

A continuing genocide

Burmese Rohingya Organisation UK - Briefing May 2020



Myanmar's failure to implement the International Court of Justice Provisional Measures Order

Background to the ICJ's provisional measures order

On 11 November 2019, the Gambia filed an 'Application Instituting Proceedings and Request for Provisional Measures' at the International Court of Justice (ICJ), the United Nations' World Court, against Myanmar for alleged violations of its obligations under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). The Gambia also 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'.¹

On 23 January 2020, the ICJ issued a relatively rare unanimous, legally-binding order on provisional measures. The order recalls that the purpose of the Genocide Convention is to 'safeguard the very existence of certain human groups' and offers recognition of the Rohingya as a protected group under the meaning of the Genocide Convention.² Under the UN Charter, which includes the statute of the Court, all member countries must comply with ICJ decisions.³

In brief, the ICJ order requires Myanmar to uphold its obligations under the Genocide Convention. The provisional measures imposed by the court require the government to prevent 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.

The full case will likely take years to conclude, with a hearing on the merits to be held at a later date. Myanmar was due to submit its initial report on implementation of the provisional measures by 23 May.

Justice for Rohingya

In light of the Myanmar government's repeated refusal to use the term Rohingya and recognise them as a group, the Court's recognition of their identity and right to exist as a protected group is a first step towards justice for the Rohingya. Rohingya survivors of genocide and other atrocity crimes have consistently and repeatedly called for justice and accountability, as well as full restoration of their citizenship rights as part of comprehensive efforts to establish the necessary conditions for their voluntary return in safety and dignity to their places of origin in Rakhine State.⁴ Such efforts must also include effective remedies to provide full reparations to the survivors, such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence.

Ongoing impunity in Myanmar

The Independent Commission of Enquiry (ICOE) set up in 2018 by the Myanmar government was tasked to 'investigate allegations of human rights violations and related issues following the terrorist attacks by the Arakan Rohingya Salvation Army (ARSA) in Rakhine State with a view to seeking accountability'.⁵ The ICOE published the 15-page Executive Summary of its findings two days before the ICJ's provisional measures order. The ICOE concluded that, 'war crimes, serious human rights violations, and violations of domestic law took place during the security operations... there are reasonable grounds to believe that members of Myanmar's security forces were involved'. The ICOE asserted that its findings revealed, 'no indication of a pattern of conduct from which one could reasonably conclude that the acts were committed with genocidal intent' and that, 'There were no credible statements on allegations of gang rape committed by Myanmar's security forces'.⁶

The ICOE's findings are therefore in direct contradiction to those of the UN Fact-Finding Mission on Myanmar (UNFMM). Its September 2018 report found that there was a 'notable pattern' of 'mass gang rape, involving multiple perpetrators and multiple victims in the same incident' and that 'the factors allowing the inference of genocidal intent are present'.⁷ The ICOE follows at least eight other government-established inquiries in Rakhine State since 2012. Its independence and impartiality has been called into question since its establishment, and a leading member of its Secretariat was part of Myanmar's legal team at the ICJ proceedings in December 2019.⁸ The ICOE's full report has never been publicly released.

Aung San Suu Kyi in her capacity as Agent placed particular emphasis on the work of the ICOE in her statement to the Court on 11 December, and asserted that 'ongoing criminal justice processes in Myanmar... must be allowed to run their course'.⁹ However, domestic legislation in Myanmar enshrines impunity. The 2008 Constitution and other laws provide for immunity from prosecution to all past and present military personnel and government officials for acts committed in the course of their duties, and guarantee the military control over its own judicial processes via an opaque court martial system, which is beyond civilian oversight.¹⁰

In February 2020, the Tatmadaw announced it had initiated two Court-martials to look into killings that took place in Maung Nu and Chut Pyin villages in northern Rakhine State. This follows reports of the Tatmadaw establishing a court-martial in November last year over the Gu Dar Pyin massacre.¹¹ Such court-martials have failed to deliver justice for the Rohingya. In November 2018, seven soldiers who were court-martialled

and jailed for ten years for their role in the Inn Din massacre were pardoned by the military and released, after spending less than a year in prison - less time than Wa Lone and Kyaw Soe Oo, the two Reuters reporters who exposed the massacre and were subsequently jailed.¹²

Conditions in Rakhine State since 23 January 2020

Armed conflict between the Tatmadaw and the Arakan Army has significantly escalated in Rakhine State and Paletwa in southern Chin State, with dozens of Rakhine, Chin, and Rohingya civilians killed. In May, the Tatmadaw declared a ceasefire in other parts of the country until the end of August, allegedly with the aim of containing the spread of COVID-19 and 'restoring eternal peace', but it has refused to extend it to Rakhine and Chin States.¹³ Prolonging the armed conflict comes at significant human and economic cost, at a time when relatively few resources are invested in fighting the COVID-19 pandemic in Myanmar.¹⁴

On 3 February – shortly after the ICJ issued its provisional measures order – the government ordered mobile internet access to be shut down again in several townships in Rakhine and Chin States, including the northern Rakhine townships of Maungdaw, Buthidaung, and Rathedaung, where the majority of the population is Rohingya.¹⁵ This makes it very difficult to monitor the situation on the ground in northern Rakhine State.

The internet shutdown has also severely hampered the ability of humanitarian organizations to deliver aid and assistance to vulnerable populations in the affected townships. While all communities are affected, the Rohingya whose livelihood opportunities are severely limited by movement restrictions and who suffered high levels of malnutrition before the August 2017 attacks, are especially at risk. When combined with pre-existing restrictions on humanitarian access - imposed by both the civilian government and the military – the internet shutdown is yet more evidence of that Myanmar's authorities are imposing conditions of life calculated to bring about the destruction of the Rohingya group in whole or in part.

On 8 May, the Tatmadaw's True News agency claimed that ARSA is stockpiling provisions near the Myanmar-Bangladesh border in preparation for a major attack.¹⁶ This claim by the Tatmadaw could be used to justify another 'clearance operation' against the Rohingya population in northern Rakhine State, following the patterns established in 2016 and 2017 during which 'There was not the least effort . . . to make any distinction between ARSA fighters and civilians' according to the UNFMM.¹⁷ Thousands of Rohingya were killed during these clearance operations and more than 800,000 forced to flee to Bangladesh to seek refuge. The Rohingya remain at serious risk of further genocidal acts, as well as possible war crimes and crimes against humanity.

Myanmar's failure to implement the ICJ's provisional measures order

Against this backdrop, in April 2020 the Office of the President in Myanmar issued three directives, ostensibly to facilitate the implementation of the ICJ's provisional measures order: 1. 'Compliance with the Convention on the Prevention and Punishment of the Crime of Genocide'; 2. 'Preservation of evidence and property in areas of northern Rakhine State'; and 3. 'Prevention of incitement to hatred and violence (or

Prevention of proliferation of hate speech'.¹⁸ Each of the ICJ's provisional measures will be analysed in turn, alongside the President's directives, government inaction, and military actions – at best, window-dressing and at worst, possible war crimes and continuation of the alleged genocidal acts.

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, take all measures within its power [emphasis added] to prevent the commission of all 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.¹⁹

On 8 April 2020, the President's Office issued a directive on 'Compliance with the Convention on the Prevention and Punishment of the Crime of Genocide', more than ten weeks after the ICJ ordered provisional measures. The directive asserts that Myanmar 'respects its obligations arising under the Genocide Convention and other sources of international law to prevent and punish the crime of genocide'. It is addressed to all State actors and 'local people' with the purpose of ensuring that they 'do not commit the acts mentioned in Articles II and III of the Genocide Convention'.

The directive instructs anyone with credible information about any such acts to inform the Office of the President through his or her superiors, and orders each Ministry and State and Region government to provide a quarterly report on 'relevant developments' to the Office of the President.²⁰ Such reports may be used to form the basis of the government's reporting to the ICJ on its compliance with the provisional measures order. However, the directive makes no reference to domestic legislation, as genocide, war crimes, and crimes against humanity are not in fact codified in Myanmar criminal law.²¹

In its provisional measures order, the ICJ took care to reiterate Myanmar's obligations to prevent and punish acts of genocide 'irrespective of the situation that the Myanmar Government is facing in Rakhine State, including the fact that there may be an ongoing internal conflict between armed groups and the Myanmar military and that security measures are in place'.²² Since 23 January 2020, dozens of Rohingya are reported to have been killed or seriously injured. Such incidents may amount to war crimes, or genocidal acts, if genocidal intent can be proven.

Just two days after the ICJ ordered provisional measures, two Rohingya women - one of whom was pregnant - were killed and seven others injured when the Tatmadaw shelled the Rohingya village of Kin Taung in Buthidaung Township.²³ On

10 February a 15 year-old Rohingya boy in Taungbwe village, Kyauktaw Township was killed by shelling reportedly fired from a Myanmar naval vessel on the Kaladan river. Four villagers were injured, including two other teenagers.²⁴ On 29 February five Rohingya – including a 12 year-old boy - were reported to have been killed by Tatmadaw shelling in Bu Ta Lone village in Mrauk Oo Township, with several others injured.²⁵ On the same day, several Rohingya and Rakhine villagers from Myaungbwe village in Mrauk Oo Township were injured in fighting between the Tatmadaw and the Arakan Army, while others were reported to be missing.²⁶

Rohingya have also been killed and injured by landmines. On 15 March a 25 year-old man was killed by a landmine in the area known as No Man's Land, which was reported to have been mined by the Tatmadaw during their clearance operations.²⁷ On 13 May two Rohingya children were killed and another injured by landmines in the Thayatpyin village tract area of Buthidaung township, although it is unclear whether the Tatmadaw or the Arakan Army were responsible for planting landmines in the area.²⁸

During the ICJ proceedings in December 2019, legal counsel to the Gambia Professor Sands described genocide as a 'continuum... comprised of different actions which individually and together, and over stages and time, amount to this most heinous crime.'²⁹ In its 2019 report, the UNFFM referred to seven indicators from which it inferred genocidal intent to destroy the Rohingya people, the fifth of which was, 'the existence of discriminatory plans and policies' that 'formed the basis of the government's persecution of the Rohingya.'³⁰ Myanmar has not taken any meaningful steps to dismantle this apparatus. In other words, the government has not implemented any significant measures to prevent the 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'.

Approximately 126,000 Rohingya displaced in the State-orchestrated violence of 2012 are confined in apartheid conditions in what are effectively detention camps across Rakhine State.³¹ Humanitarian access has been restricted, resulting in chronic food shortages, lack of access to basic healthcare, and increased risk of morbidity.³² IDPs are living in cramped conditions without adequate sanitation facilities, greatly increasing their vulnerability to the coronavirus pandemic as they are unable to take preventative measures.

Conditions for the rest of the estimated 600,000 Rohingya left in Rakhine State are also dire. Those who remain in their places of origin are surrounded by tight security and subjected to restrictions on freedom of movement, resulting in their confinement 'like animals in an open-roofed cage' as a Rohingya youth aptly describes it.³³

Aung San Suu Kyi asserted in her statement to the Court that, 'Standard security restrictions – such as curfew and checkpoints – are in place at present in the conflict zone [Rakhine State] and affect the situation of civilians there, regardless of their background.'³⁴ While it is true that all communities in Rakhine State face restrictions on freedom of movement due to the conflict situation, those imposed on the Rohingya pre-date the current fighting and are targeted and discriminatory. Freedom of movement in Myanmar is intrinsically linked to citizenship. Under the 1982 Citizenship Law Rohingya are not recognised as one of

the 'national races' entitled to citizenship. Although possession of full citizenship is no guarantee of freedom of movement, the government's systematic stripping of citizenship from the Rohingya has been further utilised to restrict their freedom of movement. Targeted restrictions include discriminatory local orders, requirements for movement permissions and security escorts, as well as physical checkpoints.³⁵

Since 23 January this year, dozens of Rohingya who have sought to flee the appalling conditions in Rakhine State have been arrested, detained, and put on trial.³⁶ On 14 February, a court in Magway Region sentenced 15 Rohingya to the maximum of two years in prison for travelling without authorisation or identity documents, while a six-year-old child was reported to have been sent to the Magway Childcare Centre run by the region's social welfare department.³⁷

The government's long-standing policy of systematically stripping the Rohingya of citizenship under the 1982 Citizenship Law and denying their right to identify as Rohingya through the National Verification Card (NVC) process remains unchanged since the 23 January ICJ provisional measures order. The NVC process, implemented under Aung San Suu Kyi's government – and appropriately described by one Rohingya refugee as a 'tool of genocide' - forces Rohingya to identify as 'Bengali' or another foreign nationality and denies them access to full citizenship.³⁸

Moreover, the government has not taken any steps to reform the 1982 Citizenship Law. The highly discriminatory 2015 Four Laws for the Protection of Race and Religion – including the Population Control Healthcare Law, which grants the authorities powers to impose mandatory birth spacing on specific communities – remain on the statute books. Policies and practices which require members of the Rohingya community to seek permission before marrying also remain in place. Such acts of omission by the government amount to failure to implement measures to prevent the commission of the genocidal act of 'imposing measures intended to prevent births within the 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 [emphasis added].'³⁹

The UNFMM's September 2019 report referred to hate speech against the Rohingya by Myanmar officials before, during, and after the clearance operations as one of the seven indicators of genocidal intent.⁴⁰ Legal counsel for the Gambia Mr. Loewenstein gave numerous examples of the dehumanizing language used to describe the Rohingya by State actors in his statement to the ICJ.⁴¹ The outgoing Special Rapporteur on the situation of human rights in Myanmar Yanghee Lee, in her final report to the UN Human Rights Council in March 2020, noted that hate speech 'remains a pervasive and serious concern, particularly on social

media.³⁴²

On 20 April, the President's Office issued a third directive on 'Prevention of incitement to hatred and violence (or) Prevention of proliferation of hate speech', more than twelve weeks after the ICJ ordered provisional measures. The directive could be interpreted as Myanmar's attempt to demonstrate it is taking steps to implement provisional measures 1 and 2, to prevent genocidal acts and incitement to commit genocidal acts. However, under Myanmar's Constitution the military is not under civilian control and the government cannot hold the military accountable for its actions.

The directive is addressed to all State actors and 'local people' and instructs them to 'take all possible measures to denounce and prevent all forms of hate speech', which is defined as, 'communications of any kind that denigrate or express animosity towards a person or a group on the basis of religion, ethnicity, nationality, race, gender or other identity factor. Incitement to violence may constitute hate speech.'⁴³ Every Ministry and State and Region government is ordered to submit a report to the President's Office on the measures it has taken, which may form the basis of the government's regular reports to the ICJ.

Human rights groups documented virulent hate speech on social media against the Rohingya before, during and after the ICJ proceedings at the Hague, including calls for Rohingya to be killed.⁴⁴ It remains to be seen how the President's order will be implemented. However, the late timing of the directive would seem to indicate a window-dressing rather than substantive measure to prevent hate speech and incitement to violence or commit genocide, particularly in light of the lack of civilian oversight of the military enshrined in the country's constitution.

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.'⁴⁵

This should be interpreted to include any evidence which might demonstrate genocidal intent, that is the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.

In its September 2019 report, the UNFMM found that 'an estimated 40,600 structures were destroyed between August 2017 and April 2019, with over 200 [Rohingya] settlements almost completely wiped out'. The Union Enterprise for Humanitarian Assistance, Resettlement and Development (UEHRD), chaired by Aung San Suu Kyi, was previously found by the UNFMM to have been responsible for overseeing 'the bulldozing of burned Rohingya villages, which is likely to have destroyed criminal evidence.'⁴⁶

In the judgment in the *Krstić* case at the International Criminal Tribunal for the former Yugoslavia (ICTY), the Trial Chamber held that, '...there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.'⁴⁷

As such, evidence of attacks on mosques and other cultural and religious property belonging to Rohingya communities should be preserved alongside mass grave sites, burned villages, and other evidence of atrocity crimes.

Also on 8 April 2020, the President's Office issued a second directive on 'Preservation of evidence and property in areas of northern Rakhine State'. This order prohibits government staff from 'destroying, or removing, or permitting the destruction, or removal of...anything that may provide evidence of' the enumerated acts under Article II of the Genocide Convention.⁴⁸

Like the first, this second directive was also issued more than ten weeks after the ICJ's order of 23 January. It thus appears to be window dressing rather than a concerted effort to implement the order to preserve evidence.

During the government's carefully controlled and orchestrated trip to northern Rakhine State for members of the international and national media at the end of January - after the ICJ's order to preserve evidence - journalists were allowed to enter a mosque ransacked and damaged by fire near Padin village in Maungdaw Township. According to reports, the village was once home to around 5,000 people, but only 200 remain. That particular mosque as well as other damaged and destroyed religious and cultural property belonging to Rohingya communities should in fact have been carefully sealed off as part of genuine efforts to preserve evidence in accordance with the provisional measures order.⁴⁹ It is possible that other evidence sites have been disturbed or destroyed since the ICJ's provisional measures order of 23 January, but the mobile internet blackout has made it difficult to monitor the situation.

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

'The Republic of the Union of Myanmar shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court.'⁵⁰

Initial media reports suggest that the government has complied and submitted a report.⁵¹ Although Myanmar is under no obligation to make the report public, doing so would allow for greater scrutiny as well as accountability to the international community and Rohingya survivors themselves.

The Directives issued by the President's Office more than ten weeks after the ICJ's provisional measures order should be regarded as nothing more than window-dressing efforts. Both the government and the military have failed to take the necessary concrete steps to implement the provisional measures. Rohingya in Myanmar continue to be confined to an open-air prison, denied freedom of movement, access to basic healthcare, and their very right to exist as Rohingya. Living with the daily prospect of being killed, maimed, burned out of their homes or subjected to renewed sexual violence, the Rohingya community remains at serious risk of genocidal acts.

Recommendations to the international community

1. Publicly support the referral of the situation in Myanmar to the International Criminal Court and use all available means to push the UN Security Council (UNSC) to make such a referral without further delay.
2. Provide support – including legal, financial, technical – to the Gambia. In particular, States parties to the Genocide Convention who have not made reservations under Article 8 should consider becoming a party to the dispute.
3. Exercise universal and other forms of jurisdiction to investigate any individual – irrespective of position or rank – who may be responsible for committing genocide and/ or other crimes under international law. Ensure such individuals are brought to justice in fair trials.
4. Use all means at your disposal to pressure the civilian and military authorities in Myanmar to end all human rights violations in the context of military operations in Rakhine State and elsewhere in the country, and to ensure that those responsible for such violations are held to account.
5. Continue concerted efforts to advocate with the Myanmar authorities for the immediate lifting of the mobile internet ban in Rakhine State and Chin States.
6. Withdraw funding and support for the NVC process in Myanmar and instead make concerted, coordinated efforts to exert pressure on the government to reform the 1982 Citizenship Law to bring it into line with international human rights standards.
7. Hold wide-ranging, meaningful and transparent consultations with all displaced Rohingya communities on their needs, priorities, and the necessary conditions for their voluntary return in safety and dignity to their places of origin in Rakhine State.
8. Urge the Myanmar authorities to grant full, unfettered, and sustained humanitarian access to Rakhine and Chin States, to assist displaced people and vulnerable populations.
9. Call on the Myanmar authorities to full and unfettered access to independent journalists and human rights monitors to Rakhine and Chin States.
10. Use all available means to ensure that Myanmar's report to the ICJ is made public, and hold public hearings at the UNSC to evaluate Myanmar's compliance with provisional measures.

Endnotes

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- 14 Physicians for Human Rights, Open letter from PHR to the Government of Myanmar to Protect Ethnic Minorities from COVID-19 (12 May 2020) available at <https://phr.org/our-work/resources/open-letter-from-phr-to-the-government-of-myanmar-to-protect-ethnic-minorities-from-covid-19/?fbclid=IwAR1_IljgYg7zf5YnjI5XVe_mfkCav_kN2Gs79CbH8UwdHip7Rr_uYnNEW6g> accessed 22 May 2020.
- 15 The legal basis for this is the broad wording of Section 77 of the 2013 Telecommunications Act. The order was imposed for three months, but as of 3 May it appears that mobile internet access has only been restored in Maungdaw Township. See UN Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (4 March 2020) UN Doc A/HRC/43/59 ¶45 and Kyaw Lin Htoon, IDPs being left behind in the response to COVID-19, say relief workers, Frontier Myanmar (11 May 2020) available at <<https://frontiermyanmar.net/en/idps-being-left-behind-in-the-response-to-covid-19-say-relief-workers>> accessed 22 May 2020.
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19 The Gambia v. Myanmar (nii) 25 ¶86.

20 President Directive No.1/2020 (nxvii).

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About Burmese Rohingya Organisation of the UK

The Burmese Rohingya Organisation of the UK (BROUK) is headquartered in London and was founded in 2005. The organisation works to highlight the plight of the Rohingya internationally and to support the Rohingya community through a number of initiatives, including by promoting and carrying out research activities on relevant topics, monitoring the human rights situation in Myanmar through an extensive network of contacts, and highlighting ongoing violations against Rohingya through international media and high-level advocacy.

BROUK provides a vital voice for the Rohingya people through its work with the community inside Myanmar, as well as the wider diaspora. The organisation is furthermore committed to training the next generation of Rohingya activists through interaction and capacity building with Rohingya youth groups.

BROUK works to ensure justice for the ongoing genocide against the Rohingya people in Myanmar by advocating for international accountability. In November 2019, BROUK filed a petition in Argentina for a universal jurisdiction case against Myanmar military and civilian leadership for crimes against humanity and genocide against the Rohingya. This is the first universal jurisdiction case regarding the Rohingya genocide anywhere in the world.

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