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NEW BRIEFING from Burmese Rohingya Organisation UK

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Ongoing Rohingya genocide: Myanmar military defies provisional measures ordered by International Court of Justice

Executive Summary

Almost two years have passed since the International Court of Justice ordered Myanmar to ‘take all measures within its power’ to prevent irreparable harm against the Rohingya in its provisional measures order. However, the evidence documented by BROUK and presented in this latest briefing (together with three previous briefings) demonstrates that in fact, genocidal acts continue to be perpetrated against the Rohingya to this day. In short, the military junta has defied the provisional measures order.

Since the previous provisional measures reporting deadline of 23 May 2021, Senior General Min Aung Hlaing and other military leaders have consistently and publicly refused to recognise the existence of Rohingya and continue to use the pejorative rhetoric of ‘Bengali’, furthering the narrative that the Rohingya are foreign interlopers who pose a national security threat to Myanmar. A secret order was reportedly issued by the junta, asserting that ‘there is no Rohingya ethnic group, they are Bengali’ and instructing civil servants working under the State Administrative Council to ‘courageously speak out’ on the issue. In August, at least one Rohingya man was killed by Special Branch in the context of a military investigation conducted in a number of Rohingya communities in the Maungdaw area in recent months, on the grounds of supposed ‘illegal entry’ into Myanmar.

The military has continued to routinely harass and arbitrarily arrest and detain Rohingya men and subject them to ill-treatment amounting to torture. The military has also continued to restrict access to livelihoods and healthcare and has blocked humanitarian assistance to the Rohingya, leaving many communities on the brink of starvation. When Rohingya men and women have sought to flee the appalling conditions of life imposed on them by the military junta in Rakhine State, they have been arrested and detained and treated as criminals, further dehumanising them.

These 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’.

Meanwhile, the junta has simultaneously perpetrated atrocity crimes in many other parts of the country since it seized power on 1 February. The junta is undoubtedly emboldened by the international community's failure to hold it accountable for its atrocity crimes. Unfortunately, the lack of transparency and public scrutiny of Myanmar's reporting on its compliance with the ICJ's provisional measures order seriously undermine their effectiveness. There is a grave risk that if the status quo continues, the junta will view this as *carte blanche* to continue committing genocidal acts against the Rohingya as well as atrocity crimes against the rest of the population with total impunity.

BROUK renews its call for the ICJ's provisional measures to be amended to include a requirement for public reporting. The lack of public scrutiny underpins impunity for atrocity crimes and may embolden the junta to commit further heinous crimes, not only against the Rohingya but against the wider population of Myanmar. If the compliance reports were made public, this would provide UN member States an opportunity to be more proactive and effective in pressing the UN Security Council to convene a meeting to discuss Myanmar's compliance, as well as fulfil its role in ensuring international peace and security with respect to the actual situation on the ground in Myanmar. The stakes have never been higher – for the Rohingya community, the wider population of Myanmar, and the international community as a whole.

Introduction

Since BROUK's last briefing on Myanmar's noncompliance with the ICJ's provisional measures published in May 2021, the human rights situation in Myanmar has rapidly and significantly deteriorated under military dictatorship.

To date, more than 1,200 civilians have been killed and over 10,000 arrested.ⁱ Indiscriminate shelling of towns and villages has continued, alongside enforced disappearances, pervasive use of torture in places of detention, sexual violence and other gross human rights violations. On 29 October, the Myanmar military began shelling the town of Thantlang in western Chin State, setting as many as 200 homes on fire. Prior to this most recent attack, approximately 10,000 residents had already fled Thantlang due to indiscriminate shelling and shooting into homes by the military in September.

According to the UN Special Rapporteur on the human rights situation in Myanmar's September report, 'The brutal campaign of the military junta likely meets the threshold for crimes against humanity and war crimes under international law, and the architects and perpetrators should be held accountable.'ⁱⁱ

On 5 November, the head of the UN-established Independent Investigative Mechanism for Myanmar (IIMM) Nicholas Koumjian said that preliminary evidence collected since the

military coup on 1 February shows a widespread and systematic attack on civilians amounting to crimes against humanity. The IIMM has a mandate to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 1 January 2011. Documents relating to the Rohingya genocide case at the International Court of Justice brought by the Gambia have been shared with those proceedings by the IIMM.ⁱⁱⁱ

UN High Commissioner for Human Rights Michele Bachelet has said, ‘Accountability remains crucial to any solution going forward. The human rights violations crimes being committed by the Tatmadaw today are built upon the impunity with which they perpetrated the shocking campaigns of violence against the Rohingya just four years ago – and also against many other ethnic minorities over decades.’^{iv}

In November, following the increased number of indiscriminate attacks against civilians in Chin State, Sagaing Region and Magwe and significant troop reinforcements in the area - echoing the military build-up prior to the ‘clearance operations’ against the Rohingya - Rohingya organisations called on members of the United Nations Security Council not to repeat the same mistakes it made in failing to act on warnings of an impending military offensive against the Rohingya in 2017.

On 11 November, the UN Security Council held its fifth closed-door meeting since the military coup and once again issued a press statement expressing ‘deep concern’ about the recent violence across Myanmar. However, it did not put a resolution to a vote in spite of repeated calls from civil society and other stakeholders for a resolution to consolidate international action to stop the junta’s violence against the people of Myanmar.

Against this backdrop of atrocity crimes perpetrated by the junta in Myanmar since the military coup, the National Unity Government (NUG - Myanmar’s government-in-exile) has sought legitimacy and recognition from the international community and the UN in particular. The NUG won a small victory when the incumbent Myanmar permanent representative to the UN Kyaw Moe Tun retained his credentials after refusing to represent the junta. However, the question of Myanmar’s representation at the UN will likely be addressed by the UN Credentials Committee, the body charged with making recommendations to the UN General Assembly on which government to recognise in the event of a dispute. The Committee will reportedly convene in November and submit a report to the UN General Assembly in December.^v

Following the approval by consensus of a draft resolution on human rights conditions in Myanmar by the Third Committee of the UN General Assembly, the junta's Foreign Ministry led by Wunna Muang Lwin issued a statement in response on 19 November:

“Myanmar does not recognize the term “Rohingya”... It is disturbing to see that the unlawful and terrorist group, NUG and Kyaw Moe Tun recognize the term “Rohingya”... The remarks by Kyaw Moe Tun, particularly with regard to Bengali-related matters, are contrary to the successive Myanmar Government’s principles and position. In this regard, the Myanmar Government highlights that the statement of Kyaw Moe Tun does not represent the country-concerned and therefore, Myanmar strongly rejects it.”^{vi}

The question of legitimate representation has implications for the genocide case before the International Court of Justice. It would appear that both the junta and the NUG seek to represent the State of Myanmar in the case. The junta has assembled a new legal team led by Wunna Maung Lwin, which includes Lieutenant-General Yar Pyae, a close ally of commander-in-chief Senior General Min Aung Hlaing. The NUG issued a statement expressing willingness to cooperate with the ICJ and to ‘comply with Myanmar’s international legal obligations’ and asserted that it had a duty to ‘ensure continuity of representation before the Court’.^{vii} Dr Sasa, Minister for International Cooperation for the NUG said in a September media interview, ‘If the ICJ will allow us to represent Myanmar by appointing an agent at the case, then that is what we also will do,’ but would not be drawn on whether the NUG would accept the allegations of genocide or argue against them in court.^{viii}

The NUG has broken with many of the policy positions held by the previous National League for Democracy government led by Aung San Suu Kyi. The NUG has embraced the term Rohingya, pledged to repeal or amend the 1982 Citizenship Law in favour of a law based on citizenship by birth (albeit in the context of constitutional reform), promised to abolish the National Verification Card system, and committed to the safe, voluntary and dignified repatriation of the Rohingya.^{ix}

An NUG statement issued on the anniversary of the military’s brutal clearance operations against the Rohingya acknowledged that atrocity crimes had been perpetrated against the community, but did not use the term genocide. It did, however, clarify that the NUG has lodged a declaration with the registrar of the International Criminal Court, accepting the Court’s jurisdiction over international crimes - namely war crimes, crimes against humanity and genocide - committed in Myanmar’s territory since 1 July 2002. Crucially, the International Criminal Court deals with individual criminal responsibility for international crimes, while the International Court of Justice case deals with allegations of State responsibility for the crime of genocide.

BROUK’s President Tun Khin has stated that, ‘The NUG Myanmar must, crucially, recognize that a genocide is taking place against the Rohingya. If we can’t face the reality of the past, there is no way that we can build a common future.’

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.^x 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.^{xi}

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.’^{xii} It published two seminal reports of its detailed findings in 2018 and 2019.^{xiii}

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.^{xiv} 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.^{xv}

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 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.^{xvi} 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.^{xvii} In other words, the case is in the public interest.

The ICJ's provisional measures order

Provisional measures are the equivalent of a legal injunction or court order, instructing a State to immediately take certain steps prior to a final ruling on the case.^{xviii} 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.'^{xix}

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.'^{xx} 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.^{xxi}

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.^{xxii} 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.^{xxiii} Under the UN Charter, which includes the Statute of the Court, all member States must comply with ICJ decisions.^{xxiv}

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

Latest developments in the ICJ case

On 20 May 2021, the Gambia submitted its response to the preliminary objections to the case submitted by State Counsellor Aung San Suu Kyi on 20 January in her capacity as agent for Myanmar, shortly before the military coup.^{xxvi} Myanmar's preliminary objections to the jurisdiction of the Court and to the admissibility of the Gambia's Application to the Court had the immediate effect of suspending proceedings on the merits of the case while the Court deals with the technical and procedural matters raised by Myanmar. However, the filing of preliminary objections do not change Myanmar's obligation to report on its compliance with the provisional measures ordered by the Court.

To date, the ICJ has yet to announce a date for oral proceedings on the preliminary objections. 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. The Court may be waiting for clarity on the question of recognition from the UN Credentials Committee before announcing oral proceedings on preliminary objections, even though representation to the ICJ is an entirely separate issue to representation at the UNGA. The Court's jurisdiction in this case is completely independent of the UNGA and the Court is not bound by whatever the UNGA decides with respect to the credentials question.^{xxvii}

Unfortunately, for Rohingya communities the preliminary objections submitted under the NLD government have significantly delayed efforts to see justice served through the ICJ proceedings.

Ongoing impunity in Myanmar

The Tatmadaw continues to act with total impunity while simultaneously weaponising the law for its own ends. On the eve of the fourth anniversary of its genocidal acts against the Rohingya, junta leader Senior-General Min Aung Hlaing added genocide provisions to the country's colonial-era Penal Code. The definition of the crime of genocide appears to be similar to that under international law, but those suspected of committing genocidal crimes can be arrested without warrants and may be punished with a death sentence or life in prison.^{xxviii} Analysts have suggested that the move was designed to ease international pressure in relation to the genocide case before the ICJ, and it seems likely that the new provisions will feature in any provisional measures compliance report submitted by the junta in November.

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 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.^{xxix}

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.^{xxx}

The case was initially rejected by Argentina's Court of First Instance, mainly over concerns that it would overlap with the investigation announced by the International Criminal Court 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. On appeal, however, the Federal Criminal Appeal Court in Buenos Aires in May 2020 overturned the rejection, ruling that more information should be sought from the Office of the Prosecutor of the International Criminal Court. A hearing on 18 August was the latest stage of this process, where the Appeal Court heard arguments for and against taking up the case. BROUK's President Tun Khin testified at the hearing, alongside Rohingya survivors of sexual violence. A final decision by the Appeal Court on whether a case can proceed in Argentina has yet to be issued.^{xxxi}

Conditions in Rakhine State since 23 May 2021

According to reports from the ground, the Arakan Army (AA) appears to be consolidating its positions in Rakhine State. In media interviews, the AA has claimed to exert influence over two-thirds of Rakhine State including control over administrative and dispute resolution mechanisms.^{xxxii} This appears to include some areas of the northern townships of Rathedaung, Buthidaung and Maungdaw. At the same time, increased presence of Tatmadaw troops was reported across northern Rakhine State.^{xxxiii}

Although the Tatmadaw removed the Arakan Army from its list of designated terrorist organisations in March 2021, prompting speculation of a deal between the two sides, the informal ceasefire agreement appears to be under pressure with sporadic clashes between the two sides reported in the northern Maungdaw area on 9 November.^{xxxiv}

In northern Rakhine State as well as Kyauktaw, Mrauk U and Minbya, Rohingya communities find themselves increasingly caught in the middle of a power struggle between the Arakan Army and the Tatmadaw, with both sides issuing stark warnings that

the Rohingya must accept their authority. In several cases, Rohingya communities have been subjected to extortion demands and abuses by both sides, severely undermining livelihoods and the ability to survive for the Rohingya.

In late July in the Minbya township area, Arakan Army soldiers demanded bribes and meat from villagers preparing for the Eid al-Adha religious ceremony. When a small number of families in the village refused to pay, the AA retaliated by committing a series of human rights abuses in the village. Around 300 AA soldiers returned a few days later and surrounded the village. Over a period of several days, they arbitrarily detained groups of villagers in the local mosque, with around 160 Rohingya detained in total. While in detention they were denied food and reported ill-treatment at the hands of the soldiers. The detainees were eventually released on 2 August after being forced to sign a declaration that no human rights abuses had taken place, and the AA soldiers withdrew from the village. However, on departure they abducted two Rohingya men.^{xxxv}

In August 2021, Rohingya communities reported that the AA was conducting headcounts and making lists of mosques and other Islamic religious sites in those three townships, as well as in Kyauktaw. That same month, AA Commander-in-Chief Twan Mrat Naing publicly stated that the AA planned to involve Muslims in administrative and police roles in areas under AA control.^{xxxvi}

In September, Rohingya communities in Buthidaung township reported that the AA convened a meeting with administrators to recruit their support for the AA, including by informing them of Tatmadaw movements in the area. In one of those villages, the AA subsequently abducted the son of a Rohingya elder, reportedly torturing him during the three days they held him in captivity. The following week AA soldiers returned to the elder's house and threatened to compile a list of any Rohingya who is not willing to join the AA police force.^{xxxvii}

Such abuses by the Arakan Army compound the hardships already faced by Rohingya communities in Rakhine State due to the difficult conditions of life imposed on them by the military junta.

Myanmar junta defies provisional measures ordered by International Court of Justice

The junta continues to impose sporadic restrictions on internet access across the country, which makes it very challenging to document human rights violations. As such, the information set out below represents a small fraction rather than a comprehensive account of violations that have taken place since 23 May 2021.

The Myanmar junta has continued its long-standing denial of the existence of the Rohingya, both in rhetoric and in practice. In recent public statements senior military officials have continued to use the term ‘Bengali’ in a pejorative sense, implying that the Rohingya are foreign interlopers from Bangladesh.

The junta continues to deny citizenship to the Rohingya under the 1982 Citizenship Law and perseveres with its coercive practices to force the Rohingya to accept the National Verification Card - documentation which denies their identity.^{xxxviii} Citizenship is often referred to as ‘the right to have rights’ as citizenship usually confers a host of other rights. The junta’s continued refusal to grant the Rohingya citizenship defies the ICJ’s order to ‘take all measures within its power’ to prevent irreparable harm to the Rohingya as a protected group.

The junta appears to have rescinded an April 2020 Presidential order issued by the NLD government to avoid bringing further charges against ‘Bengali’.^{xxxix} Rohingya continue to flee the appalling conditions imposed on them in Rakhine State. Since 23 May 2021, dozens of Rohingya who have tried to flee have been arrested, detained, and put on trial. Cases are either brought under the 1949 Residents of Burma Registration Act (and 1951 Resident of Burma Registration Rules), which carries a maximum penalty of two years in jail with hard labour, or under Article 13(1) of the 1947 Burma Immigration (Emergency Provisions) Act.^{xl} Such cases are widely reported in the local media, accompanied by photos released by the military authorities of those arrested. This furthers the junta’s narrative that Rohingya are ‘illegal Bengali’ and a threat to national security.

The junta’s continuing noncompliance with each of the ICJ’s provisional measures will be further analysed below.

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.’^{xli}

Killing

In August, four villages in the northern Maungdaw area were besieged by soldiers from Infantry Battalion 375. In cooperation with Border Guard Police from the area 5 Border Guard office in Maungdaw they conducted an investigation, accusing villagers of illegal entry from Bangladesh. They conducted a registration process and recorded video footage and photos of the villagers. The administrator of one of the villages in the northern Maungdaw area summoned and subsequently arrested and detained at the Maungdaw Special Branch police office, where he was brutally beaten during interrogation. Five other men from that village have also been detained and remain in police custody. They have reportedly been denied access to their families, food, and medical care.

On 29 August, the administrator of one of the other four villages was also summoned and arrested by Special Branch. Two days later his body was handed over by Special Branch to Maungdaw General Hospital. Special Branch claimed that he had died as a result of COVID-19, but he had showed no symptoms of infection before he was arrested. When villagers collected his body from the hospital to prepare it for burial, they saw signs of torture on his body.^{xlii}

Arbitrary arrest and detention; inhuman treatment amounting to torture

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'.^{xliii}

In practice, the junta has continued to arbitrarily arrest and detain Rohingya men – a pattern of conduct identified by the UNFMM, particularly during periods of heightened tension^{xliiv} - subjecting several of them to severe beatings and other forms of inhuman treatment amounting to torture. Such violations may constitute 'causing serious bodily or mental harm to the members of the group' when there is genocidal intent.

Three separate incidents have taken place in Buthidaung township in August and September alone, at a time of increasing militarisation and rising tensions between the Arakan Army and the Tatmadaw.^{xlv}

On 21 August, the body of a soldier from LIB552 was reportedly dumped outside a Rohingya village in Buthidaung township. Dozens of soldiers arrived in the village and surrounded it in the early evening. Seven Rohingya men were arrested and detained. Later that night, a 72-year-old man and his three sons were also arrested. The soldiers beat and tortured the four men, tying one of the men inside a rice sack and dragging him along by a rope as if he were an animal. All but two of the detainees have since been released. They

are currently being held in Buthidaung jail, where their families are allowed to visit once a month and they have access to a lawyer, although it is unclear what charges the two men face.

In early September, dozens of soldiers from LIB551 – including the Battalion Commander and a Special Branch police officer – raided a home in another village in Buthidaung township. They were reportedly searching for one Rohingya man who they accused of killing a soldier. When they didn't find him at home they detained his wife and parents-in-law instead and took them to the house of the Ward administrator, where they interrogated and threatened them. Although they were released they have since been summoned for interrogation by LIB555 five more times, incurring more than 200,000 kyats (around US\$130) in transportation costs.

On 24 September, around 40 soldiers conducted a night raid and arrested two Rohingya men in a village tract to the south of Buthidaung township, accusing them of providing food assistance to the Arakan Rohingya Salvation Army. They were held overnight at the military camp in the Sein Hnyin Pyar area, before being taken the next morning on foot to No 1 Military Strategic Command battalion where they were held for several weeks. Although they were not tortured while in detention, family members had to pay bribes in order to send food to the two men. They were only released after the soldiers extorted 10,000,000 kyats (around \$6,500) from each man.

Blocking humanitarian assistance

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 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.^{xlvi}

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 more than nine years under appalling conditions. Ongoing travel restrictions and denial of access to livelihoods make it very difficult to survive, leaving Rohingya communities largely dependent on humanitarian assistance. The COVID-19 crisis and military coup have compounded this situation. Between June and August, Rohingya communities received no assistance from

the World Food Programme, due to banking issues and lengthy delays in issuing travel permits for humanitarian workers by the military authorities.^{xlvii} This left many Rohingya communities on the edge of starvation, according to information received by BROUK and local media reports.^{xlviii}

Denial of access to livelihoods, land confiscation, extortion and forced labour

Ongoing denial of access to livelihoods for the Rohingya group - alongside land confiscation, extortion and forced labour demands - all undermine the group's ability to make a living and to survive.

In September, Rohingya villagers, traders and boat owners reported facing repeated extortion demands from Tatmadaw soldiers while travelling on the Mayu river in Buthidaung township. The soldiers are reported to have been temporarily transferred to the area and include some from LIB551.^{xlix}

On 27 October, around 100 Rohingya from the Myoma area of Maungdaw township were summoned by their Ward Administrator early in the morning and ordered to clean up Myoma football stadium. They were not able to refuse the order, as they could face punishment or demands for extortion. On arrival at the stadium, they were instead made to participate in a ceremony in support of the Tatmadaw. Similar ceremonies took place around the country, including in Sittwe on 1 November.¹

On 29 October, Rohingya from three different villages in Minbya township reported that military personnel and police confiscated their land and sold it on. For the past five months, the Arakan Army have made repeated extortion demands from those same villages including confiscation of rice and other food provisions. The land confiscation will compound the food security challenges the villagers already face.^{li}

For many Rohingya, the conditions of life imposed upon them since the State-orchestrated violence of 2012 have become unbearable. Many of those who have tried to flee Rakhine State over the past few months have been arrested, detained and charged – effectively criminalised for attempting to flee those appalling conditions of life.

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.’

In late May, junta leader Min Aung Hlaing gave a rare media interview to Chinese-language Phoenix television, during which he refused to accept the term ‘Rohingya’ and defended the 1982 Citizenship Law as a legitimate means of determining citizenship status.^{lii} A secret order by the State Administrative Council reported issued sometime after 8 June and leaked to the media in August instructed that, ‘There is no Rohingya ethnic group, they are Bengali’ and ordered civil servants to ‘courageously speak out’ on the issue.^{liii} In a press conference on 12 June, Major General Zaw Min Tun similarly reiterated the application of the 1982 Citizenship Law, and reinforced the use of the pejorative term ‘Bengali’ to refer to the Rohingya.^{liv} On 28 September, the military-owned Myawady news outlet published an anti-Muslim, anti-Rohingya opinion-editorial in which it claimed that the 2016 and 2017 ‘clearance operations’ were “justified”.^{lv}

While such public statements and secret orders may not directly constitute incitement to commit genocide, ‘denial of the existence of protected groups or of recognition of elements of their identity’ is a recognised indicator of ongoing risk factors for genocide, as detailed in BROUK's May 2021 briefing.^{lvi}

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

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

BROUK has continued to collect information about new construction work taking place on the site of razed Rohingya villages where mass killings took place. Such actions by the authorities risk destroying any remaining evidence of genocidal acts committed in 2017, and are in defiance of this provisional measure.

In Maungdaw township, after the clearance operations in 2017 the whole of Myo Thu Gyi village tract in 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. In November 2021, Rohingya community members reported to BROUK that new District Education, District Health, District Agriculture and Fishery offices under the junta's State Administrative Council have been constructed in the Myo Thu Gyi village tract area.

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.^{lviii} In November 2021 BROUK received information that the junta has renamed it Shwe Taung village and that Rakhine continue to relocate there against the wishes of local Rohingya communities, as the land belongs to Rohingya who were either killed or fled to Bangladesh.^{lviii}

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.’

It remains unclear whether the military junta and / or the NUG will submit reports on compliance with provisional measures to the ICJ by the 23 November deadline, and how the Court will respond.

The lack of transparency and scrutiny in such a high-profile public interest case risks undermining confidence in the proceedings. It may even have the effect of further emboldening the military junta to continue perpetrating genocidal acts against the Rohingya and other atrocity crimes against the wider population with complete impunity.

Analysis

Almost two years have passed since the ICJ ordered Myanmar to ‘take all measures within its power’ to prevent irreparable harm against the Rohingya. However, the evidence documented by BROUK and presented in this latest briefing (together with three previous briefings) demonstrates that in fact, genocidal acts continue to be perpetrated against the Rohingya to this day. In short, the military junta has defied the provisional measures order.

Senior General Min Aung Hlaing and other military leaders have consistently and publicly refused to recognise the existence of Rohingya and continue to use the pejorative rhetoric of ‘Bengali’, furthering the narrative that the Rohingya are foreign interlopers who pose a national security threat to Myanmar. At least one Rohingya man was killed by Special Branch in the context of a military investigation into ‘illegal entry’ to Myanmar.

The military has continued to routinely harass and arbitrarily arrest and detain Rohingya men and subject them to ill-treatment amounting to torture. The military has also continued

to restrict access to livelihoods and healthcare and has blocked humanitarian assistance to the Rohingya, leaving many communities on the brink of starvation. When Rohingya men and women have sought to flee the appalling conditions of life imposed on them by the military junta in Rakhine State, they have been arrested and detained and treated as criminals, further dehumanising them.

These 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’. Moreover, as the junta continues to build new structures on the sites of razed Rohingya villages where mass killings took place during the clearance operations of 2016 and 2017, this also defies provisional measure 3 with its explicit instruction to prevent the destruction of and ensure the preservation of evidence related to allegations of genocidal acts.

Meanwhile, the junta has simultaneously perpetrated atrocity crimes in many other parts of the country since it seized power on 1 February. The junta is undoubtedly emboldened by the international community’s failure to hold it accountable for its atrocity crimes. Unfortunately, the lack of transparency and public scrutiny of Myanmar’s reporting on its compliance with the ICJ’s provisional measures order seriously undermine their effectiveness. There is a grave risk that if the status quo continues, the junta will view this as *carte blanche* to continue committing genocidal acts against the Rohingya as well as atrocity crimes against the rest of the population with total impunity.

Legal analysts have pointed out that there is no legal impediment in its Statute or the Rules of the Court which prevent the ICJ from making Myanmar’s reports on compliance with provisional measures public. As Rosenberg et al have argued, in a public interest case like this - which deals with both *erga omnes* and *erga omnes partes* obligations to the whole international community - ‘the norm and consistent practice should be that reports are public and that confidentiality should be justified only by compelling reasons from the Court.’^{lix} 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.^{lx} This should include a requirement for public reporting. There are a number of compelling reasons for this.

Firstly, Rohingya groups have already called for this. As the ICJ deals with disputes between States, Rohingya survivors have no status before the Court. However, the case deals directly with their experiences and their right to exist as a protected group under the Genocide Convention. Under international human rights law, they have the rights to know, to truth, and to effective participation. Ignoring Rohingya demands for transparency and public scrutiny in the ICJ case risks undermining confidence in the Court and in these legal proceedings.

Secondly, the lack of public scrutiny of compliance reports serves the interests of the military junta and nobody else. The lack of public scrutiny underpins impunity for atrocity crimes and may embolden the junta to commit further heinous crimes, not only against the Rohingya but against the wider population of Myanmar.

Thirdly, as pointed out by Rosenberg et al, although Article 77 of the Rules read with Article 41(2) of the Court's Statute provides that any provisional measures ordered by the Court are to be *communicated* to the United Nations Security Council (UNSC), there is no indication that the reports on compliance with the orders have been provided to the UNSC.^{lxi} If the compliance reports were made public, this would provide UN member States an opportunity to be more proactive and effective in pressing the UN Security Council to convene a meeting to discuss Myanmar's compliance, as well as fulfil its role in ensuring international peace and security with respect to the actual situation on the ground in Myanmar.

The stakes have never been higher – for the Rohingya community, the wider population of Myanmar, and the international community as a whole.

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

- Ensure that the situation in Myanmar is on the agenda at the UN Security Council and push for 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.
- 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 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.
- Exercise universal and other forms of jurisdiction to investigate any individual from Myanmar – irrespective of position or rank - who may be responsible for committing genocide, war crimes, and crimes against humanity under international law. Ensure such individuals are brought to justice in fair trials.

Endnotes

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^x 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).

^{xi} 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.

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

^{xiii} 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.

^{xiv} 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.

^{xv} FFM 2019 report *supra* endnote 15 70 [220].

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- ^{xvii} 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].
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- ^{xxx} Lord Millet in *R v. Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No.3)*, (UK) (1999) [177].
- ^{xxxi} For more information, see Tun Khin and Tomás Ojea Quintana for Opinio Juris, ‘Symposium on the Current Crisis in Myanmar: Inching Closer to a Historic Universal Jurisdiction Case in Argentina on the Rohingya Genocide’ (30 September 2021) available at <[piniojuris.org/2021/09/30/symposium-on-the-current-crisis-in-myanmar-inching-closer-to-a-historic-universal-jurisdiction-case-in-argentina-on-the-rohingya-genocide/](http://opiniojuris.org/2021/09/30/symposium-on-the-current-crisis-in-myanmar-inching-closer-to-a-historic-universal-jurisdiction-case-in-argentina-on-the-rohingya-genocide/)> accessed 20 November 2021.
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^{xlix} Detailed information on file with BROUK. Identifying information has been withheld to protect Rohingya.

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