military regime shortly after Cyclone Nargis sets a grim precedent for proceeding with sham polls during a humanitarian disaster. In 2008, the junta claimed that over 92 percent of voters had approved its military-drafted constitution, on a turn-out of 98 percent.⁷⁰

The regime has also treated Rakhine State as its playground in its quest for international political legitimacy. As well as its flawed investigation into the Chut Pyin massacre and other events during the 2017 clearance operations, in preparation for submitting its counter-memorial to the Court, the regime has also sought to push ahead with a pilot project of repatriation of 1,000 Rohingya from refugee camps in Bangladesh, mediated by China. The project is a bilateral arrangement and the UN's refugee agency (UNHCR) has not been involved with the negotiations. UNHCR's position is that current conditions are not conducive to the safe and sustainable return of Rohingya refugees.

In March, the regime organised a visit by foreign diplomats from eight countries including Bangladesh and China to Rakhine State in a bid to demonstrate that the security situation was stable enough for the pilot project to proceed. The visit was reportedly led by Union minister

67 Narinjara News, 'Junta leader visits Rakhine to consolidate power' (3 March 2023) available at <<https://www.narinjara.com/news/detail/64017e4a66b6f3021f33ea7d>> accessed 14 May 2023.

68 Narinjara News, 'The census of the Rakhine state will be taken on January 9th for the upcoming election' (2 January 2023) available at <<https://www.narinjara.com/news/detail/63b234791bd6f537aa2c9f97>> accessed 14 May 2023.

69 Mizzima, 'AA: No elections in Rakhine State if ceasefire breaks down' (4 March 2023) available at <<https://www.mizzima.com/article/aa-no-elections-rakhine-state-if-ceasefire-breaks-down>> accessed 15 May 2023.

70 Reuters, 'Myanmar's charter sails through referendum' (26 May 2008) available at <<https://www.reuters.com/article/us-myanmar-referendum-idUSSP33290120080526>> accessed 16 May 2023.

U Ko Ko Hlaing, a former Lieutenant Colonel who acted as the Agent for Myanmar at the ICJ during the public hearings on Myanmar's preliminary objections to the case in February 2022.⁷¹ They reportedly visited a refugee reception centre in Maungdaw, as well as IDP camps in Sittwe and Kyaukpyu.⁷² Later that month junta officials made a trip to Cox's Bazar to continue negotiations for the pilot project. They travelled from northern Rakhine State using United Nations boats with the UN's logo removed. The UNHCR and the World Food Program provided the boats "at the very firm request" of Myanmar junta officials. The UN's resident coordinator in Myanmar expressed concern that the trip had created a "reputational risk" for all UN agencies and could jeopardize staff security.⁷³

In early May, the regime announced that 750 plots of land in 15 villages in the northern part of Maungdaw township had been prepared for the Rohingya repatriation project. It invited a small delegation of Bangladeshi officials and Rohingya refugees to visit makeshift camps built with the support of China. One of the resettlement camps was built on the site of former Rohingya villages in Zin Paing Nyar village tract, burned during the 2017 'clearance operations'.⁷⁴ A Rohingya woman in the delegation reported, "My green village has been converted into a fortified camp. I feel bad to see the makeshift houses. We will not go to the camps – we want to live in our villages." Another Rohingya member of the delegation emphasised, "We have demanded that they return our homesteads and land. We will build our own houses on our land – unless we are given citizenship and our homesteads back, we will not return."⁷⁵

Such high-profile visits to northern Rakhine State were only possible due to the temporary ceasefire between the AA and the Myanmar military; the situation is neither stable nor secure. Moreover, the whole of Rakhine State is now a major humanitarian disaster zone.

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

In its September 2019 report, the UNFFM found that the eight common risk factors for atrocity crimes and two specific risk factors for genocide set out by the UN Office on Genocide Prevention and the Responsibility to Protect were all present in Myanmar.⁷⁶ 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.

71 For an overview of Union minister U Ko Ko Hlaing's controversial career, see The Irrawaddy, 'Who is Myanmar Regime Apologist Ko Ko Hlaing?' (28 April 2022) available at <<https://www.irrawaddy.com/opinion/analysis/who-is-myanmar-regime-apologist-ko-ko-hlaing.html>> accessed 17 May 2023.

72 Narinjara News, 'Bangladesh gives list of 1,000 refugees to Myanmar' (11 March 2023) available at <<https://www.narinjara.com/news/detail/640c5a3466b6f3021f33eaad>> accessed 16 May 2023.

73 Benar News, 'Unmarked UN boats used to ferry junta officials to refugee camps, email shows' (17 March 2023) available at <<https://www.benarnews.org/english/news/bengali/junta-boats-03172023174236.html>> accessed 16 May 2023.

74 UNFFM 2018 report, op. cit. 229 [970] and UNFFM 2019 report op. cit. 41 [132].

75 Radio Free Asia, 'Rohingya stand firm on citizenship after day-trip to Rakhine state' (8 May 2023) available at <<https://www.rfa.org/english/news/myanmar/rohingya-rakhine-05082023040942.html>> accessed 16 May 2023.

76 UNFFM 2019 report op. cit. 77 [240].

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.⁷⁷

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

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

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

- a) killing members of the group;
- b) causing serious bodily or mental harm to the members of the group;
- c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
- d) imposing measures intended to prevent births within the group.⁷⁸

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

Moreover, the junta has not taken any steps to lift restrictions on freedom of movement, access to healthcare, or access to humanitarian aid for Rohingya communities. In fact, restrictions have tightened over 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. These conditions of life inflicted on Rohingya communities in Rakhine State were a significant factor in the preventable deaths of hundreds of vulnerable Rohingya – especially women and children - during Cyclone Mocha. The ongoing commission of the genocidal acts of deliberately inflicting conditions of life calculated to bring about the group's physical destruction, causing serious bodily or mental harm, and killing members of the group are described in detail below, under **Provisional measure (2)**.

⁷⁷ The UN Office on Genocide Prevention and the Responsibility to Protect 'Framework of Analysis for Atrocity Crimes: a tool for prevention' (2014) 18-19.

⁷⁸ The Gambia v. Myanmar, ICJ Provisional Measures Order (23 January 2020) op. cit. 25 [86].

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.⁷⁹

The regime has continued with its intrusive and degrading 'Swe Tin Sit' map-record-check investigative process in the northern townships of Buthidaung, Maungdaw and Rathedaung, in spite of the provisional measures order. This intimidating investigation which is unique to Northern Rakhine State was also described in detail in the UNFFM's 2018 report.⁸⁰ In recent years it has been conducted by members of the military, immigration officers and Border Guard Police. The process involves photographing residents outside their homes, removing or adding family members to household registration lists, 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. The 'Swe Tin Sit' process was captured in rare undercover footage shot as part of an Al Jazeera 101 East documentary, corroborating BROUK's earlier reports of widespread extortion in relation to the birth registration process for Rohingya.⁸¹

BROUK continues to receive reports of Rohingya being coerced into accepting the NVC. Several Rohingya from villages in the Sittwe township area reported that they were forced to accept the NVC in order to apply for Form 4 permission to travel outside of Sittwe. They also reported that Rohingya must accept an NVC as 'Bengali' to apply for citizenship, regardless of whether they already hold previously recognised identity documents.

In March, a mobile immigration team visited Khaung Doke Kar-1 and Thet Kay Pyin IDP camps. These visits appear to have coincided with the regime's efforts to push forward with the pilot repatriation scheme, as they occurred a few days after Union minister U Ko Ko Hlaing brought a group of diplomats to visit Baw Du Pha IDP site in Sittwe during their trip to Rakhine State. Local reports indicate that a small number of Rohingya IDPs applied for the NVC during the visit by the mobile immigration team, but many more refused. One young Rohingya man explained, "We're asked to provide details about where and when we arrived in the region. But we have been living here for generations. Moreover, the card looks like a form of registration for foreign nationals. Why should we be [sic] agree with it? So we are not in a position to accept the NVC cards."⁸²

Members of the Rohingya group subsequently released from prison in one of the regime's many 'amnesty' public relations exercises are also routinely forced to accept the NVC. BROUK received reports of one recent such case involving 800 Rohingya boys and girls aged between 12-18, described in detail below.⁸³

79 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].

80 UNFFM 2018 report op. cit. 138-139 [583-588].

81 BROUK, 'Prevent the unthinkable' (2 December 2022) 26, available at <<https://www.brouk.org.uk/wp-content/uploads/2023/01/BROUK-Report-Prevent-the-unthinkable-2-December-2022.pdf>> accessed 17 May 2023.

82 BNI, 'Military council issues National Verification Card to 30 Muslim refugees' (13 March 2023) available at <<https://www.bnionline.net/en/news/military-council-issues-national-verification-card-30-muslim-refugees>> accessed 17 May 2023.

83 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 - Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (iii) Criminalisation and imprisonment of Rohingya fleeing the conditions of life inflicted on them.

Rohingya men, women and children are criminalised for trying to flee the conditions of life inflicted upon them by the regime. 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, thereby dehumanising the group.

The movement restrictions, including criminal sanctions, have forced many Rohingya to resort to dangerous options to try to flee, such as through human trafficking networks. For example, in December 2022, the bodies of 13 Rohingya men and boys were discovered piled on top of each other at the side of the road, shown in images widely circulated on social media. The victims are presumed to have died while in the custody of traffickers. According to reports received by BROUK the military authorities further denied the victims dignity in death by cremating their bodies, a practice considered unclean in the Islamic faith, even though local Muslim organisations had offered to perform Islamic burial rites.

Further, Rohingya communities in Sittwe and Buthidaung have sought to repair mosques and other religious buildings of important cultural significance. The 160-year-old Grand Mosque or Jama Mosque in Sittwe has been closed for worship since the State-orchestrated violence of 2012 and is now in a state of disrepair. Community leaders have sought permission to repair it from both the NLD government and the current SAC authorities but were refused on the grounds that it was 'built by foreigners'.⁸⁴

In Buthidaung township, the Rohingya community in the Mee Chaung Zay village tract area constructed a mosque and a madrasa, to replace a previous Islamic building that was burned down in 2021. The Myanmar military carried out 'clearance operations' in the area in 2017, including extensive burning of homes and public buildings.⁸⁵ The community did not seek permission from the authorities, in the knowledge that they would not receive it. In April, the township General Administration Department issued an order to stop what it called the illegal construction of a religious structure.⁸⁶

The practices outlined here match several of the other risk factor indicators for genocidal acts, namely denial of the group's identity (risk factor 3), discriminatory, segregational policies and legislation (risk factor 4) and (indirect) attacks against cultural or religious symbols and property (risk factor 7). 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 deliberately inflicting on the group conditions of life calculated to bring about

⁸⁴ Detailed information on file with BROUK.

⁸⁵ UNFFM 2018 report op. cit. 224 [962], 226 [965].

⁸⁶ DMG, 'Junta stops construction of Islamic school in Buthidaung Twsp village' (6 May 2023) available at <<https://www.dmediag.com/news/socavig.html>> accessed 17 May 2023.

its physical destruction in whole or in part, causing serious bodily or mental harm to members of the group, and killing members of the group under Article II of the Genocide Convention.

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part⁸⁷

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

‘Examples of such acts include, but are not limited to, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.’⁸⁸

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]’⁸⁹

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]⁹⁰

The ICJ, in its interpretation of the meaning of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction”, has held that forced displacements may occur in parallel to other acts prohibited by Article II of the Genocide Convention. Forced displacements may also be indicative of the specific intent to destroy a group in whole or in part behind those parallel genocidal acts.⁹¹

In light of the preventable deaths of hundreds of Rohingya internally displaced persons during Cyclone Mocha, the next section of this briefing focuses on the illustrative factors of

⁸⁷ All information in this section on file with BROUK, unless otherwise referenced.

⁸⁸ 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].

⁸⁹ ICTY, *Prosecutor v. Karadzic*, op. cit. [548].

⁹⁰ ICTY, *Prosecutor v. Karadzic*, op. cit. [546].

⁹¹ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports 2015, 72 [161-163].

the conditions of life imposed on members of the group to assess the objective probability of these conditions leading to the physical destruction of the group in part. These illustrative factors include the circumstances of the forced displacement of the Rohingya, their subsequent arbitrary and indefinite detention in camps, the location of and the conditions in those camps, the particular vulnerabilities of the group, as well as the lack of disaster preparedness and wilfully negligent response to Cyclone Mocha by the *de facto* authorities.

(i) More than ten years of arbitrary and indefinite detention for more than 140,000⁹² Rohingya confined to camps

Forced displacement of the Rohingya

More than 140,000 Rohingya (of whom 112,000 are in rural Sittwe) have been subjected to arbitrary and indefinite detention in camps across Central Rakhine State for more than a decade, in violation of international law.⁹³

From 8 June 2012 onwards, violence spread across Rakhine State and lasted at least until August. A second wave of violence was instigated in October 2012. It affected the Rohingya, ethnic Rakhine and Kaman communities across 12 townships. In addition to instigating the 2012-2013 violence, security forces committed serious human rights violations against Rohingya across Rakhine State, such as indiscriminate extrajudicial killings (including of women, children and the elderly), sexual violence (including rape, mutilation, and sexual slavery), mass arbitrary arrests of Rohingya and torture carried out in police stations and Buthidaung prison, the burning of homes, and the destruction of mosques and looting of shops.⁹⁴ The security forces also failed to intervene to stop the violence that erupted between communities.

The State-orchestrated violence in 2012-13 marked a critical juncture in the military authorities' treatment of the Rohingya. Rohingya displaced by the violence in central Rakhine State were segregated from Rakhine displaced populations and confined to camps. The enduring impact of the violence of 2012-2013 is often overlooked in the wake of the mass killings and other atrocity crimes that took place in 2016-2017. In fact, the State-orchestrated violence in 2012-2013 laid the groundwork for the brutal 'clearance operations' that were to follow.

The 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 set out how the violence against the Rohingya was planned and instigated by government officials and state security forces.⁹⁵ It followed a carefully crafted hate campaign that portrayed the Rohingya and other Muslims as an existential threat to Buddhism and to Myanmar, described in detail in the UNFFM's 2018 report.⁹⁶

Around 95 per cent of those who were displaced in the violence of 2012-13 were Muslims, most of them Rohingya and the rest Kaman. Most Rakhine displaced by the violence received assistance from the authorities to return home or resettle by the end of 2015.⁹⁷ After losing

⁹² These numbers are based on the CCCM Cluster report, 'CCCM Camp Profiles, Central Rakhine, Myanmar Q1 2023' (March 2023). The precise figure given is 143,670.

⁹³ 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).

⁹⁴ UNFFM 2018 report op. cit. [628], [630-649], [652-663], [669-679].

⁹⁵ UNFFM 2018 report op. cit. [696-716], [724-728].

⁹⁶ UNFFM 2018 report op. cit. [696-716]

⁹⁷ UNFFM 2018 report op. cit. [689] [693].

family members as well as their homes, land and businesses in the violence, the Rohingya and most Kaman remain in camps.

A Human Rights Watch investigation into the 2012 violence determined that the attacks were carried out with the intent to drive the Rohingya from the state or at least forcibly relocate them.⁹⁸

The location of and conditions in the camps

The authorities decided on the locations of camps for the segregation and internment of the Rohingya. Many of the camps are situated on former paddy fields and in low-lying coastal areas, highly prone to flooding. The authorities denied humanitarian agency requests for sufficient land and resources to construct camps that would comply with international humanitarian standards, resulting in overcrowded, unsanitary sites.⁹⁹ Most of the camps are surrounded by barbed wire, military camps, security guards and checkpoints, including inside the camps. In 2018 the UNFFM found that the confinement of Rohingya in camps constituted 'arbitrary and discriminatory deprivation of their liberty'.¹⁰⁰ That same year living conditions in the camps were described by then-United Nations Assistant Secretary-General Ursula Mueller as "beyond the dignity of any people".¹⁰¹

According to Human Rights watch, 'The term "detention camps" [rather than the commonly used "internally displaced persons camps"] more accurately reflects the extreme movement restrictions imposed on the Rohingya since 2012 that amount to arbitrary and indefinite detention and severe deprivation of liberty'.¹⁰²

A Cyclone Mocha briefing by Human Rights Watch noted that, 'The resulting living conditions are, by design, squalid, contributing to a growing tally of preventable deaths and annual threats from extreme weather.'¹⁰³ In its November 2022 briefing, BROUK reported the preventable deaths of at least 42 young children and 10 women during childbirth in just some of the camps since the provisional measures were ordered. The true figures are likely to be higher, due to the difficulties with collecting information from the camps.¹⁰⁴

The particular vulnerabilities of the Rohingya

The UNFFM described the 'extreme vulnerability' of the Rohingya group as 'a consequence of State policies and practices implemented over decades, steadily marginalising the Rohingya. The result is a continuing situation of severe, systemic and institutionalised oppression from birth to death.'¹⁰⁵ In its 2020 provisional measures order, the ICJ also recognised the Rohingya remaining in Myanmar as 'extremely vulnerable'.¹⁰⁶

98 Human Rights Watch, ' "All You Can Do is Pray": Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State' (April 2013).

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

100 UNFFM 2018 report op. cit. [528] [693]

101 See video available at <<https://twitter.com/uschimuller/status/981625075953782784?lang=fr>> accessed 23 May 2023.

102 HRW (October 2020) op. cit. 5-6, 16-17.

103 Human Rights Watch, 'Cyclone Mocha Devastates Myanmar's Rohingya: 'Apartheid' Camps Left Tens of Thousands Trapped, Exposed' (18 May 2023) available at <<https://www.hrw.org/news/2023/05/18/cyclone-mocha-devastates-myanmars-rohingya>> accessed 18 May 2023.

104 BROUK, 'Prevent the unthinkable: The international community must leverage the International Court of Justice's provisional measures order before it's too late' (2 December 2022) 23.

105 UNFFM 2018 report op. cit. [622].

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

The 13 camps in the rural Sittwe area in particular are very overcrowded. Thae Chaung camp has just 7m² per person, far short of the international standard of 45m² per person in camps for the internally displaced. More than half of the 112,000 residents of the Sittwe camps are Rohingya children, with this figure rising to 63 and 64 percent in Ohn Taw Chay and Ohn Taw Gyi South camps, respectively.¹⁰⁷

The Rohingya confined to camps are largely living in cramped temporary bamboo structures known as ‘longhouses’, designed to last two years. In its May 2022 briefing, BROUK reported that on average just 43 percent of the longhouses across all Rohingya camps had been repaired over the previous two years.¹⁰⁸

Lack of disaster preparedness

Myanmar is vulnerable to a wide range of natural disasters. The country’s coastal areas are particularly exposed to cyclones, tropical storms and tsunamis. The whole country is at risk from earthquakes while the mountainous regions are also vulnerable to landslides. Following Cyclone Nargis in 2008, which claimed the lives of 140,000 people, UNOCHA opened a country office in Myanmar and has worked with successive governments on early warning and disaster preparedness.¹⁰⁹ In 2015, Cyclone Komen caused devastating floods and landslides in Myanmar, claiming at least 132 lives.¹¹⁰ Cyclone Komen was reported to have damaged around 25 percent of shelters in the Sittwe camps, while 42 percent were damaged by Cyclone Mora in May 2017.¹¹¹ The military authorities were undoubtedly aware of the potentially severe impact of Cyclone Mocha on the extremely vulnerable Rohingya they had forcibly displaced and then deliberately confined to camps in areas highly prone to flooding, particularly in Sittwe where the cyclone was forecast to make landfall.

Wilfully negligent response to Cyclone Mocha by the de facto authorities

As described earlier in this briefing, survivors reported that they didn’t understand how serious the situation was, due to the lack of effective awareness-raising. BROUK is aware of only minimal efforts to directly relocate Rohingya IDPs to safety by the de facto authorities, contrary to the claims by the junta. Buildings designated as cyclone shelters in rural Sittwe did not have the capacity to meet the needs of the more than 112,000 Rohingya held in the Sittwe camps.

(ii) Restrictions on movement, humanitarian access, and access to healthcare for Rohingya across Rakhine State ¹¹²

Even before Cyclone Mocha hit Rakhine State, Rohingya IDPs confined to camps were facing additional pressures on top of the squalid conditions. Amid rapid inflation, food prices have soared across the country and Rohingya IDPs are struggling with the stipend-based system of assistance provided by the World Food Programme (WFP). In April, Rohingya IDPs in Taung Paw camp in Myebon reported that a sack of rice was more than three times the monthly stipend amount and appealed for a return to food aid packages. WFP reportedly responded that they are facing difficulties delivering food packages.¹¹³ With widespread price gouging following Cyclone Mocha, prices of basic food items will continue to rise.

107 CCCM Cluster report, ‘CCCM Camp Profiles, Central Rakhine, Myanmar Q1 2023’ (March 2023).

108 BROUK, ‘ ‘Slow death’: ten years confined to camps for 130,000 Rohingya in Myanmar’ (23 May 2022) 11.

109 UNOCHA Myanmar, Disaster Response Preparedness < <https://www.unocha.org/myanmar/disaster-response-preparedness>> accessed 23 May 2023.

110 ICRC, ‘Update on Myanmar Flood Response’ (15 November 2015).

111 HRW (October 2020) op. cit. 95.

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

113 DMG, ‘Muslim IDPs ask UN aid agency to resume food package delivery system’ (25 April 2023) available at <<https://www.dmediag.com/news/miwpunc.html>> accessed 19 May 2023.

As previously reported by BROUK, the military authorities have pushed ahead with the ‘camp closure’ strategy, which is better understood as the permanent segregation and detention of Rohingya in flood-prone locations adjacent to existing camps. 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. In May, UNOCHA reported that the de facto authorities had started relocating families from Kyauk Ta Lone camp (the fourth camp earmarked for closure) to the new adjacent relocation site and had issued a deadline of 15 May for all IDPs to relocate.¹¹⁴ At the time of writing, it has not been possible to confirm how many people have been forced to relocate to the new site. BROUK has received information that Cyclone Mocha caused widespread destruction at the Kyauk Ta Lone sites and there are reports of injuries but fortunately no deaths.

Aside from the more than 140,000 Rohingya men, women and children living in arbitrary and indefinite detention in the camps, Rohingya communities across Rakhine State are effectively living in an open-air prison. They are subjected to severe restrictions on their movement across Rakhine State, imposed through a complex system of written and verbal orders, abusive practices, extortion, barbed-wire barriers, and militarised checkpoints. 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.’¹¹⁵ Many remote rural communities in Northern Rakhine State are largely dependent on humanitarian aid.

In March, UNOCHA reported that humanitarian access for international organisations was still limited to specific urban locations in the northern townships of Maungdaw and Buthidaung, with rural areas largely inaccessible for international staff. It noted that, ‘delayed provision of travel authorizations is endangering the health and survival of malnourished children.’¹¹⁶ By May, UNOCHA reported that 28,000 people from 58 villages in northern Rakhine did not receive food assistance due to these access constraints.¹¹⁷

In Kyauktaw township, movement restrictions imposed in at least one Rohingya village tract are inextricably linked to demands for forced labour. As reported by BROUK in its November 2022 briefing, Military Operation Command 9 (MOC 9) based in Kyauktaw routinely orders village administrators from Rohingya villages to provide labourers to work on farmland controlled by the Myanmar military, a long-standing practice that has been perpetrated against these villages for years. If the villagers refuse to provide labour, they must provide rice or face heavy financial penalties. Over the reporting period, Rohingya villagers refused to provide labour or rice to the military and so MOC 9 imposed travel restrictions on their village tract for three months. The travel blockade was only lifted after each village in the tract met the military’s extortion demands. During this time, villagers were unable to access medical care or travel for work, suffering food shortages due to the loss of income.

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

In January, 34 young people – several of them believed to be under the age of 18 - from the area of Kyauktaw described above attempted to flee the country. The group were taken to Sittwe by boat, where they were subsequently arrested by the police. All were subsequently released after meeting extortion demands. Rakhine State authorities are alleged to be involved in the human trafficking of Rohingya.

¹¹⁴ UNOCHA Myanmar, Humanitarian Update no. 29 (6 May 2023) 10.

¹¹⁵ UNFFM 2018 op. cit. 119 [500].

¹¹⁶ UNOCHA Myanmar, Humanitarian Update no. 27 (4 March 2023) 8.

¹¹⁷ UNOCHA Myanmar, Humanitarian Update no. 29 (6 May 2023) 5, 8.

BROUK has received numerous reports detailing the arrests and detention of at least 339 Rohingya attempting to flee the conditions of life inflicted on them in Rakhine State over the reporting period.¹¹⁸ According to statistics collected by Radio Free Asia, nearly 2,000 Rohingyas have been arrested on their way to Malaysia from Rakhine State and Bangladesh between December 2021 to March 2023. The junta has sentenced nearly 500 of them to two to five years in prison.¹¹⁹

Cases against the Rohingya are usually brought under the 1949 Residents of Burma Registration Act (and 1951 Resident of Burma Registration Rules), which carries a maximum penalty of two years in jail with hard labour, or under Article 13(1) of the 1947 Burma Immigration (Emergency Provisions) Act) for a jail term of five years.¹²⁰ 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.¹²¹ The Myanmar State's complex web of discriminatory laws and movement restrictions applied solely to members of the Rohingya group 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.

According to information received by BROUK, more than 800 boys, girls and young people aged 12-18 are currently being held in a youth rehabilitation centres in Yangon run by the Ministry of Social Welfare, Relief & Resettlement after being detained for attempting to flee Rakhine State.¹²² They have apparently been officially released as part of the regime's various 'amnesties' this year but remain in detention while police and immigration make arrangements to return them to Rakhine State. BROUK is very concerned at reports that they will be forced to accept the NVC. Moreover, before Cyclone Mocha hit Rakhine State, the authorities reportedly had planned to send them to Thet Kay Pyin camp in Sittwe with the expectation that the Rohingya community in the camp would take responsibility for the children and young people. While Rohingya community leaders should be involved in a meaningful way in ensuring the welfare of the children and young people, there are significant safeguarding concerns that warrant the involvement of the International Committee of the Red Cross and other agencies with expertise on family reunification and child psychosocial support.

BROUK has also received reports about two youths aged 17 and 19 who died in prison in late April and early May respectively, after being arrested and imprisoned for attempting to flee the conditions of life inflicted on them in Rakhine State. Although their cause of death is not known, they are believed to have died due to denial of medical treatment. Conditions in Myanmar prisons are notoriously harsh for all inmates, but political dissidents and members of the Rohingya group are routinely targeted for ill-treatment amounting to torture, including the denial of timely medical assistance.¹²³ Detainees rely on family members to bring them food to supplement the meagre prison rations, as well as medicines. Rohingya men, women and children who are arrested and detained for attempting to flee the conditions of life imposed on them are often imprisoned far from Rakhine State. Family members cannot visit because they too would risk being arrested and detained for travelling without identity documents and travel permission.

118 284 men, 49 women, and at least 6 children.

119 RFA, 'Myanmar navy arrests 130 Rohingya attempting to flee to Malaysia' (4 April 2023) available at <<https://www.rfa.org/english/news/myanmar/rohingya-arrests-malaysia-04042023165839.html>> accessed 19 May 2023.

120 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).

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

122 Detailed information on file with BROUK.

123 Assistance Association for Political Prisoners (Burma) 'Deaths in Junta Detainment' (27 March 2023); UNFFM 2018 report op. cit. 157 [669].

In summary, the illustrative factors set out above arguably meet the objective probability criterion for the genocidal act of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, particularly when examined together. Firstly, the Myanmar authorities instigated and participated in the 2012 violence which forcibly displaced more than 140,000 already vulnerable Rohingya, then segregated them in overcrowded, flood-prone internment camps where they have remained in arbitrary and indefinite detention in squalid conditions without adequate shelter for over a decade. Secondly, the remaining Rohingya population in Rakhine State effectively lives in an open-air prison, subjected to severe restrictions on movement and denied access to humanitarian aid and healthcare, designed to result in their 'slow death'. Thirdly, the Myanmar authorities criminalise and imprison members of the Rohingya group who attempt to flee the conditions of life inflicted upon them. The proactive attempts by Myanmar authorities to prevent the Rohingya group from escaping these appalling conditions is arguably indicative of genocidal intent to destroy the group in whole or in part.

Recalling the 2016 ICTY Karadzic judgment, the genocidal act of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part 'does not require proof that the conditions actually led to death or serious bodily or mental harm of members of the protected group. When **"such a result is achieved, the proper charge will be paragraphs (a) or (b)" [killing or serious bodily or mental harm].**' [emphasis added]¹²⁴

Causing serious bodily or mental harm to members of the group¹²⁵

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

Rohingya survivors of Cyclone Mocha in the camps and villages along the Sittwe coastline have endured immense suffering that could have been prevented by effective disaster preparedness and evacuation planning by the Myanmar authorities. Not only have they suffered preventable injuries, causing serious bodily harm, but they have witnessed the preventable deaths of their loved ones, which has also caused serious mental harm. This mental anguish has been compounded by the Myanmar authorities' refusal to allow unfettered humanitarian access to the affected communities, leaving survivors to fend for themselves after the cyclone hit. The delay in allowing humanitarian assistance to reach survivors has likely caused additional serious bodily and mental harm to Rohingya survivors of Cyclone Mocha, due to the lack of medical care, safe shelter, food, and clean drinking water, and the high risk of waterborne diseases – particularly outbreaks of Acute Watery Diarrhoea among children.

Furthermore, the Myanmar authorities' criminalisation and imprisonment of those attempting to flee the conditions of life inflicted on them in Rakhine State – including children – has also caused serious mental harm to untold numbers of Rohingya.

In addition, BROUK continues to receive reports of the SAC arbitrarily arresting and detaining Rohingya men. This is an ongoing discriminatory pattern of conduct systematically targeted at Rohingya, described in the 2018 UNFFM report.¹²⁶ At times, the arrests appear to have been made for the purpose of extortion demands. In other instances, Rohingya detainees were subjected to brutal beatings at the hands of soldiers, amounting to ill-treatment and torture; a

¹²⁴ ICTY, *Prosecutor v. Karadzic*, op. cit. [546].

¹²⁵ All information in this section on file with BROUK, unless otherwise referenced.

¹²⁶ 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].

pattern also described by the UNFFM.¹²⁷ Such violations may also constitute the genocidal act of causing serious bodily or mental harm to the members of the group when committed with genocidal intent.

In late June 2022, the military authorities arrested and detained nine Rohingya men from four different Rohingya villages in rural Sittwe. They accused the men of paying taxes to or supporting the Arakan Army. Most of the men were detained for four or five days, during which time they were frequently punched and beaten with wooden sticks. They were subsequently released after meeting extortion demands. However, one Rohingya man was charged under Section 17/1 of the Unlawful Association Act and is currently on trial in Sittwe.

Killing members of the group

The conditions of life inflicted upon Rohingya in the camps and villages along the Sittwe coastline have resulted in the preventable deaths of an estimated 400 or more members of the Rohingya group during Cyclone Mocha, including a high proportion of women, children, and the elderly. Furthermore, the regime's obstruction of humanitarian assistance may cause additional preventable deaths among extremely vulnerable Rohingya survivors. As such, in accordance with the Karadzic case law, such killings may amount to genocidal acts when intent to destroy the group in whole or in part can be inferred from the context and the actions of the perpetrators.

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

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

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

BROUK has received reports that starting in January 2023, a number of ethnic Rakhine settlers began to move onto farmland previously owned by Rohingya at the entrance to Thin Gar Net village in Buthidaung township. There are now reported to be almost 200 houses in the area. The Myanmar military's Light Infantry Battalion 552 has a base about half a mile away, but has made no attempt to stop the settlers.¹²⁸

The Myanmar military carried out 'clearance operations' in Thin Gar Net village tract in 2017, also documented in the UNFFM's 2018 report.¹²⁹ According to BROUK sources, a number of Rohingya villagers are believed to have been killed by the Myanmar military during those operations. As such, Myanmar should preserve evidence related to the alleged genocidal acts carried out in the Thin Gar Net village tract area. However, the SAC authorities have made no attempt to stop the Rakhine settlers from occupying the land and disturbing evidence of possible crimes even though LIB 552 is located nearby.

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

¹²⁷ UNFFM 2018 report op. cit. [612].

¹²⁸ Information on file with BROUK.

¹²⁹ UNFFM 2018 report op. cit. 204 [881].

to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court.’

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

The extensive evidence and analysis of the junta’s breaches of the ICJ’s provisional measures order presented in this briefing underscore – yet again – the urgent need for international scrutiny and transparency in the reporting process on compliance with provisional measures to the Court in this case.

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.¹³⁰ If Myanmar were legally obliged to make its compliance reports public as part of its erga omnes obligations to the international community on the prevention and punishment of genocide, this would give UN member states compelling reason to urge the UN Security Council to exercise its Chapter VII mandate and adopt a binding resolution on Myanmar in pursuit of peace and security in the country and wider region.¹³¹ Such a resolution should include referring the situation in Myanmar to the International Criminal Court.

Conclusion

More than three years have now passed since the International Court of Justice instructed the Myanmar State to ‘take all measures within its power’ to prevent the commission of genocidal acts against the Rohingya in its provisional measures order. Tragically, the disproportionate impact of Cyclone Mocha on the extremely vulnerable Rohingya has resulted in the senseless loss of hundreds of lives and has laid bare the appalling conditions of life inflicted upon those confined to squalid camps for over a decade by the military regime.

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

For its part, the international community must give generously to meet the urgent humanitarian needs of the Rohingya and people across Myanmar. The situation in Myanmar was already one of the most underfunded crises in the world before Cyclone Mocha hit. Direct support to local civil society organisations already working to respond to Cyclone Mocha is urgently needed via flexible funding mechanisms.

¹³⁰ 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 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.

¹³¹ 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.

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

The evidence documented by BROUK and presented in this latest briefer (together with six previous briefings) demonstrates that the Myanmar military's conduct continues to cause irreparable harm to the Rohingya group. The evidence points to the ongoing commission of the genocidal act 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.

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 international, national, and local humanitarian actors immediate, unrestricted, and sustained access to Rakhine State and the rest of the country;
 - Myanmar cooperate with United Nations bodies and other international investigative mechanisms that seek to investigate the acts that are the subject of this case.

Recommendations to UN member states

- Urgently exert maximum pressure on Myanmar to allow international, national, and local humanitarian actors immediate, unrestricted, and sustained access to Rakhine State and the rest of the country and end all arbitrary restrictions on freedom of movement, access to health and other resources indispensable for survival for the Rohingya.
- Give generously to meet the urgent humanitarian needs of the Rohingya and people across Myanmar, including via flexible funding mechanisms that enable direct support to local civil society organisations already working to respond to Cyclone Mocha.
- 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.
- Exercise universal and other forms of jurisdiction to investigate any individual from Myanmar – irrespective of position or rank - who may be responsible for committing genocide, war crimes, and crimes against humanity under international law. Ensure such individuals are brought to justice in fair trials.
- Propose a UN Security Council resolution that imposes a comprehensive arms embargo on Myanmar, including on the transfer of aviation fuel to the military; imposes targeted economic sanctions on the Myanmar military, its leaders, and its sources of revenue, and refers the situation in Myanmar to the International Criminal Court. The prospect of a veto by a Member State in the UN Security Council should not deter other Member States from placing a resolution before the Council for consideration, debate and a vote.
- Coordinate multilateral efforts to impose arms embargoes on Myanmar, including on the transfer of aviation fuel to the military as well as targeted economic sanctions on the Myanmar military, its leaders, and its sources of revenue.

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



Published by Burmese Rohingya Organisation UK
May 2023

24 Quakers Place, Forest Gate, London E7 8AG
Phone: +44 208 553 5259 Email: brorg.london@gmail.com
www.brouk.org.uk