



## International Inaction over Myanmar's Noncompliance with ICJ Provisional Measures

### Executive Summary

The key to preventing history from repeating itself is ensuring justice and accountability for the gross human rights violations amounting to atrocity crimes perpetrated against the Rohingya in Myanmar. The International Court of Justice's recognition of their identity and right to exist as a protected group in the preliminary hearings in *The Gambia v. Myanmar* genocide case was a first step towards justice for the Rohingya. On 23 January 2020, the ICJ issued a relatively rare unanimous order on provisional measures - the equivalent of a legal injunction or court order prior to a final ruling on the case. The Court described the Rohingya remaining in Myanmar as 'extremely vulnerable' and ordered Myanmar to 'take all measures within its power' to prevent irreparable harm against the Rohingya.

Instead, Myanmar has repeatedly refused to repeal the 1982 Citizenship Law or restore full citizenship to members of the Rohingya group. The government of Myanmar disenfranchised the vast majority of Rohingya in the November 2020 elections and denied their right to participate in public affairs. Myanmar has thereby continued to deny the existence of the Rohingya and to subject them to exclusionary laws, policies, and practices, putting them at risk of further genocidal acts.

BROUK has painstakingly documented human rights violations – in many cases amounting to atrocity crimes - perpetrated against the Rohingya by the government and military since 23 January 2020. These include killings as well as systemic violations of the right to freedom of movement and restrictions on access to livelihoods and healthcare for Rohingya, which constitute imposing conditions of life intended to bring about the destruction of the group, in whole or in part. BROUK's analysis demonstrates that genocidal acts continue to be commissioned and perpetrated against the Rohingya, with intent to destroy the group in whole or in part. Myanmar's abject failure to comply with the ICJ's provisional measures calls into question their effectiveness, given their protective function. Urgent action is needed by the International Court of Justice and the international community to strengthen the measures, prevent further suffering and loss of life for the Rohingya, and to take concrete steps towards justice and accountability for the atrocity crimes they have faced.

### Introduction

This second briefing follows BROUK's first biannual report published in May, on Myanmar's compliance with the provisional measures ordered by the International Court of Justice in the *Gambia's* genocide case against Myanmar. Both reports coincide with Myanmar's own reporting on its compliance to the Court, which to date has not been made public. The information compiled in this report is based on primary data collected and verified by BROUK in October and November 2020, as well as secondary sources from other human rights organisations and reputable news outlets. With this briefing, BROUK aims to bring the world's attention to the dire situation on the ground in Rakhine State affecting the estimated 600,000 Rohingya remaining there and the urgent need for increased legal protection of the Rohingya.

### Background to the *Gambia v. Myanmar* genocide case at the ICJ

In 2016 and 2017, BROUK and many other human rights organisations documented gross human rights violations perpetrated by the Myanmar military (known as the Tatmadaw) and its proxies during 'clearance operations' in Myanmar's Rakhine State, resulting in significant loss of life among the Rohingya. These included mass rape of Rohingya women, children burned alive, machete attacks, shooting at fleeing villagers, the use of rocket launchers to raze entire Rohingya villages to the ground, coordinated massacres, as well as landmines laid at the border to target those fleeing the violence.<sup>1</sup>

In March 2017, the UN-backed Independent International Fact-Finding Mission on Myanmar (IFFM) was established by the Human Rights Council with a mandate 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.'<sup>2</sup> It published two seminal reports of its detailed findings in 2018 and 2019.<sup>3</sup>

The IFFM found that Myanmar had committed four out of the five underlying acts of genocide enumerated in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), namely killings members of the Rohingya group, causing

serious bodily or mental harm to members of the group, deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part, and imposing measures intended to prevent births within the group.<sup>4</sup> It further concluded that genocidal intent to destroy the Rohingya people in whole or in part could be inferred from the State's pattern of conduct.<sup>5</sup> According to the FFM,

The Tatmadaw and other security forces (often in concert with civilians) intentionally and unlawfully killed Rohingya men, women and children throughout the period under review, that is, since 2011, but particularly since 25 August 2017. **These deaths were a direct or indirect result of the severe and systemic oppressive measures imposed on the Rohingya and the "clearance operations" in 2016 and 2017 in which they culminated** [emphasis added].<sup>6</sup>

Against this background, on 11 November 2019 the Gambia filed a case against Myanmar at the International Court of Justice (ICJ) alleging that Myanmar has committed genocide against the Rohingya people. 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: killing members of the group, including through mass executions of men and boys, the deliberate targeting of children and infants, and the burning down of entire villages, often with women and children trapped inside their homes; causing serious bodily or mental harm to members of the group by committing sexual violence against Rohingya women and girls on a massive scale and subjecting men, women and children to torture and other forms of cruel treatment on the sole basis of their identity as Rohingya; and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part by destroying or otherwise denying access to food, shelter and other essentials of life.<sup>7</sup>

The Gambia noted that elements of Myanmar's persecution of the Rohingya are 'particularly indicative of genocidal intent': namely, its systematic denial of legal rights to the Rohingya and its support for pervasive hate campaigns

designed to achieve the collective demonisation and dehumanisation of the Rohingya.<sup>8</sup>

The ICJ is the principal judicial organ of the United Nations, otherwise known as the World Court. It deals with disputes between States, not the individual criminal responsibility of particular perpetrators. Disputes between States relating to the Genocide Convention are rare. In 2007, the ICJ ruled that a genocide took place in Srebrenica in the *Bosnia v. Serbia* case. However, it found that Serbia violated its duty to prevent and punish this genocide, rather than holding it responsible for committing genocide or complicity in genocide.<sup>9</sup>

The Gambia's case against Myanmar marks the first time that a State without a direct connection to the alleged crime of genocide has brought a case before the ICJ under the Genocide Convention.<sup>10</sup> In doing so, the Gambia has emphasised the importance of the legal concept of *erga omnes* – an obligation owed to everyone. Due to the gravity of the crime of genocide and the fundamental nature of the duty to prevent and punish it, Myanmar has an obligation to the international community as a whole.<sup>11</sup> The Gambia's right to bring the case despite not suffering particular harm was upheld by the ICJ in its provisional measures order, on the basis of the *erga omnes* nature of the obligations relating to genocide.

### 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 to fulfil its obligations under international law prior to a final ruling on the case.<sup>12</sup> As part of its case filing, the Gambia included an urgent request for the Court to order provisional measures in light of 'the ongoing, severe and irreparable harm being suffered by members of the Rohingya group.'<sup>13</sup>

On 23 January 2020, the ICJ issued a relatively rare unanimous order on provisional measures. The Court described the Rohingya remaining in Myanmar as 'extremely vulnerable'. 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.<sup>14</sup> 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** [emphasis added] under the Genocide Convention.'<sup>15</sup> In short, the provisional measures order recognises that Myanmar's actions prior to the order were wholly inadequate to protect the Rohingya. It creates an expectation that Myanmar must take concrete measures in order to meet its obligations under the Genocide Convention.<sup>16</sup>

At the heart of this case there are two key legal issues. The first is whether Myanmar has already committed genocide

against the Rohingya. The second is whether genocidal acts continue to take place, with genocidal intent.<sup>17</sup> Without prejudging the merits of the case - i.e. whether or not genocide has already taken place - the World Court ordered Myanmar to 'take all measures within its power' to prevent irreparable harm against the Rohingya. Critically assessing Myanmar's compliance with the order is therefore of the utmost importance. 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.<sup>18</sup> Under the UN Charter, which includes the Statute of the Court, all member States must comply with ICJ decisions.<sup>19</sup>

In the *Bosnia v. Serbia* case, the court ordered similar provisional measures in 1993, but without the reporting requirement. The genocide at Srebrenica took place two years after those provisional measures were ordered, which called into question the effectiveness of their protective function.<sup>20</sup> The regular reporting requirement in *The Gambia v. Myanmar* case is a significant step forward in a legal process that may take many years. However, at present Myanmar is not required to make the reports public (although the Gambia may comment on the reports). This makes it impossible for parties outside of the legal process to scrutinise Myanmar's particular claims regarding its compliance with the provisional measures. For Rohingya survivors this lack of transparency is yet another injustice. As BROUK's President Tun Khin has emphasised, 'Rohingya should not be kept in the dark about our own fate.'<sup>21</sup>

## Latest developments in the ICJ case

Myanmar submitted its first report on its compliance with the provisional measures ordered by the ICJ by the 23 May 2020 deadline.<sup>22</sup> It chose not to make the report public, and is not obliged to do so under the current terms of the provisional measures. Its second report is due by 23 November 2020, followed by the third on 23 May 2021, and every six months thereafter until the case concludes.

In February, the Maldives announced its intention to intervene in the case, followed by Canada and the Netherlands in September. In a joint statement, Canada and the Netherlands welcomed the 'laudable step' taken by the Gambia in bringing the case before the World Court and noted that they 'consider it our obligation to support these efforts which are of concern to all of humanity.' Canada and the Netherlands stated their intention to focus on crimes related to sexual and gender-based violence, including rape.<sup>23</sup>

On 23 October 2020, the Gambia filed its 500-page Memorial at the ICJ setting out detailed evidence to support its legal arguments in the case. Myanmar has until the 23 July 2021 to file a Counter-Memorial.<sup>24</sup>

Neither document is likely to be made publicly available for some time, possibly not until the case has concluded.<sup>25</sup> If Myanmar decides to file a preliminary objection to the case, it must do as soon as possible and by 23 January 2021 at the latest. If so, the proceedings on the merits of the case will be suspended until the preliminary objection has been heard by the Court.<sup>26</sup>

## Justice for Rohingya

In light of the fact that Myanmar officials continue to deny the existence of the Rohingya, the Court's recognition of their identity and right to exist as a protected group was 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. 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

Under the Genocide Convention, Myanmar has an obligation to enact legislation to give effect to the provisions of the Convention. In particular, this requires providing penalties under the law for persons guilty of genocide or any of the other acts enumerated under article III of the Convention - whether they are State actors or private individuals - and to punish them according to the law.<sup>27</sup> However, domestic law in Myanmar does not incorporate genocide or other crimes under international law. There has been no progress in reforming the law to grant domestic courts jurisdiction over international crimes.<sup>28</sup> Moreover, the legal system enshrines impunity for perpetrators of human rights violations, particularly the Tatmadaw. The 2008 Constitution, 1959 Defence Services Act and Law No. 25/2016 Presidential Security Act 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 the opaque court martial system, which is beyond civilian oversight. National courts have no jurisdiction over the military.<sup>29</sup> Despite this reality, Aung San Suu Kyi in her capacity as Agent during the ICJ proceedings in December 2019 asserted that, 'ongoing criminal justice processes in Myanmar... must be allowed to run their course.'<sup>30</sup>

On 30 June 2020, the Tatmadaw announced that a court-martial established in November the previous year had convicted two officers and a soldier for 'weakness in following instructions' at Gu Dar Pyin in Buthidaung in 2017, where a massacre took place. Their punishment was not disclosed. In September 2020, the Tatmadaw announced that enquiries it had conducted into killings that took place in Maung Nu and Chut Pyin villages in

northern Rakhine State would result in a court-martial, expected to begin before the end of the year.<sup>31</sup> As recently emphasised by the UN High Commissioner for Human Rights Michelle Bachelet, '[s]ecrecy and lack of independence characterize all Tatmadaw-run processes, making court-martial proceedings inadequate to render justice for crimes committed by military personnel against civilians.'<sup>32</sup> 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 Commander-in-Chief of the military Senior-General Min Aung Hlaing 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.

Aung San Suu Kyi placed particular emphasis on the work of the government-established Independent Commission of Enquiry (ICOE) in her statement to the Court on 11 December. 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.<sup>33</sup> The ICOE's full report has never been publicly released. In its Executive Summary, 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.'<sup>34</sup> Aung San Suu Kyi and Myanmar's legal team studiously ignored the allegations of 'mass gang rape, involving multiple perpetrators and multiple victims in the same incident' put forward by the Gambia based on the evidence collected by the FFM. The use of rape and sexual violence as an act of genocide committed with genocidal intent is well-established in international law following the landmark judgment in the Akayesu case at the International Criminal Tribunal of Rwanda (ICTR).<sup>35</sup> Evidence of such acts will likely play a pivotal role in future legal proceedings.

The Myanmar military recently broke with its long-established pattern of denials of sexual violence perpetrated by its soldiers against ethnic and religious minority women. After months of denials, Major General Zaw Min Tun, chair of the Tatmadaw's True News agency, admitted that three of its soldiers raped an ethnic Rakhine woman during a clearance operation that took place in Rathedaung township on 30 June. The public statement issued by the Tatmadaw stated that the perpetrators would face a court-martial but did not name the perpetrators, instead publicly naming the victim.<sup>36</sup> Such actions demonstrate the callous disregard for survivors of sexual violence and underscore the impossibility of justice and accountability within Myanmar.

The key to preventing history from repeating itself is ensuring accountability for the gross human rights violations amounting to atrocity crimes perpetrated against the Rohingya in Myanmar. To that end BROUK has consistently called for justice and accountability through international legal mechanisms, due to the persistent

lack of accountability via the domestic legal system. In November 2019, BROUK petitioned courts in Argentina to open a case against Myanmar's civilian and military leaders for genocide and crimes against humanity under the legal principle of universal jurisdiction. Universal jurisdiction allows States to prosecute serious international crimes committed by any person anywhere in the world in their domestic courts, based on the principle that such crimes are heinous and can be regarded as an attack on the international legal order.<sup>37</sup>

That same month, the International Criminal Court (ICC) began a formal investigation into the crimes against humanity of persecution, other inhumane acts, and deportation or forcible transfer of population, with reference to the mass exodus of Rohingya from Rakhine State to Bangladesh. Since Myanmar is not a State Party to the Rome Statute of the ICC, the ICC investigation only covers crimes against Rohingya that took place, at least in part, on Bangladeshi territory, which is a State Party.<sup>38</sup> A case in Argentina would be able to investigate to the full range of crimes committed against the Rohingya in Rakhine State, including torture, enforced disappearances, murders, rapes and other inhumane acts. In petitioning courts in Argentina to open such a case, BROUK's actions are in line with a key recommendation of the FFM, which urged UN Member States to bring universal jurisdiction cases in their domestic courts 'to investigate and prosecute alleged perpetrators of serious crimes under international law committed in Myanmar.'<sup>39</sup>

## Conditions in Rakhine State since 23 May 2020

Armed conflict between the Tatmadaw and the Arakan Army has continued to escalate in Rakhine State and Paletwa in southern Chin State. According to the UN Special Rapporteur on the human rights situation in Myanmar, since May 2020, an average of 30 civilians are reported to have been killed or injured every month in the armed conflict in Rakhine State. Overall, more than 500 civilians have been either killed or injured since the beginning of 2020, including ethnic Rakhine, Rohingya, Chin and others, as a result of shelling, airstrikes, heavy artillery and small-arms fire, and landmines.<sup>40</sup> The Tatmadaw ignored the call of the UN Secretary-General for a global ceasefire in light of the COVID-19 pandemic, instead launching further 'clearance operations' beginning 26 June in Rathedaung township in Northern Rakhine State, displacing around 10,000 mostly ethnic Rakhine civilians.<sup>41</sup>

In 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. In August the government partially lifted the ban but reduced internet speeds to 2G, which has the same effect of making mobile internet access virtually impossible.<sup>42</sup> This makes

it very difficult to monitor the situation on the ground in Rakhine State. It also makes it very challenging to disseminate accurate public health information related to the COVID-19 pandemic.

Myanmar's second wave of COVID-19 took hold in both Yangon and Rakhine State, prompting renewed hate speech and scapegoating of the Rohingya population. A racist cartoon by the Voice newspaper depicted a Rohingya as an 'illegal Bengali' crossing the border and bringing COVID-19 with him.<sup>43</sup> This coincided with hate speech against the Rohingya in the run up to the national elections, including anti-Rohingya slogans adopted by political candidates.<sup>44</sup>

Despite being arbitrarily stripped of citizenship by the 1982 Citizenship Law, effectively rendering them stateless in their own homeland, Rohingya were able to exercise their right to vote in the 1990 elections and elected four Rohingya members of parliament. In the 2010 elections, Rohingya were issued with Temporary Registration Cards or 'White Cards', which although did not grant citizenship did entitle the bearers to vote, and three Rohingya members of parliament were subsequently elected. However, in 2015 the government began to limit the right to vote and stand in elections to those recognised as citizens under the highly discriminatory 1982 law.<sup>45</sup> State Counsellor Aung San Suu Kyi maintained the 2015 ban on Rohingya voting in the 2020 election, and the Union Election Commission (UEC), appointed by her government, continued the policy of barring Rohingya parties and candidates from standing in the election.<sup>46</sup> The UEC also cancelled the elections in large swathes of ethnic minority areas including most of Rakhine State, disenfranchising the vast majority of ethnic Rakhine voters. Suu Kyi's National League for Democracy party won a landslide victory in the 8 November elections, securing over 80 percent of available parliamentary seats.

## Myanmar's failure to comply with the ICJ provisional measures order

Against this backdrop, Myanmar must comply with the ICJ provisional measures order to protect the Rohingya from acts of genocide and submit its second report on the steps it has taken to comply by 23 November.

In its September 2019 report, the FFM found that the eight common risk factors for atrocity crimes and two specific risk factors for genocide set out by the UN Office on Genocide Prevention and the Responsibility to Protect were all present in Myanmar.<sup>47</sup> The two specific risk factors for genocide are 'intergroup tensions or patterns of discrimination against protected groups' and 'signs of an intent to destroy in whole or in part a protected group'. The following indicators of these two risk factors are particularly relevant in the current context:

1. History of atrocity crimes committed with impunity against protected groups.
2. Past or present serious tensions... with the State,

with regards to access to rights and resources... participation in decision making processes... expressions of group identity or to perceptions about the targeted group.

3. Denial of the existence of protected groups or of recognition of elements of their identity.
4. Past or present serious discriminatory, segregational, restrictive or exclusionary practices, policies or legislation against protected groups.
5. Targeted physical elimination, rapid or gradual, of members of a protected group, including only selected parts of it, which could bring about the destruction of the group.
6. Widespread or systematic discriminatory or targeted practices or violence against the lives, freedom or physical and moral integrity of a protected group, even if not yet reaching the level of elimination.
7. Attacks against or destruction of homes, farms, businesses or other livelihoods of a protected group and/or of their cultural or religious symbols and property.<sup>48</sup>

In the current context of Myanmar, genocidal acts have already been perpetrated against the Rohingya with total impunity in the 'clearance operations' of 2016 and 2017. The first genocidal risk indicator is thus clearly present. With regard to the second and third risk indicators, Myanmar has systematically stripped the Rohingya of citizenship over many years and denied their right to a group identity as Rohingya. As the Special Rapporteur on the human rights situation in Myanmar has highlighted, 'the denial of citizenship is historically a common feature in the commission of the crime of genocide.'<sup>49</sup> Myanmar has repeatedly refused to repeal the 1982 Citizenship Law or restore full citizenship to members of the Rohingya group. Myanmar's disenfranchisement of the vast majority of Rohingya in both the 2015 and November 2020 elections and denial of their right to participate in public affairs as political candidates is an equally clear example of the genocidal risk indicator of 'exclusionary practices, policies or legislation against protected groups'. As emphasised by the United States Holocaust Memorial Museum, genocide risk indicators 2-4:

[D]emonstrate the Myanmar government's intent to deny the existence of the Rohingya people, as a group, in Myanmar and are used by the government to suggest that there are no Rohingya who lawfully reside in Myanmar or who have demographic roots in the country. This not only tangibly harms the Rohingya, but it also encourages the rest of Myanmar society to view the Rohingya as an alien and threatening presence in their country. The denial of citizenship heightens the vulnerability of the Rohingya, rendering them more susceptible to other human rights violations and

escalating violence at the hands of the military and other non-Rohingya civilians....Due to Myanmar's failure to take concrete steps to mitigate these risk factors, the Rohingya remain at serious risk of genocide reoccurring.<sup>50</sup>

In April 2020 the Office of the President in Myanmar issued three directives, ostensibly to comply with 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.'<sup>51</sup> As noted by the UN High Commissioner for Human Rights, 'No information is available on follow-up actions by the authorities to disseminate and raise awareness of the content of these directives among officials and government agencies of all levels.'<sup>52</sup>

BROUK and other human rights organisations have painstakingly documented human rights violations – in many cases amounting to atrocity crimes - perpetrated against the Rohingya by the government and military since 23 January 2020. This is extremely challenging due to restricted internet access imposed by the government in Rakhine State, and therefore represents a small fraction rather than a comprehensive account of violations that have taken place within that timeframe. Compliance with each of the ICJ's provisional measures will be analysed below, in light of these acts and omissions by State actors and of the other indicators of genocidal risk factors highlighted above.

### **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.<sup>53</sup>

The April 2020 President's Office directive on 'Compliance with the Convention on the Prevention and Punishment of the Crime of Genocide' is addressed to all State actors and

'local people' with the stated 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 President's Office through his or her superiors, and orders each Ministry and State and Region government to provide a quarterly report on 'relevant developments' to the President's Office.<sup>54</sup> Any such reports have not been made publicly available.

In its provisional measures order, the ICJ reiterated 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.'<sup>55</sup>

BROUK has documented killings of Rohingya that have taken place since the 23 January provisional measures order. As previously reported in May, a Rohingya teenage boy was killed by shelling when a Myanmar naval vessel fired on his village of Taung Bwe in Kyauktaw township during a clash between the Myanmar armed forces and the Arakan Army in February. Several others were injured, including two teenage girls. A 16 year-old boy and his father found a landmine while farming near their village of Khaung Dote (Rohingya name Allay Gyunt) in Kyauktaw in May. Without knowledge or understanding of the risks, they took it home where it exploded, killing them both.<sup>56</sup>

Fierce fighting has taken place in Mrauk Oo township and led to the deaths of an unknown number of Rohingya civilians. BROUK has documented several human rights violations that amount to atrocity crimes in one village alone, which took place in February. Six Rohingya villagers, including a 7-year-old boy, were killed by shelling during a clash between the Tatmadaw and the Arakan Army on around 8 February. The Tatmadaw took up positions next to Rohingya homes, effectively using the Rohingya as human shields during the fighting. On 28 and 29 February five Rohingya men and a 14-year-old boy were taken from their homes in the village and arbitrarily detained by the Tatmadaw. Their relatives do not know where they were taken or if they are still alive. BROUK is gravely concerned that the detainees may have either been killed by the Tatmadaw or imprisoned and subjected to hard labour, which may also result in their deaths. Another 18-year-old man was killed in the crossfire between the Tatmadaw and the Arakan Army in the same village on 29 February.<sup>57</sup>

Rohingya civilians find themselves in an impossible situation in the conflict. In early February in another village in Mrauk Oo, two Rohingya farmers who were having lunch at their rice paddy store were forced to direct a column of Tatmadaw soldiers to the road. Sometime afterwards, the Arakan Army arrived and abducted the Rohingya farmers. The next day they were found dead in a river, with their hands tied behind their backs. In late February, a 19-year-old man from a different village in the Mrauk Oo area was forcibly constricted by the Tatmadaw

to act as a human shield. He was forced to walk ahead of a military column as a guide when he stepped on a landmine and was killed. His dead body was found on 29 February. In Minbya township, a 16-year-old boy, his father and another man were caught in a landmine explosion in the forest near their villages in March. The two older men were killed instantly. Villagers brought the boy to hospital, but he died the following day.<sup>58</sup>

In Buthidaung township, two Rohingya children were killed in early October when they were forcibly taken by the Tatmadaw to act as human shields. They were part of a group of around fifteen Rohingya villagers forcibly conscripted by the Tatmadaw to guide soldiers through terrain believed to have been mined by the Arakan Army. The two children were reportedly killed when the Arakan Army ambushed the column of soldiers.<sup>59</sup>

BROUK has also documented unlawful killings of Rohingya by the Tatmadaw and Border Guard Police outside of active conflict zones. A strict curfew is enforced throughout Rakhine State and there are Tatmadaw soldiers, Border Guard Police and riot police stationed at multiple checkpoints at the entrances to Rohingya villages and throughout detention camps, where Rohingya internally-displaced persons (IDPs) have been confined since the State-orchestrated violence of 2012. In early August, one Rohingya man was accosted as he was returning from work and beaten to death by a group of ethnic Rakhine civilians and riot police in Dwa Myaung village in Sittwe. A few days later, two Rohingya men were shot on sight by riot police from unit no. 36 in the same village. One man was killed instantly while the other was shot in the head and survived, but lost an eye. In early October, three Rohingya men were shot dead on sight by the Tatmadaw in Minbya. They were rowing their boat in a creek near Myo Ma market when they were killed by soldiers on the bridge above them.<sup>60</sup>

In addition to a continued pattern of killings, systemic violations of the right to freedom of movement and restrictions on access to livelihoods and healthcare for Rohingya trapped in their villages and internment camps in Rakhine State are ongoing. For the past eight years until today the continued confinement of around 126,000 Rohingya in such camps under apartheid conditions is causing irreparable harm to those communities. Such denials and restrictions constitute imposing conditions of life intended to bring about the destruction of the Rohingya, in whole or in part.

In Sittwe, heavily guarded security checkpoints and barbed wire barriers block the entrances to Muslim quarters such as Bumay and Aung Mingalar in the downtown area. In the internment camps, there are checkpoints throughout. IDPs told BROUK that permission to leave is virtually impossible to obtain. IDPs face interrogation if they request permission to leave the camp, which is intended to humiliate and undermine them. As a result, some find ways to secretly leave the camp to purchase essential food items or medicines, but if they are caught at one of the

checkpoints they face either a ruthless beating or extortion. The current rate for extortion is 20,000 – 75,000 MMK (up to almost US\$60).<sup>61</sup> IDPs told BROUK that these restrictions are having a severe impact, particularly in the current context of the COVID-19 pandemic in Sittwe. 'It is incredibly complicated and difficult for us in the camp during the lockdown. We are struggling to survive and we are sick of tolerating starvation.'

In the Kyauktaw area, Rohingya are confined either to their villages or within internment camps. They are denied access to livelihoods on their own land. A Rohingya from the area reported to BROUK, 'Since we are not allowed to go out and work we face food shortages. We need to borrow food from others and share it. Some of us borrow money from villagers who have family members abroad. Then we work for those villagers to pay off the debt.' Rohingya in the Kyauktaw area are also denied access to medical care. They reported that there is no health clinic nearby where they can access medication. Rohingya and other Muslims are banned from accessing township centres, including the hospital in Kyauktaw. For serious cases the only option is Sittwe General Hospital, but families require various travel permissions including Village Departure Certificates and Form 4s, which are difficult and costly to obtain. They also have to pay extortionate sums for security escorts and transportation.<sup>62</sup>

Rohingya from Nay Pu Kan (known to Rohingya as Ma Negga Fara) village in Kyauktaw township were driven out of their village by Rakhine mobs, the police and Tatmadaw in June 2012. Rakhine people seized the property of Rohingya, including their cattle, and destroyed their homes. The Rohingya were forcibly relocated to the detention camp at Nidin and in Wa Kin village. In 2020 the Rakhine State authorities – including the Ministry of Social Welfare, Relief and Resettlement, Ministry of Security and Border Affairs and the Union Enterprise for Humanitarian Assistance, Resettlement and Development (UEHRD)- constructed a reception camp in Nay Pu Kan and resettled Rakhine IDPs who had fled armed clashes between the Tatmadaw and the Arakan Army there, on land belonging to the Rohingya.

The unbearable conditions of life imposed on the Rohingya in Rakhine State are made worse by severely restricted and unpredictable humanitarian access. Myanmar's highly bureaucratic travel authorization processes for aid workers continue to disrupt critical humanitarian activities. In May, additional levels of control were added, including the required case-by-case agreement of the Tatmadaw Western Command.<sup>63</sup>

Rohingya continue to flee the appalling conditions imposed on them in Rakhine State. Since 23 January 2020, dozens of Rohingya who have tried to flee have been arrested, detained, and put on trial. They are effectively criminalised for travelling without the identity documents which the State itself has denied them. Cases 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.<sup>64</sup>

A Presidential order issued in April 2020 – but not released publicly – to the Ministry of Labour, Immigration and Population, instructed the release of ‘Bengali’ prisoners, to drop charges against them, and to avoid bringing further charges against them.<sup>65</sup> BROUK has documented the cases of two teenage Rohingya boys from a village in Kyauktaw who were arrested in June 2019 and only released on 15 February 2020 after being coerced to accept the National Verification Card (NVC). Several other documented cases on file with BROUK follow a similar pattern. Most recently, two teenage Rohingya girls and a 27-year-old Rohingya man fled one of the internment camps in Kyauktaw and were arrested on 28 October. They were released on 5 November on condition of accepting the NVC card. A 25-year-old man from a village in Kyauktaw under tight restrictions was arrested on 5 October and is currently detained. He is due to appear at the township court in Sittwe.<sup>66</sup> Arbitrary arrests of Rohingya who attempt to flee the brutal conditions of life imposed upon them are therefore continuing in spite of the Presidential Order.

Within the NVC process Rohingya are denied the right to their own identity and are instead forced to record ‘Bengali’ and accept the designation of ‘foreigner’. Although this is not denoted on the NVC itself, it is recorded on the documentation held by the Immigration office. Local Rohingya from the Kyauktaw area report that Rohingya elders face pressure to convince their communities to accept the NVC. Although the government promised the Rohingya that holding an NVC would guarantee rights such as freedom of movement and access to livelihoods such as fishing, this is untrue. NVC holders continue to report restrictions on their freedom of movement, access to livelihoods and healthcare. The NVC process does not offer a path to full citizenship, in spite of government claims to the contrary.

### **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].’

The President’s third 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.’

The FFM’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. 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 during the preliminary measures hearings.<sup>67</sup> The UN High Commissioner for Human Rights report recently emphasised that Tatmadaw propaganda pages containing racist language and hatred remain online on Facebook.<sup>68</sup> Moreover, individuals who engaged in hate speech and vitriol aimed at the Rohingya during the recent election campaign faced no legal consequences, in spite of the President’s directive.<sup>69</sup>

### **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.’

The President’s second directive 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.’

In its September 2019 report, the FFM 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 UEHRD, chaired by Aung San Suu Kyi, was previously found by the FFM to have been responsible for overseeing ‘the bulldozing of burned Rohingya villages, which is likely to have destroyed criminal evidence.’<sup>70</sup>

An investigative report published by Reuters in September 2020 included satellite images showing that construction in Rohingya villages razed during the 2016 and 2017 ‘clearance operations’ has continued to expand over the past year, particularly in the area around Maungdaw. It is thus likely that criminal evidence continues to be destroyed, even since the 23 January provisional measures order.<sup>71</sup>

### **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.’

Myanmar is expected to comply with this provisional measure, following the submission of its first report in May. However, it is highly unlikely the government will make any of its reports public unless it is legally-bound to do so.

## Analysis

Myanmar's continued refusal to grant citizenship to the Rohingya, disenfranchisement of the Rohingya and denial of their right to participate in public affairs during the 2020 elections all demonstrate that it has failed to comply with the ICJ's order to 'take all measures within its power' to prevent irreparable harm to the Rohingya as a protected group.

BROUK further believes that Myanmar has categorically failed to comply with provisional measure 1, the order to take all measures within its power to prevent the commission of genocidal acts. The ongoing violations documented by BROUK match the risk factors for genocide, namely 'patterns of discrimination against protected groups' and 'signs of an intent to destroy in whole or in part a protected group'. More specifically, they are clear examples of the indicators for these two risk factors.

Firstly, the killings are an example of 'targeted physical elimination, rapid or gradual, of members of a protected group'. Secondly, the confinement of Rohingya in their villages or internment camps and the continued denial of access to livelihoods and healthcare is an example of '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'.

The genocidal act of 'deliberately inflicting conditions of life on the group intended to bring about its physical destruction' is sometimes referred to as 'slow death.' This act 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. They include subjecting the group to a subsistence diet, failing to provide adequate medical care, systematically expelling members of the group from their homes, or subjecting members of the group to excessive work or physical exertion.<sup>72</sup>

In 2018, the FFM found that Myanmar had imposed many of the means identified in the jurisprudence of the ICTY and ICTR, stating that 'collectively these measures have eroded the ability of the Rohingya to support themselves and to survive as a community in Rakhine State. They have exposed them to destitution, immediate and long-term health risks, and preventable deaths.'<sup>73</sup> The current conditions imposed on Rohingya in Rakhine State have worsened amid the COVID-19 pandemic and escalating

conflict. The ability of the Rohingya to survive such conditions of life imposed upon them is under ever-increasing threat.

Thirdly, the confinement of Rohingya in their villages or internment camps is a clear example of 'serious discriminatory, segregational, restrictive or exclusionary practices, policies or legislation against protected groups'. The systematic stripping of citizenship from the Rohingya and coercion to accept a form of identification document that designates them as a foreign interloper are yet further examples.

Finally, the highly discriminatory 2015 Four Laws for the Protection of Race and Religion – including the Population Control 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'.

There is little to no publicly available evidence to suggest that Myanmar has complied with provisional measures 2 and 3 either, on ensuring security forces and those under its influence do not commit or incite genocide, and preserving evidence of alleged genocidal acts respectively. In fact, military propaganda pages on Facebook continue to publish material inciting hatred, and the Myanmar authorities continue to construct on Rohingya villages razed during the 2016 and 2017 clearance operations, thereby potentially destroying vital evidence of atrocity crimes.

BROUK believes that genocidal acts continue to be commissioned and perpetrated against the Rohingya group, with intent to destroy the group in whole or in part.

Myanmar's abject failure to comply with the ICJ's provisional measures calls into question their effectiveness, given their protective function. The failure of provisional measures in preventing the massacre at Srebrenica set a dangerous precedent and should compel the Court to act decisively and without delay. When the Gambia filed its request for provisional measures it emphasised that, '[t]his is an urgent situation that literally cries out for the Court's protection.'<sup>74</sup> The situation is even more urgent now.

Under the Rules of the Court, the ICJ may of its own accord either issue further provisional measures, or amend the existing order by providing more specific instructions.<sup>75</sup> This should include a requirement for public reporting, both to ensure greater transparency for survivors and those currently at risk of genocidal acts, and to ensure rigorous scrutiny of Myanmar's compliance with the measures. As emphasised by a group of scholars in August 2020, 'there is no clear legal obstacle in the Statute or the Rules to the ICJ making Myanmar's reports publicly accessible.'<sup>76</sup> Amended

or additional provisional measures should also include a requirement for policy and legislative changes as part of concrete measures that Myanmar must take to comply with the order, as set out clearly by the US Holocaust Memorial Museum.<sup>77</sup> The ICJ should also reconsider the sixth provisional measure requested by the Gambia, in an amended form – namely requiring Myanmar’s cooperation with international investigative mechanisms into alleged genocidal acts.<sup>78</sup>

## Recommendations to the International Court of Justice

- In light of the ongoing irreparable harm being suffered by members of the Rohingya group, move to either amend the existing provisional measures order or issue further provisional measures, including, 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 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 the international community

- Urge the government of Myanmar to restore full citizenship to the Rohingya as a matter of the utmost priority. Publicly withdraw support for the NVC process in Myanmar and instead make concerted, co-ordinated efforts to exert pressure on the government to repeal the 1982 Citizenship Law and 1983 Citizenship Procedures and replace them with legislation in line with Myanmar’s obligations under international human rights law.
- Ensure that the situation in Myanmar is on the

agenda at the UN Security Council and hold public hearings at the UNSC 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 consider applying to the ICJ to intervene in the case following the example set by the Maldives, Canada, and the Netherlands.
- Exert maximum pressure on Myanmar to cooperate with the International Criminal Court investigation and provide access to Rakhine State to ICC investigators.
- 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.
- 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.
- Use all available means 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.
- Call on the Myanmar authorities to full and unfettered access to independent journalists and human rights monitors to Rakhine and Chin States.
- Continue concerted efforts to advocate with the Myanmar authorities for the restoration of full mobile internet access in Chin and Rakhine States.
- 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.

## 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.

**Contact details:** +44 2082 571 143; [brorg.london@gmail.com](mailto:brorg.london@gmail.com); [www.brouk.org](http://www.brouk.org)

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60 The names and other biographical details of those killed are on file with BROUK. The name of the police commander in charge of riot police unit no. 36 is also on file with BROUK.

61 BROUK has documented the cases of four Rohingya men who were arbitrarily arrested by riot police unit no. 36 in September and November for leaving their quarter without permission, leaving a detention camp to purchase food without permission, and going outside without wearing a mask.

62 Rohingya Communities Worldwide, Joint UPR Submission 15 [44], Independent Rakhine Initiative, 'Freedom of Movement in Rakhine State' (March 2020) 125.

63 Special Rapporteur on Myanmar (1 September 2020) 15 [78].

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

65 BHRN 'Nowhere to Run' 29.

66 Biographical details of the victims on file with BROUK, including their NVC serial numbers.

67 FFM 2019 report 73 [224]. The Gambia v. Myanmar, ICJ, 'Tuesday 10 December 2019 Verbatim Record: Statement by Mr. Loewenstein' (CR 2019/18) 29 [3].

68 Report of the Office of the United Nations High Commissioner for Human Rights High Commissioner (3 September 2020) 10 [39].

69 BROUK, 'International Acceptance of Rohingya Disenfranchisement Encourages Further Abuses'.

70 FFM 2019 report 5 [5] and FFM 2018 report 409 [1619].

71 Poppy McPherson, Reuters, 'Three years after exodus, Myanmar erases names of Rohingya villages, U.N. map makers follow suit' (11 September 2020) available at <[https://www.reuters.com/article/us-myanmar-rohingya-insight/idUSKBN262058?fbclid=IwAR2e9rHYL9IDJ0T0Ac8gB3bQh2YSMjjkHx-16kCYHw\\_Coklb26njMDa3rik](https://www.reuters.com/article/us-myanmar-rohingya-insight/idUSKBN262058?fbclid=IwAR2e9rHYL9IDJ0T0Ac8gB3bQh2YSMjjkHx-16kCYHw_Coklb26njMDa3rik)> accessed 21 November 2020.

72 See 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].

73 FFM 2018 report 355 [1403].

74 The Gambia v. Myanmar, International Court of Justice 'Application Instituting Proceedings and Request for Provisional Measures' (11 November 2019) 66 [131].

75 See ICJ 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 2020 and USHMM, Report#2, 5.

76 Becker et al, *Opinio Juris*, 'Why so secret'.

77 USHMM, Report#2, 6.

78 See also Prachiti Venkatraman and Ashley Jordana, 'Myanmar's Compliance'.