The Human Cost of Failure

Burmese Rohingya Organisation UK - Briefing May 2021

Myanmar's Continued Non-compliance with International Court of Justice Provisional Measures

Executive Summary

BROUK has long maintained that 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 and other ethnic and religious minorities in Myanmar. Tragically, the world is yet again bearing witness to atrocity crimes in Myanmar. Emboldened by a culture of impunity and the international community's failure to hold it accountable for past crimes, the military has brutally cracked down on peaceful protests across the country in response to its unlawful coup d'état on 1 February 2021. At the same time systemic violations against the Rohingya in Myanmar have continued, in the context of an ongoing genocide.

For the Rohingya community, the International Court of Justice's (ICJ) provisional measures order in The Gambia v. Myanmar genocide case was a first step towards justice. 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 in a case. The Court expressed the view that 'the Rohingya in Myanmar appear to constitute a protected group' within the meaning of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[1] It 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.[2]

BROUK has painstakingly documented human rights violations – in many cases amounting to atrocity crimes - perpetrated against the Rohingya by the military and other actors since 23 January 2020. These include killings as well as systemic violations of the right to freedom of movement and restrictions on access to healthcare and livelihoods for Rohingya, which constitute imposing conditions of life intended to bring about the destruction of the group. BROUK's latest analysis demonstrates that genocidal acts continue to be perpetrated against the Rohingya, with intent to destroy the group in whole or in part.

Myanmar's continued noncompliance with the ICJ's provisional measures comes at a high human cost – the lives not only of Rohingya, but of people across the entire country. As long as the international community fails to stop the ongoing genocide against the Rohingya, Myanmar's military, the Tatmadaw, will continue perpetrating atrocity crimes against all peoples in Myanmar. It is imperative that the ICJ takes bold steps to reinforce its provisional measures and ensure robust and transparent monitoring of their implementation. For its part, the international community must pursue all available avenues for international justice and accountability for the Rohingya and all people in Myanmar.

Introduction

Since BROUK's last briefing on Myanmar's compliance with the ICJ's provisional measures published on 23 November 2020, the rapidly deteriorating situation in the country and related developments have cast doubt on Myanmar's continued engagement in the genocide case before the ICJ.

On 21 January 2021 State Counsellor Aung San Suu Kyi submitted preliminary objections to the jurisdiction of the Court and the admissibility of the Application to the ICJ in her capacity as designated agent for Myanmar. In doing so, Myanmar sought to have the case against it dismissed. The immediate effect was to suspend proceedings on the merits of the case, and the Gambia was given until 20 May 2021 to make its submission to the Court in response to Myanmar's preliminary objections.[3]

Aung San Suu Kyi's role in defending the Tatmadaw's genocidal acts against the Rohingya on the world stage was not enough to appease the generals, who refused to recognise the NLD's landslide victory in the November 2020 elections. Shortly after the Union Electoral Commission rejected the military's allegations of electoral fraud, the Tatmadaw staged an unlawful coup d'état on 1 February, arresting Aung San Suu Kyi and other senior NLD officials. The military announced a one-year state of emergency, installed Tatmadaw officials in place of the civil-

1 UN General Assembly, Resolution 260/III, 9 December 1948, entered into force 12 January 1951, 78 U.N.T.S. 277.

2 The legal question of whether or not the Rohingya constitute a protected group within the meaning of Article II of the Genocide Convention ('a national, ethnical, racial or religious group') will be subject to detailed examination by the Court if the case proceeds to the merits stage. In considering the request by the Gambia for the indication of provisional measures, the Court applied a plausibility standard, hence the wording 'appear to constitute a protected group' in its order.

3 See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order, 28 January 2021. Available at: <https://www.icj-cij.org/public/files/case-related/178/178-20210128-ORD-01-00-EN.pdf> accessed 16 May 2021.

ian-led government, and handed power to Senior General Min Aung Hlaing as the head of the newly formed 'State Administrative Council' (SAC).

The people of Myanmar immediately responded by organising peaceful protests and a Civil Disobedience Movement across the country in defiance of the coup. The crackdown by the Tatmadaw against peaceful civilian protestors was equally swift, but brutal and violent. The Tatmadaw employed coordinated and systematic military force against the protestors, including the use of snipers and rocket-propelled grenades in urban centres. To date, at least 810 civilians have been killed and more than 4,200 are currently detained.[4] Many of those killed were arrested, detained, and tortured to death by security forces overnight, with their families instructed to collect their dead bodies the next day.[5] Medics and other rescue workers attempting to provide medical care to peaceful protestors injured by security forces have been deliberately targeted.[6] Human rights organisations have documented enforced disappearances, pervasive use of torture in places of detention, sexual violence and other gross human rights violations that may constitute crimes against humanity, according to the UN Special Rapporteur on the human rights situation in Myanmar Thomas Andrews.[7]

With Suu Kyi held under house arrest since 1 February, and currently facing up to 26 years in prison on six different charges, she has been effectively silenced and side-lined by the junta.[8] In April, a group of NLD parliamentarians elected in November 2020 led the formation of Myanmar's government-in-exile. The National Unity Government (NUG) includes former members of government, leading human rights activists, anti-coup protest leaders, and representatives from ethnic minority groups. Although some members of the NUG have acknowledged the previous government's failure to protect the Rohingya, others were complicit or supportive of the Tatmadaw's genocidal attacks against them.[9] Unsurprisingly, given that the Rohingya's identity and status as citizens continues to be denied and they were disenfranchised from not only voting but also from standing as candidates in the 2020 elections, the NUG does not include any Rohingya representative.

The NUG has called for international justice for atrocity crimes committed since the 1 February coup. BROUK joins the NUG's call for international justice for these atrocities, and recently published its 'Paths to Justice' briefing, which made a series of recommendations for the pursuit of inclusive international justice and accountability in post-coup Myanmar.[10] Efforts to seek justice and accountability cannot be limited to the atrocity crimes that have been perpetrated since the coup; they must include the ongoing genocide against the Rohingya as well as war crimes and crimes against humanity suffered by other ethnic and religious minorities over many years.

Against this complex backdrop, it is unclear to what extent the military – or indeed the NUG – will engage with the ongoing genocide case at the International Court of Justice brought by the Gambia against Myanmar. Sadly, what is not in doubt is the fact that systemic violations against the Rohingya in Myanmar have continued, in the context of an ongoing genocide.

With this briefing, BROUK highlights these ongoing systemic violations against the Rohingya. This third briefing in the series by BROUK once again coincides with Myanmar's own reporting deadlines to the Court. To date Myanmar's reports have not been made public by the Court, in spite of repeated calls by BROUK and other Rohingya-led organisations.[11] The information compiled in BROUK's briefing is based on primary data collected and verified by BROUK in April and May 2021, as well as secondary sources from other human rights organisations and reputable news outlets.

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 Tatmadaw and its proxies during 'clearance operations' in Myanmar's Rakhine State, resulting in significant loss of life among the Rohingya.[12] 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

4 Statistics compiled by the Assistance Association for Political Prisoners – Burma available at <https://aappb.org/> accessed 20 May 2021. Only deaths verified by AAPP are included in the tally, with the actual number of fatalities likely to be higher.

5 Frontier Myanmar Doh Athan Podcast 'Death in detention – interviews with family members' (14 April 2021) available at < https://www.frontiermyanmar.net/en/podcast-death-in-detention/> accessed 16 May 2021.

6 Myanmar Now, 'Hospital staff severely beaten during raid by junta forces in Tamu' (13 April 2021) < https://myanmar-now.org/en/news/hospital-staff-severely-beaten-during-raid-by-junta-forces-in-tamu> accessed 16 May 2021.

7 Statement by Thomas H. Andrews UN Special Rapporteur on the Situation of Human Rights in Myanmar to the UN Human Rights Council (11 March 2021) available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26884&LangID=E> accessed 16 May 2021.

8 Myanmar Now, 'State Counsellor's next court session under junta to be held in-person, lawyer says' (10 May 2021) available at <https://myanmar-now.org/en/news/state-counsellors-next-court-session-under-junta-to-be-held-in-person-lawyer-says> accessed 16 May 2021.

9 BROUK, 'Paths to Justice - Opportunities for Inclusive International Justice in Post-Coup Myanmar' (May 2021) available at <https://www.brouk.org.uk/wp-content/uploads/2021/05/BROUK-Briefing-Paths-to-Justice.pdf> accessed 16 May 2021.

10 ibid.

11 Joint letter by 30 Rohingya-led organisations 'Joint Letter re: Myanmar's obligation to comply with the provisional measures indicated by the ICJ on 23 January 2020' (17 June 2020) available at <https://www.theerc.eu/joint-letter-to-icj-myanmars-obligation-to-comply-with-the-provisional-measures/> accessed 16 May 2021; BROUK, 'Dereliction of Duty: International Inaction over Myanmar's Noncompliance with ICJ Provisional Measures' (November 2020).

12 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).

ground, coordinated massacres, as well as landmines laid at the border to target those fleeing the violence.[13]

In March 2017, the Independent International Fact-Finding Mission on Myanmar (FFM) was established by the UN 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.'[14] It published two seminal reports of its detailed findings in 2018 and 2019.[15]

The FFM 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.[16] 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.[17]

On 11 November 2019, the Gambia filed a case against Myanmar before the 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, 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; 2) 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 3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part by destroying or otherwise denying access to food, shelter and other essentials of life.[18]

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.[19] 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.[20] In affirming the Gambia's right to bring the case despite not suffering particular harm, the ICJ held that:

> '[A]ll the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention… It follows that any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, and to bring that failure to an end.'[21]

The ICJ's provisional measures order

Provisional measures are the equivalent of a legal injunction or court order, instructing a State to immediately take

13 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.

14 UN Human Rights Council Resolution 34/22, adopted 24 March 2017 (3 April 2017) UN Doc A/HRC/RES/34/22.

15 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 and UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar', (16 September 2019) UN Doc. A/HRC/42/CRP.5.

16 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.

17 FFM 2019 report supra endnote 15 70 [220].

18 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].

19 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.

20 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].

21 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order (23 January 2020), [41].

certain steps prior to a final ruling on the case.[22] 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.'[23]

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.'[24] 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.[25]

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.[26] Without prejudging the merits of the case - i.e. whether or not genocide has already taken place - the ICJ ordered Myanmar to 'take all measures within its power' to prevent irreparable harm against the Rohingya. 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.[27] Under the UN Charter, which includes the Statute of the Court, all member States must comply with ICJ decisions.[28]

In another case involving the Genocide Convention, the Bosnia v. Serbia case, the ICJ ordered similar provisional measures in 1993, but without the reporting requirement. The genocide at Srebrenica took place two years after those provisional measures were ordered, which called into question the effectiveness of their protective function.[29] The regular reporting requirement in The Gambia v. Myanmar case is a significant step forward in a legal process that may take many years.

BROUK welcomes the recent change to the Internal Judicial Practice of the Court, which 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 will report periodically to the Court.[30] This development increases scrutiny, but not transparency per se. However, the ad hoc committee can recommend potential options to the Court, which could include a recommendation to make Myanmar's reports public. As BROUK's President Tun Khin has emphasised, 'Rohingya should not be kept in the dark about our own fate.'[31]

Latest developments in the ICJ case

As set out above, on 20 January 2021, State Counsellor Aung San Suu Kyi submitted preliminary objections to the jurisdiction of the Court and the admissibility of the Application in her capacity as agent for Myanmar, shortly before the military coup.[32] This had the effect of suspending proceedings on the merits. In its order setting the deadline for Myanmar's response, the Court reserved the subsequent procedure for further decision, which means that it will issue a decision on whether to hold oral proceedings on the preliminary objections at a later date. The deadline for the Gambia to submit its response is 20 May 2021.[33]

The military coup significantly complicates the case at the ICJ, for a number of reasons. Firstly, it seems unlikely that Aung San Suu Kyi could continue as the agent in the case, given that she has been detained by the junta. Secondly, the ICJ Statute refers to States and not governments. In a situation where the legitimacy of a government or appointed agent is contested, it is unclear from the Court's jurisprudence and legal texts how the ICJ would respond.

As such, in its recent 'Paths to Justice' briefing, BROUK recommended that the NUG take the following steps (among others):

a) recognise the Rohingya's identity, provide for the restoration of full citizenship to them, commit to

22 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).
23 The Gambia v. Myanmar, ICJ 'Application Instituting Proceedings and Request for Provisional Measures' (11 November 2019) [113].
24 The Gambia v. Myanmar, ICJ provisional measures order 22 [73].
25 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.
26 Becker et al, 'Rohingya Symposium: Why So Secret? The Case for Public Access to Myanmar's Reports on Implementation of the ICJ's Provisional Measures Order' (25 August 2020) available at <http://opiniojuris.org/2020/08/25/rohingya-symposium-why-so-secret-the-case-for-public-access-to-myanmars-reports-on-implementation-of-the-icjs-provisional-measures-order/> accessed 21 November 2020.
27 The Gambia v. Myanmar, ICJ 'Application Instituting Proceedings and Request for Provisional Measures' (11 November 2019) 46 [86] 58 [113].
28 United Nations, Charter of the United Nations (1945) 1 UNTS XVI Art 94(1).
29 The Gambia v Myanmar, International Court of Justice, 'Application of the Convention on the Prevention of the Crime of Genocide' (General List No 178 - Hearing on Request for Provisional Measures) CR 2019/18 70 [21].
30 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.
31 BROUK, 'Rohingya genocide continues unabated as Myanmar ignores the "World Court's" provisional measures' (25 May 2020).
32 Supra endnote 3.
33 ibid.

government reforms that remove discriminatory laws and policies regarding the Rohingya.

b) Include Rohingya representation in the NUG.
c) Designate its own agent in the ICJ case, file a progress report in relation to the ICJ's provisional measures order that is publicly available and contains concrete measures to ensure that the rights of the Rohingya under the Genocide Convention are respected.
d) Request the Court not to accept submissions from the junta's designated agent in the case.[34]

At the time of writing, it remains unclear whether the junta and/or the NUG will submit a report on Myanmar's compliance with the provisional measures order by the 23 May 2021 deadline. This may present an additional challenge for the recently created ad hoc committee, which is charged with examining the information supplied by parties in relation to the implementation of provisional measures.

Given the uncertainties currently surrounding the case, it is perhaps unsurprising that no additional States have publicly stated their intention to intervene in the case, following the announcements by the Maldives, Canada and the Netherlands last year.[35] There is significant support for such a move in the UK, with more than 100 parliamentarians signing an open letter to the UK government in December in response to calls by BROUK and other Rohingya advocacy groups for the UK to intervene in the case.[36] As other analysts have observed, it is likely that other States will wait for the conclusion of the preliminary objections phase before moving forward with their support for the case.[37]

Justice for Rohingya

For the Rohingya community, the Court's January 2020 provisional measures order was a first step towards justice. The military's brutal crackdown on peaceful protestors across the country since the 1 February coup has also awakened the public consciousness to the truth about the military's lies, propaganda, hate speech and atrocity crimes against the Rohingya, prompting apologies from public intellectuals and student unions. Displaced Rohingya in refugee camps in Bangladesh have also expressed their solidarity with the victims of this latest wave of atrocity crimes by the Tatmadaw.[38]

An important next step is a similar shift in public consciousness towards supporting justice and accountability for the Rohingya. Rohingya survivors of genocide and other atrocity crimes have consistently and repeatedly called for justice and accountability. This must include full restoration of their citizenship 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, as well as the full enjoyment of their basic human rights such as access to livelihoods, adequate medical care, freedom of movement and the right to education. Justice efforts must also extend to effective remedies to provide full reparations to the survivors, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence.

Ongoing impunity in Myanmar

As BROUK's President Tun Khin has emphasised, 'Justice is the only way to break the cycle of violence in Myanmar. The Tatmadaw felt empowered to launch a brazen military coup because it has never been held to account for its crimes in the past, including the genocide against the Rohingya.'[39]

The Tatmadaw attempted to justify its military takeover by invoking a state of emergency under Article 417 of the 2008 Constitution. However, concerns over voter list irregularities do not equate to a situation which may "disintegrate the Union," "disintegrate national solidarity," or "cause the loss of sovereignty." Under Article 417, these situations must be caused by certain types of "acts" or "attempts," which are listed as: "insurgency," "violence," or "wrongful forcible means." As the Special Rapporteur has pointed out, 'Under the military-drafted 2008 Myanmar Constitution, this coup is illegal. The generals violated their own rules when they seized control of the government.'[40]

The Tatmadaw continues to act with total impunity while simultaneously weaponising the law for its own ends. Since the military coup it has unilaterally amended the Penal Code, tightened laws which already restricted fundamental freedoms, and imposed draconian new legislation and penalties.[41] Myanmar's 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

34 Supra endnote 9, 3-5, 9.
35 See Priya Pillai, 'Myanmar Coup d'état – Implications for International Justice', Opinio Juris (11 February 2021) available at <http://opiniojuris.org/2021/02/11/myanmar-coup-detat-implications-for-international-justice/> accessed 16 May 2021.
36 BROUK, 'UK Government Should Act On Call Of More Than 100 Parliamentarians To End Rohingya Genocide' (18 December 2020) available at <https://www.brouk.org.uk/uk-government-should-act-on-call-of-more-than-100-parliamentarians-to-end-rohingya-genocide/> accessed 16 May 2021.
37 See Pillai article. See also, Brian McGarry, 'Third-State Intervention in the Rohingya Genocide Case: How, When, and Why? (Parts I and II), Opinio Juris (11 September 2020) available at < http://opiniojuris.org/2020/09/11/third-state-intervention-in-the-rohingya-genocide-case-how-when-and-why-part-i/> and <http://opiniojuris.org/2020/09/11/third-state-intervention-in-the-rohingya-genocide-case-how-when-and-why-part-ii/> accessed 16 May 2021.
38 Tun Khin, 'The world must act now to stop the brutality of Myanmar's junta', Al Jazeera (7 March 2021) available at <https://www.aljazeera.com/opinions/2021/3/7/the-world-must-act-now-to-stop-the-myanmar-militarys-brutality> and Radio Free Asia, 'Junta Brutality Gives Myanmar's Majority a Taste of Ethnic Minorities' Plight (23 April 2021) available at <https://www.rfa.org/english/news/myanmar/ethnic-minorities-plight-04232021173252.html> accessed 16 May 2021.
39 BROUK, 'New Briefing Highlights How A Democratic Myanmar Is Impossible Without Justice' (12 May 2021) available at <https://www.brouk.org.uk/new-briefing-highlights-how-a-democratic-myanmar-is-impossible-without-justice/> accessed 16 May 2021.
40 UN Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews' (4 March 2021) UN Doc A/HRC/46/56 304 [13-15].
41 ibid 10 [65-70].

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.[42]

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.[43] However, the Penal Code in Myanmar does not incorporate genocide, war crimes or crimes against humanity. There was no progress in reforming the law to grant domestic courts jurisdiction over international crimes under the NLD government.[44]

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.[45]

In its 'Paths to Justice' briefing, BROUK set out the avenues available to pursue international justice for the brutal violence unleashed by the Tatmadaw against people in Myanmar, both in the context of the post-coup protests and in years prior. The briefing urges the NUG to clearly and publicly announce its support for such international justice efforts, including for crimes against the Rohingya. The briefing also calls on the NUG to publicly commit to reforms and domestic institutional changes needed to pursue justice domestically.[46]

Conditions in Rakhine State since 23 November 2020

According to information compiled by the UN Special Rapporteur, armed conflict between the Arakan Army and the Tatmadaw intensified throughout January – October 2020 in Rakhine and Chin States, resulting in the deaths of at least 226 civilians with a further 555 injured, and more than 100,000 internally displaced.47

Following the November 2020 elections, the Arakan Army and the Tatmadaw reportedly reached an informal ceasefire agreement. No armed clashes between the two sides have been reported since 12 November, but landmines and unexploded ordnances pose an ongoing threat to all communities. On 11 March 2021 the Tatmadaw removed the Arakan Army from its list of designated terrorist organisations, prompting speculation of a deal between the two sides.48

Shortly after the coup, Tatmadaw leaders visited internment camps in Sittwe Township, where Rohingya have been confined since 2012. They summoned Camp Management Committees and instructed them that internally-displaced people (IDPs) should not participate in any protests and that if they did, action would be taken against them. The Tatmadaw also reiterated COVID-19 stay-at-home measures and ordered that outside access to the camps be prevented. Small-scale anti-coup protests were reported to have taken place in the southern Rakhine townships of Ann, Thandwe and Taungup.[49] There have been no reports of protests in the northern townships, in part due to residents' security fears.[50] In April, the Arakan Army chief asserted that he did not want the Civil Disobedience Movement and popular protests in Rakhine State, claiming that they will undermine the AA's efforts to secure greater autonomy. According to some analysts, the AA has been able to establish strongholds in all 17 townships across Rakhine State.[51]

Rohingya communities in Rathedaung township have reported an increase in Tatmadaw troops since November 2020, stationed between Aung Thazi and Htee Swe villages. Similarly, in Buthidaung township, additional troops from LIB 15, LIB 263 and LIB22 have been stationed in Sein Hnyin Pyar, Tha Peik Taung, and Ti Tu Pauk village

42 Rohingya Communities Worldwide, 'Joint Submission to the UN Universal Periodic Review of Myanmar' (July 2020) 5 [13].
43 Genocide Convention 78 UNTS 277 art II III, IV, V.
44 Report of the Office of the United Nations High Commissioner for Human Rights, 'Situation of human rights of Rohingya Muslims and other minorities in Myanmar' (3 September 2020) UN Doc A/HRC/45/5 12 [52].
45 Lord Millet in R v. Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No.3), (UK) (1999) [177].
46 BROUK briefing supra endnote 9; see also UN Human Rights Council, 'Compilation of all recommendations made by the Independent International Fact-Finding Mission on Myanmar, to the Government of Myanmar, armed organizations, the UN Security Council, Member States, UN agencies, the business community and others', A/HRC/42/CRP.6, 16 September 2019, paras 19, 21-22 (FFM Recommendations). Available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.6.pdf.> accessed 16 May 2021.
47 Supra endnote 40 25 [26] 32 [58].
48 Myanmar Now, 'Brotherhood Alliance tells military to stop killings, threatens to abandon ceasefire' (30 March 2021) available at <https://myanmar-now.org/en/news/brotherhood-alliance-tells-military-to-stop-killings-threatens-to-abandon-ceasefire> accessed 16 May 2021.
49 Supra endnote 40 14 [93].
50 Radio Free Asia, 'No Protests in War-torn Half of Myanmar's Rakhine State, Where Some See Upside of Coup' (24 February 2021) available at <https://www.rfa.org/english/news/myanmar/rakhine-state-02242021203439.html> accessed 16 May 2021.
51 The Irrawaddy, 'AA Chief Does Not Want Myanmar's Strikes and Protests in Rakhine State' (12 April 2021) available at <https://www.irrawaddy.com/news/burma/aa-chief-not-want-myanmars-strikes-protests-rakhine-state.html> accessed 16 May 2021.

tracts respectively since December 2020. In Maungdaw township, Rohingya communities report that in March 2021 additional Border Guard Police were deployed to replace those who had been called to central Myanmar to crackdown on peaceful protestors.[52]

In some disputed areas of Rathedaung township, Rohingya communities report being under dual administration whereby both the AA and the Tatmadaw have appointed village administrators, significantly increasing the burden of restrictions of movement, extortion, and arbitrary taxation for the Rohingya community. Since February 2021 the AA has imposed a punitive system of arbitrary taxation on the Rohingya in at least 20 Rohingya villages in Kyauktaw township, described in detail below. At the same time, they continue to face freedom of movement restrictions, arbitrary detention and extortion, and torture and inhuman treatment by the Tatmadaw. As one Rohingya man reported to BROUK, 'Since the AA has become dominant and powerful they have imposed many rules and regulations on us, which we did not expect… both the AA and the Tatmadaw treat us with suspicion. The most awful thing and the biggest risk we face is that we are trapped between these two armed groups.'[53]

Shortly after the coup, the military restored internet access to Rakhine State following targeted shutdowns since June 2019. However, by early April the junta had imposed a ban on both mobile data and fixed wireless connectivity across the country leaving only fixed-line connectivity, which is inaccessible to most people, especially Rohingya communities.[54] Such restrictions put lives in danger, because they make it virtually impossible for people to receive information about the possible resumption of hostilities or updates about COVID-19. They also make it very challenging to document human rights violations. In April and May 2021, BROUK was only able to collect detailed information from Kyauktaw, Rathedaung, Buthidaung and Maungdaw townships, and some information from Sittwe. As such, the information set out below represents a small fraction rather than a comprehensive account of violations that have taken place since 23 January 2020 when the provisional measures were ordered.

Myanmar's continued noncompliance with the ICJ provisional measures order

Despite the complexities of the current situation, under international law the State of Myanmar must comply with the ICJ provisional measures order to prevent acts of genocide against the Rohingya and submit its third report on the steps it has taken to comply by 23 May 2021.

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'.[55] These directives, which are the only measures that are publicly known, are manifestly and woefully insufficient to comply with the provisional measures order.

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.[56] 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.[57]

In the current context of Myanmar, genocidal acts have

52 Detailed information on file with BROUK.

53 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the Tatmadaw.

54 Access Now, 'Update: internet access, censorship, and the Myanmar coup' (3 May 2021) available at <https://www.accessnow.org/update-internet-access-censorship-myanmar/> accessed 16 May 2021.

55 Republic of the Union of Myanmar Office of the President Directives No. 1/2020 Compliance with the Convention on the Prevention and Punishment of the Crime of Genocide (8 April 2020); No. 2/2020 Preservation of evidence and property in areas of northern Rakhine State (8 April 2020) and No. 3/2020 Prevention of incitement to hatred and violence (or) Prevention of proliferation of hate speech (20 April 2020).

56 FFM 2019 report 77 [240].

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

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. Myanmar has repeatedly refused to repeal the 1982 Citizenship Law or restore full citizenship to members of the Rohingya group.

Instead, it has continued with its National Verification Process, which denies Rohingya the right to their own identity. They are forced to record 'Bengali' and accept the designation of foreigner by the Immigration office, with promises of access to livelihoods (such as fishing) and other basic needs. However, 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 Myanmar's claims to the contrary. Rohingya community members in Buthidaung reported to BROUK that in January 2021, Township Immigration authorities and the police distributed pamphlets promoting the NVC written in Bengali, which the community does not understand. In doing so, the authorities have continued to treat the Rohingya as though they were 'foreign interlopers' from Bangladesh. Rohingya community members in Kyauktaw continue to report pressure and coercion from Immigration authorities to accept the NVC, as well as other corrupt practices.[58]

Myanmar's refusal to grant citizenship - coupled with ongoing coercive practices to force the Rohingya to accept documentation which denies their identity - demonstrates 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.

The Special Rapporteur's March 2021 report to the UN Human Rights Council documented the killing of 33 Rohingya civilians, including 15 children and 3 women, plus 38 injured since the provisional measures were ordered on 23 January 2020 up until the end of January 2021.[59] Some of these incidents were also documented by BROUK in its first and second briefings in this series, but not all. The violations described by BROUK in this report have not previously been documented and add to a growing body of evidence that systemic violations against the Rohingya in Myanmar continue, in the context of an ongoing genocide.

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.'[60]

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.[61] Any such reports have not been made publicly available.

Killings and preventable deaths

BROUK has documented that on 27 September 2020, a 45-year-old Rohingya man was arrested by Border Guard Police (BGP) from Mingalargyi base while travelling between village tracts in Maungdaw township. He was accused of having links to the Arakan Rohingya Salvation Army (ARSA) and was transferred to the custody of Sector 5 BGP that same day. He was detained for more than two weeks and is reported to have been tortured to death on 15 October 2020. His body was sent to Maungdaw General Hospital for a post-mortem examination the next day. A group of BGP from Sector 5 including the Sector Commander went to his house that day and informed his wife that he had died from COVID-19, and forced her to sign a document to that effect. His body was never released to his family. Instead, Rohingya from Maungdaw were ordered to bury him in a cemetery close to Maungdaw General Hospital, with the BGP standing guard.[62]

58 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the Tatmadaw.
59 Supra endnote 40 Annex VI.
60 The Gambia v. Myanmar, International Court of Justice Provisional Measures Order (23 January 2020) 25 [86].
61 Republic of the Union of Myanmar Office of the President Directive No. 1/2020 Compliance with the Convention on the Prevention and Punishment of the Crime of Genocide (8 April 2020).
62 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals

Ongoing denial of medical care and discriminatory travel restrictions imposed on the Rohingya have also directly contributed to the deaths of at least fifteen Rohingya since the start of 2021, nine of them children. Children under five have been severely affected by an outbreak of diarrhoea in the internment camps in Sittwe since late April. Due to additional requirements imposed by the SAC, national and international staff have faced difficulties in securing the necessary travel authorisations to enter the camps, and have largely had to rely on local Rohingya staff working under their remote supervision to try and control the outbreak. Nine infants and young children – aged between 5 months and 2 years 6 months - and have already died and 20 more have been transferred to a rural hospital in Thek Kay Pyin IDP camp.[63]

Rohingya living in five village tracts in Rathedaung township reported to BROUK that they have been denied access to the downtown area of Rathedaung – including the hospital - since the State-orchestrated violence of 2012. In January 2021, a 45-year-old Rohingya man died of abdominal pain in his home due to the lack of medical treatment available to him. In February, a 55-year-old Rohingya woman suffering from asthma died while she was on the way to Buthidaung hospital, as the restrictions prevented her from seeking treatment at Rathedaung hospital. That same month, a 25-year-old Rohingya man sadly died under similar circumstances after reaching Buthidaung hospital.[64]

The medical care available at Buthidaung hospital is very limited, and preventable deaths have also been reported in Buthidaung. In January 2021, a 62-year-old Rohingya man in Buthidaung town suffered from a fever for two weeks and died without receiving medical treatment. That same month a 61-year-old Rohingya man suffering from Hepatitis B was unable to obtain the necessary travel authorisations to travel to Yangon or another township with adequate facilities and subsequently passed away. In February, a 64-year-old Rohingya man suffering from meningitis and Hepatitis was ordered to apply for Form 4 travel authorisation for permission to travel to Yangon for treatment, even though he holds a 3-fold National Registration Card. He died before permission was granted.[65]

Under the SAC, Rohingya who have travelled without travel authorisation to seek the medical assistance denied to them by the State have been arrested and detained. A 48-year-old Rohingya man from Kyauktaw township who was suffering from a long-standing eye problem was arrested on 10 February 2021 while en route to Bangladesh for an eye operation, and sent to prison in Sittwe.[66] The confinement of Rohingya in their villages or internment camps and the continued denial of access to 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 (ICTY and ICTR). They include failing to provide adequate medical care, the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.[67]

In the 2016 Karadzic judgment, the ICTY further clarified, '[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].'[68]

In addition to the killing, these recent cases documented by BROUK in which denial of access to medical care and discriminatory restrictions on movement led to the preventable deaths of Rohingya are further evidence of the commission of genocidal acts against the group.

Arbitrary detention, extortion, and inhuman treatment

In its provisional measures order, the ICJ reiterated Myanmar'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'.[69]

Rohingya men have been subjected to arbitrary detention and extortion by the Tatmadaw. In Kyauktaw, where the Tatmadaw have a base to the south side of the Kaladan

by the Tatmadaw.

63 Detailed information on file with BROUK.

64 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the Tatmadaw.

65 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the Tatmadaw.

66 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the Tatmadaw.

67 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], ICTY, Prosecutor v. Karadzic, IT-95-5/18-T, Judgment, 24 March 2016, [547].

68 Prosecutor v. Karadzic, ibid [546].

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

river, a pattern of detention, extortion, and inhuman treatment possibly amounting to torture is emerging. In one emblematic case documented by BROUK, three fishermen were detained by the Tatmadaw while out fishing and brutally beaten. Soldiers called their village leaders and demanded ransom payments for their release. Rohingya community members report that such incidents are becoming commonplace for market sellers, traders, fishermen or those dependent on travel on the Kaladan river.

Blocking humanitarian assistance

The UN Special Rapporteur reported increasing challenges with humanitarian access in Rakhine State, 'including shifting travel authorization requirements...with travel authorization often limited to particular sectors and granted for short periods of time, impeding the provision of quality, predictable humanitarian assistance and services.'[70] In the Buthidaung area, around 1,000 Rohingya IDPs who had formed a new settlement on Rohingya land with permission of the Arakan Army reported to BROUK that the Tatmadaw and General Administrative Department (GAD) deliberately blocked international humanitarian assistance earlier this year.[71]

Demands for forced labour, denial of access to livelihoods, land confiscation, and extortion

The Tatmadaw's routine demands for forced labour from members of the Rohingya group disrupt their ability to make a living. In October and November 2020, soldiers from LIB 551 forced Rohingya villagers from three village tracts in Buthidaung township (450 households in total) to harvest the rice soldiers had planted on land belonging to the Rohingya.[72] On 10 November 2020 the Tatmadaw intercepted two Rohingya fishermen in Kyauktaw and forced them to porter for them. One of the men returned to his village with three days later, while the other only returned home after 19 days, but without his boat. In another example from Maungdaw in January 2021, the Tatmadaw commandeered four fishing boats and forced eight Rohingya fishermen to transport them and their baggage to a nearby jetty. [73]

The restrictions imposed on Rohingya village tracts in the Rathedaung area since the 2012 State-orchestrated violence mean that they are trapped in their villages, with no possibility of casual work or farm cultivation. They are forced to depend on home gardening and in-kind work within their villages.[74] In the Kyauktaw area, permission to travel can only be obtained by paying the Tatmadaw a bribe of 25,000 MMK each time, which is beyond the means of most Rohingya. Rohingya who attempt to pass by one of the Tatmadaw bases in the Kyauktaw area face arbitrary detention, torture and inhuman treatment, and extortion.

Rohingya villagers from the Kyauktaw area continue to suffer from the loss of their land, property and livelihoods in the 2012 State-orchestrated violence and are still waiting for justice and restitution. In Buthidaung township, Rohingya villagers report that 500 acres of their farmland was confiscated by the Tatmadaw in February 2020 and a new Border Guard Police outpost constructed on the land. In Maungdaw township, some Rohingya survivors of the 2017 clearance operations who took refuge in neighbouring villages managed to return to their original homeland in 2019 and have built shelters and established subsistence farms. In 2020 the authorities ordered the villagers to demolish their dwellings to make way for a new Township plan. The villagers are living in constant fear of eviction and renewed violence at the hands of the Tatmadaw.[75]

These appalling conditions of life imposed on the Rohingya group across Rakhine State reflect several of the indicators of the risk factors for genocide set out above, namely: present serious discriminatory, segregational, restrictive or exclusionary practices against a protected group; systematic discriminatory or targeted practices or violence against the lives and freedom of a protected group, even if not yet reaching the level of elimination; and attacks against or destruction of homes, farms, businesses or other livelihoods of a protected group. With regard to the question of genocidal intent, the ICTY Karadzic case established 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.'[76]

70 Supra endnote 40 30 [53].
71 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the Tatmadaw and AA.
72 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the Tatmadaw and AA.
73 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the Tatmadaw.
74 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the Tatmadaw and AA.
75 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the Tatmadaw.
76 Supra endnote 68 [548].

As part of its rationale for ordering provisional measures to prevent irreparable harm to the Rohingya, the ICJ described the Rohingya remaining in Myanmar as 'extremely vulnerable'. The estimated 600,000 Rohingya remaining in Rakhine State have either been trapped in internment camps or the open-air prison of their villages for almost nine years under many of these appalling conditions, which have left them struggling for survival.

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.'

The informal ceasefire and the AA's removal from the Tatmadaw's designated terrorist groups list raises the prospect of some kind of agreement or power-sharing arrangement between the two groups. Although there is no suggestion at this stage that the AA is under the control, direction, or influence of the Tatmadaw, such an arrangement could potentially bring the AA under the purview of provisional measure 2. In light of violations by the AA perpetrated against members of the Rohingya group documented by BROUK, this evolving situation should be closely monitored.

Rohingya villagers have described how difficult the situation is in Buthidaung township, especially around the Mayu mountain area where the Tatmadaw are stationed to the east of the mountain (in Maungdaw township) and the Arakan Army are stationed to the west, in Buthidaung township. The restrictions in place since 2017 mean that is risky for them to go to the forest to cut wood or the river to fish as the Tatmadaw and Arakan Army are constantly patrolling. Rohingya villagers report having to pay bribes to both the Tatmadaw and the Arakan Army in order to cut bamboo from the forest. They described how the Tatmadaw and the Arakan Army take what they need from Rohingya farms, leaving the Rohingya with virtually nothing left. If they want to renovate their houses, they need to seek permission from both the Tatmadaw and the AA. On 22 January 2021, 20-year-old Rohingya man was beaten to death by members of the Arakan Army while working in his vegetable field, after resisting demands to handover vegetables from his field to a member of the AA the previous day.[77]

In the Rathedaung area, Rohingya villagers report that they need to seek travel authorisation from the Tatmadaw village administrator and are also subjected to heavy extortion and arbitrary taxation demands from the AA. The Tatmadaw are reported to be based in the forest, while the AA have stationed themselves in villages. The Arakan Army detained two Rohingya men from the same village tract on 3 February and 19 April 2021 respectively and are reportedly holding them at their base in the nearby mountains. Between 28-30 April 2021 the AA demanded arbitrary taxes from all Rohingya in two Rohingya villages. These range from 1,000 MMK per month from each household to 150,000 MMK per month from each warehouse owner. In addition, each village has to supply the AA with 20 bags of rice each month.[78]

Rohingya villagers described an extensive set of rules and arbitrary taxation system imposed on them by the AA in around 20 villages in the Kyauktaw area since the beginning of 2021. The AA appointed local Rohingya leaders and ordered them to collect taxes from each household, ranging from 1,000-3,000 MMK. The AA also makes frequent demands for rice and chicken. The AA has since also imposed a rule that nobody is permitted to construct any kind of building without first informing them. They took photographs of all of the houses which have been built since 2012, and have begun demanding payment ranging from 50,000 MMK for a small shelter up to 500,000 MMK for a substantial building from each villager. The Arakan Army threatened to detain two Rohingya men and a woman who had recently returned to their village in Kyauktaw from Bangladesh unless they paid 500,000 MMK each (over $300).[79]

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.' Missing from the public realm is any indication of measures to ensure the effective enforcement of this directive. Events following its issuance,

77 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the AA.

78 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the AA.

79 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the AA.

detailed below, demonstrate that the directive is not being enforced in any meaningful manner.

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'. [80]

According to information recently received by BROUK, after the clearance operations in 2017 the whole of Myo Thu Gyi village tract in Maungdaw township was confiscated. The Tatmadaw constructed a large new Border Guard Police outpost on the site of Hainda Para village. More than 100 Rohingya are estimated to have been killed here, with some bodies reportedly buried in Myo Thu Gyi cemetery and others removed by the Tatmadaw. Construction of Maungdaw Township administration buildings in the area is reported to continue to date.[81]

In March 2021, Maungdaw Township and District authorities together with the Ministry of Social Welfare and the Union Enterprise for Humanitarian Assistance, Resettlement and Development began building a new Buddhist settler village for Rakhine IDPs from Myebon and Minbya on the site of Holla Banga Rohingya village in the Nwa Yone Taung village tract. An estimated 23 Rohingya were killed there during the 2017 clearance operations and their bodies reportedly removed by the Tatmadaw.[82]

Such actions by the authorities risk destroying any remaining evidence of genocidal acts committed in 2017, and are in defiance of this provisional measure.

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.'

As explained above, at the time of writing it remains unclear whether the junta and/or the NUG will submit a report on Myanmar's compliance with the provisional measures order by the 23 May 2021 deadline.

Conclusion

Myanmar has categorically failed to comply with the provisional measures order, in particular 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'. 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 continued noncompliance with the ICJ's provisional measures comes at a high human cost – the lives not only of Rohingya, but of ordinary people across the country. The junta is emboldened by the international community's failure to hold it accountable for its atrocity crimes. Myanmar's continued failure to comply calls into question the effectiveness of the ICJ's provisional measures, 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.

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.[83] 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. BROUK hopes that this will be a recommendation put forward by the ad hoc committee established by the Court to assist it in monitoring the implementation of provisional measures.

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.[84] 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.[85]

80 FFM 2019 report 5 [5] and FFM 2018 report 409 [1619]

81 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the Tatmadaw.

82 Detailed information on file with BROUK. Identifying information has been withheld to protect family members and villagers from the risk of reprisals by the Tatmadaw.

83 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.

84 USHMM, Report#2, 6.

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

Recommendations to the International Court of Justice

1. 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:
2. Myanmar makes its reporting public, to ensure transparency and rigorous scrutiny of its compliance with the order;
3. 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;
4. 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 National Unity Government

1. Recognise the Rohingyas' identity, provide for the restoration of full citizenship to them, and commit to government reforms that remove discriminatory laws and policies targeting the Rohingya.
2. Include Rohingya representation in the NUG's composition.
3. Publicly commit to complying fully with the ICJ's provisional measures order, to set out in writing and make publicly available, the measures that it will undertake to comply with the Court's order, and to consult with Rohingya advocacy groups on what concrete measures are needed.
4. Publicly commit to respecting the ICJ's decision on the merits and to implementing any orders directed at it, including with respect to reparations.
5. Publicly commit to assisting the Court in securing evidence and witnesses, if it is requested to do so by the Court.
6. Accept the findings and recommendations of the United Nations Independent International Fact-Finding Mission on Myanmar (IIFFMM). This includes an unequivocal acknowledgment that genocide and crimes against humanity has been committed against the Rohingya, as stated by the UN Fact-Finding Mission.

Recommendations to the international community

1. 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.
2. 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.
3. Exert maximum pressure on Myanmar to cooperate with the International Criminal Court investigation and provide access to Rakhine State to ICC investigators.
4. Publicly support the referral of the situation in Myanmar to the International Criminal Court or support the creation of an ad hoc international tribunal and use all available means to push the UN Security Council to make such a referral without further delay.

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 exten- sive 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 dias- pora. 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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