

BURMA AND THE ICJ RULING

For the Month of February 2020



In this monthly update, the human rights advocacy NGO Justice for All/Burma Task Force¹ will consider Burma's compliance with International Court of Justice directives to protect the Rohingya minority from Genocide in Burma (Myanmar) and to ensure accountability of the Burmese government.

On January 23, 2020, the International Court of Justice (ICJ) issued four "provisional measures"² directing the government of Myanmar to protect the Rohingya minority from the crime of Genocide. At the request of the ICJ, the government of Myanmar is now required to submit an initial report after four months and thereafter at 6-month intervals, detailing efforts to implement these legally binding directives.

Importantly, the ruling recognizes the Rohingya as a protected class, shielded under the Genocide Convention, contrary to Burmese government claims. Therefore, the ICJ Provisional Measures require prevention of the following:

- (a) Killing members of the (targeted) 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.

Will Burma develop the political will to ensure compliance? Will legal and constitutional weaknesses be corrected to strengthen accountability mechanisms? These questions point to major challenges ahead. As this report will demonstrate, there have been few if any significant signs of progress in Burma in 2020. On the contrary, in the weeks after the ICJ ruling the Burmese army stepped up its violent attacks on civilian areas, resulting in numerous casualties and mass displacement. The Rohingya's lack of access to food, health, education before the ICJ provisional measure remains unchanged, and Rohingya freedom of movement remains highly restricted.

The Burmese military blockade and internet blackout in Rakhine State are intended to prevent collection of evidence as well as to hide ongoing human rights abuses of the local population. Given the extremely difficult conditions imposed on Rakhine State and the resulting lack of access to any outside organizations or journalists, the data we collect must be consolidated from local articles and field reports. This March 2020 report will include a variety of reputable sources currently available. As we move forward into the year, each month we will include more data, in order to more accurately understand Burmese government compliance on a range of humanitarian and human rights issues primarily pertaining to the Rohingya minority.

This memo is produced by Burma Task Force, a program of Justice for All, an NGO that has been advocating for Rohingya rights since 2012. Accredited at the United Nations Department of Global Communications, and with an active office in Washington DC, our Justice for All team works to confront and prevent genocide against religious and cultural minorities. In addition to working with policymakers, we also work to promote and empower grassroots response, especially from the impacted communities.

Initial Response of the Government of Burma

It was significant that during the hearings the government of Burma submitted testimony that failed to mention the Rohingya by their name, an illustration of the truly comprehensive denial of rights and recognition symptomatic of its genocidal policies. Nevertheless, the Court found that the Rohingya are a protected class.

Though the Government of Burma took "note" of the ICJ ruling, some observers remarked that it did not explicitly commit to compliance. Zaw Htay, the spokesman for the Burmese President's Office told reporters in Naypyidaw that no genocide had occurred in Rakhine State. Referring to the Genocide Convention, which Burma signed in 1949, he added that, "The ruling is based on these two articles, so we don't need to take any

special action based on the ruling.”

The Burmese Foreign Ministry also released a statement³³ that blamed foreign human rights groups for spreading wrong information and referred instead to the findings of the so-called Independent Commission of Enquiry (ICOE) appointed by the government to investigate military “clearance operations” in Northern Rakhine State. It should be noted here that the full ICOE report has never been released publicly, but only its Executive Summary⁴⁴. The Burmese government has used these softer ICOE findings to distract from the UN Fact Finding Mission and other reputable reports.

The Burmese government energetically promoted popular support for Aung San Suu Kyi while she testified in the Hague. Following this nationalist campaign, the authorities have so far felt themselves able to ignore outside pressure from the international community. Clearly, the military continues to enjoy impunity as it has for so many decades. Indeed, this first monthly report will detail numerous deadly attacks on civilians and other serious human rights abuses that the Burmese military has perpetrated since immediately after the ICJ ruling on Jan 23, 2020.

Troubling Trends After ICJ Ruling

In Northern Rakhine State and adjoining Chin State, starvation conditions have been exacerbated by the lack of freedom of movement as imposed by the military. There is almost no access to humanitarian aid or medical care. In central Rakhine State, a re-imposition of mobile internet service restrictions on February 3, 2020 has limited communications in up to 9 towns and sparked fears that these measures may hide the destruction of mass graves or other evidence, in defiance of the ICJ rulings, or even mask commission of new war crimes and rights abuses.

Internet services are being curtailed in Maungdaw, Buthidaung, Rathedaung, and Myebon townships and in Paletwa township in neighboring Chin state, as well as four other townships — Ponnagyun, Mrauk-U, Kyauktaw, and Minbya. The Burmese government cited security requirements and public interest as the reasons.

The provisional ICJ rulings state that, **“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.”** But even though the Burmese military is limiting access and communication throughout the blackout areas, some evidence has emerged to indicate the possibility of serious non-compliance.

February 22, 2020 field reports indicate that the Burmese military and Border Patrol have been bulldozing remaining homes and mosques in specific locations. According to these sources, on February 2, 2020, a number of homes were destroyed in the Rohingya village of Donpaik (Aung Seik Pyin) in Maungdaw North along with the historic Mufti Sultan Mosque (also known as Stone Mosque) in Ridah village. Furthermore, “on February 16, 2020, a mosque in the village of Fawkhali (Pawut Chaung) and a second mosque, built in early 1900s in the village of Manama, were demolished by Myanmar armed forces.” Witnesses report that these night-time demolitions take places in locations where mass atrocities were perpetrated during the military’s “Clearance Operation” in 2017, strongly suggesting an attempt to remove evidence of crimes.

Radio Free Asia reported that, “Maung Saungkha, spokesman for Athan, a domestic organization that advocates freedom of expression in Myanmar, questioned whether the internet blackout flies in the face of an order issued last month by the International Court of Justice (ICJ) for Myanmar to take emergency measures to protect Rohingya Muslims still living in Rakhine and to preserve evidence from a 2017 military-led crackdown during which atrocities targeting the minority group were committed.”

Rise in Violence

The ICJ ruling states, Burma must “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 (see leading paragraph, p. 1), or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide.”

While in future updates we will examine Burma’s collusion role in incitement, we should first consider the legacy of mass atrocities in Rakhine State, as perpetrated primarily by the Burmese military over a period of decades and resulting in waves of displaced Rohingya as well as the destruction of over 350 villages in their homeland. The violence has not abated.

Two days after the ICJ ruling, on January 25, 2020, Myanmar Army Light Infantry Battalion LIB 551 fired two artillery shells on Rohingya village of Kin Taung (Khawaya Zeeri village) in Buthidaung township. Two women, one pregnant, were killed and seven other people were wounded when shells hit the village. A local lawmaker, a villager and the ethnic Rakhine separatist group, Arakan Army (AA), all alleged that that the Myanmar military was responsible for the shelling.



Burmese General Min Aung Hlaing has formed a propaganda team⁵⁵ called the Military Team to Impart True Information (MIT) which has been convening press conferences since the ICJ instead of the civilian-run Ministry of Information, in order to control media access to Rakhine State. On February 3, 2020, the MIT held a press conference, blaming the Arakan Army for two alleged actions—shelling Kin-Taung village and raping a Muslim woman. The AA promptly rejected the accusations. Amnesty International and a few other media⁶⁶ have reported that the indiscriminate shelling was done by the Myanmar Army.

Nevertheless, either despite or because of the military presence, the situation in Rakhine State is not secure. A young Rohingya boy⁷⁷ was kidnapped and slain by Rakhine armed men in Paung Htoke village of Mrauk-U on February 18, 2020. He had gone to a deserted area to find some access to the internet when he was assaulted and murdered.

By mid-February, at least seven civilians⁸⁸ had already been killed, including three Rohingya in Buthidaung township, and up to 50 injured, including 21 ethnic Khami children hit by gunfire in a village in Buthidaung on Feb. 13. Experts also cited the death of a Rohingya boy from Kyauktaw township who died of injuries sustained during shelling, with seven civilians wounded. Moreover, reports out of the region indicated that up to 1,100 people had been displaced, including 600 civilians from We Ma Kya village in Kyauktaw.

Burmese military shelling is currently targeting civilian areas of both the Rohingya and Rakhine communities in Rakhine State as well as in Karen State. ⁹Landmines also continue to take their toll. On February 17, UN experts met¹⁰ to express serious concerns about the ongoing killing and displacement of civilians. The group included Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar; Cecilia Jimenez-Damary, Special Rapporteur on the human rights of internally displaced persons; David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Fernand de Varennes, Special rapporteur on minority issues. “We are especially fearful for them as violence has increased in the areas where an internet shutdown was recently re-imposed,” they said in a statement. “It is well known that human rights violations and abuses occur during security operations in Myanmar.”

The Arakan Information Center reports¹¹ that 18 were killed in February, with 71 injured, 13 arrested and one disappeared, a motorcycle deliveryman missing since February 20. Military shells injured Rohingya in numerous localities. On February 26 a man feeding his cows was hit by a shell in the village of Phayapyin Aungpa, and on February 28, Burmese Navy artillery killed a woman and injured several others in the town of Minbya. The next day, at least three young people were killed in Myung Pwe, and three houses burned.

Freedom of Movement and Homelessness

Genocide is not limited to killing, as explained in a recent article¹² by Laetitia van den Assum, a member of the Advisory Commission on Rakhine State chaired by Kofi Annan. Ms. van den Assum points out that enforced starvation is “high on the list” of genocidal benchmarks. She also lists the harsh restrictions on basic rights that have been in place for years, such as freedom of movement and right to assembly.

In Burma the right to assemble remains compromised by inequality. For example, Rohingya people who wish to go fishing simply to eat a meal require a permit while other people are free to do so. Local reports indicate that local authorities taunt Rohingya fishermen, saying, “Go ask the ICJ to give you permit to fish.”

Hundreds of Rohingya men, women and children have recently been jailed¹³ in Burmese prisons or in youth detention centers for seeking to travel freely, fleeing from the dangerous, locked-down regions in Rakhine State. On February 12, 2020, the Burmese navy¹⁴ arrested 54 Rohingya in the Tanintharyi region in the Andaman Sea, who now jailed and waiting for the Burmese Government to send them back to Rakhine State instead of allowing them to emigrate as they intended. Many do not have homes¹⁵ to return to. According to a local resident quoted in news reports¹⁶, “In Maungdaw region, many villages are gone,” Hammad Shari said. “I don’t know how these people can go back to their homes... The government said that houses would be built for these families. We have given them a list. We’ve got the plan to build homes, but so far, none have been built.”

For returning Rohingya, the Burmese government is only offering space in transit camps and “reception centers.” Counting several hundred Rohingya arrested as they fled, the government claims to have repatriated 600 Rohingya “returnees” in this way.

February 22, 2020 email reports from the Arakan Rohingya Union (ARU) indicate that some five thousand other Rohingya have been languishing in several prisons in Rakhine State. The notorious “Class A” prisons located in Buthidaung, Maunhdaw, and Sittwe are designed to accommodate 1800-2000 inmates in each location; however, “currently serious overcrowding is reported in Buthidaung prison due to the increased arrests. Rohingya inmates - mostly from Maungdaw and Buthidaung -receiving 30-40 years of prison terms are transferred to Sittwe prison after the sentencing. Inmates receiving extended prison sentences from Mrohng, Kyauktaw, Punnajwen, Gwa, Ann, Taungoke, and other townships are transferred to Kyaupru and Thandwe prisons. Myanmar armed forces and local officials arbitrarily arrests Rohingya and bring charges of being

operative or collaborator of local armed groups; however, when they fail to produce evidence, the detainees are kept in the prison for months or years until new charges of participating in 2012 communal violence are brought in. Sentences are handed down in the court solely based on the statements by the Myanmar armed force personnel or their allied Buddhist Rakhine militia group.”

The Government of Burma has claimed to shut large IDP camps for displaced persons in Rakhine State, but has set up an elaborate checkpoint system to prevent the residents from moving freely. Reuters reporters reported on the situation in late 2018: ““Yes, we moved to new houses – it’s correct to say (the camp is closed),” said Kyaw Aye, a community leader from a camp called Nidin, in central Rakhine. “But we’ll never be able to stand on our own feet because we can’t go anywhere.”¹⁷17

Burmese military attacks and policies disrupting social and economic life in many areas of Rakhine State have displaced Rakhine as well as Rohingya residents, with Burmese soldiers deliberately destroying new camps¹⁸18. Refugee Agencies have tried to address root causes of enforced statelessness but to little avail. A recent UNHCR report envisions a plan to repatriate and resettle Rohingya but admits that, “in a context of increased instability, the overall protection environment for Rohingya communities remaining in Rakhine State is not expected to improve, and as such voluntary refugee returns from Bangladesh are unlikely.”¹⁹19

Meanwhile those Rohingya families who have fled to Bangladesh continue to try to escape difficult conditions there. On February 11, 2020 at least 16 out of 138 Rohingya drowned²⁰20 when their boat overturned in the Bay of Bengal, with over 50 still missing.



Access to Health, Food and Education

Hunger has long been used as a weapon against the Rohingya minority. The violence of the military occupation and the increasing instability of Burma’s Rakhine State has now resulted in a dismaying level of food insecurity. According to The New Humanitarian (TNH), “Maung Hla Thein, a farmer from Mrauk U township, north of Sittwe, told TNH in a phone interview that rice production in his area had dropped by about two thirds compared to a normal year. “Many farmers, including my son, were detained by the military and tortured last year in June and now they are in prison for simply going to the paddy field,” Maung Hla Thein said. “Now, no one wants to risk their lives trying to cultivate rice.”²¹21

In 2020, eight out of seventeen townships in Burma’s Rakhine State have been off limits to most aid groups²²22. In the midst of this crisis, International Rescue Committee (IRC) withdrew from the region in early January 2020 because of government restrictions on staff movements. This ended a program that had assisted more than 56,000 people for over five years, impacting Myebon, Pauktaw, Kyaukphyu, and Minbya townships. Explaining their refusal to allow staff travel, the local authorities claimed that the humanitarian aid program had been involving journalists.²³23



Because of similar pressures, access to health care is also deteriorating in Rakhine State. Poverty and conflict ensure that the price of most services keeps them out of reach, and there are no blood banks or other basic services. Because of anti-Rohingya sentiment, unequal access to health care remains a severe problem, despite Recommendations 27 and 38 of the Kofi Annan’s Advisory Commission on Rakhine State. Even a Burmese doctor in a Burmese news publication recently emphasized the problem of unequal access²⁴²⁴

Because of harsh government policies of restricted access, large multinational programs²⁵²⁵ such as World Health Organization in Yangon are not able to reach many displaced Rohingya populations, especially in Northern Rakhine State. Many resources²⁶²⁶ have been flowing to the refugee camps in Cox’s Bazar, Bangladesh, but the scale of need is enormous.

Another long-established aspect of the Rohingya genocide is the systematic denial of education to Rohingya children, especially in Rakhine State²⁷²⁷. There has been no change in Burmese policies. Only in recent months has the right to basic education been recognized for Rohingya refugee children in Bangladesh²⁸²⁸. This ongoing, deliberate denial of the human potential of Rohingya children represents an attack on the entire community and the impoverishment of future prospects.

Legal Hurdles and Political Will

On February 21, 2020 the Burmese military issued an announcement²⁹²⁹ that it will “probe a government-appointed commission’s findings on killings in Maung Nu and Chut Pyin villages, where about 300 civilians are believed to have died at the hands of soldiers during “clearance operations.” However, according to Laura Haigh of Amnesty International, “In terms of the ICJ’s order, what the government and the military are doing will not be enough to stave off what are very, very serious allegations of international crimes, genocide among them.” Haigh also said military courts are not the answer to holding to account soldiers who allegedly committed atrocities against the Rohingya, because the bodies are not independent or under civilian oversight.’

Impunity is built into the Burmese legal system. In an important legal analysis, *An Analysis of the Military Justice System of Burma and the Potential Implementation of ICJ’s Decision on Provisional Measures*³⁰³⁰” The Burma-based Legal Aid Network contrasts Burma’s Military Justice System with some others in order to understand the potential for reform in compliance with international norms. Unfortunately in Burma, the civilian Supreme Court does not have any power over the military courts or courts-martial which exist in parallel with the Supreme Court³¹³¹ and it is the Burmese army that decides, often in an ad hoc way, which regions are to be governed on an emergency basis.

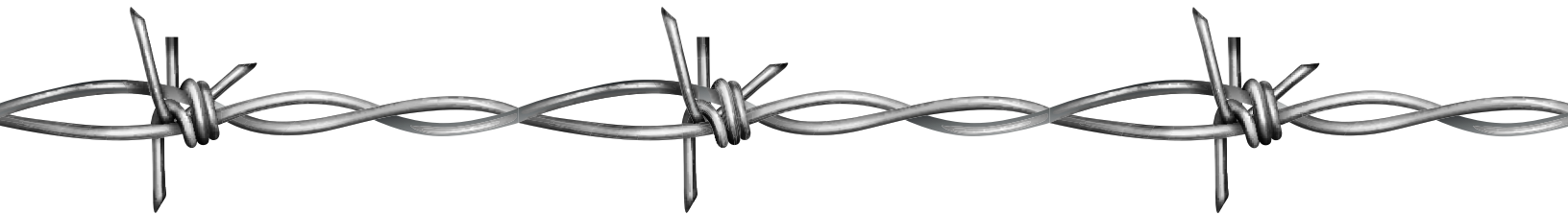
Though Aung San Suu Kyi has been in some sort of political office since 2012 she has “never initiated or exerted efforts to produce a national law in a way that the essence of international humanitarian law (Geneva Convention)—the protection of civilians and of prisoners of war, but not limited to—can be implemented empirically.³²³²” And even when Aung San Suu Kyi’s former bodyguard Ko Par Gyi was murdered by the military

while working as a journalist in 2014, the area he was working in was determined to be subject to military courts even though Mon State was at peace at the time. The military can change the rules as it wishes.

At the Hague, State Counsellor Aung San Suu Kyi asserted that, “The Gambia has not challenged the quality of the military justice in the Inn Din case, only the pardon, which many of us regret.” Yet she must know that normally, high-ranking army commanders, as superiors, must be held criminally responsible for all heinous crimes committed by their subordinates³³. In the case of the InnDinn massacre the generals attempted to shield their own responsibility by taking action against subordinates Suu Kyi must know that this sort of scapegoating is not acceptable in most militaries.

The Legal Aid Network notes important contradictions that exist between the Constitution of Burma and the Defense Services Act of 1959: and yet, “Min Aung Hlaing, Commander-in-Chief, has applied the power to grant pardons by invoking the Defense Services Act. Furthermore, this unlawful action has been endorsed by Aung San Suu Kyi.”³⁴

Indeed, according to the Legal Aid network, there is no provision in the 1959 Defense Services Act in regard to any war crimes committed by the Burmese Army. This analysis strongly suggests that serious legal obstacles remain to implementation of the ICJ provisions, even if the political will is found to enact them. Moreover, the Burmese military is financially independent from the civilian government. The funding flows from military-run industries, not from elected officials. Until that problem is addressed, accountability will remain a dream.



Conclusion

In Burma, despite an emerging civil society, impunity and bias have long been institutionalized and will continue to stand in the way of compliance. To address policies that demonize and marginalize the Rohingya, a review of discriminatory legislation, such as the 1982 Citizenship Laws, and the so-called Race and Religion laws of 2015, should be undertaken. The inherently problematic 2008 Constitution should also be reformed, and citizenship should be based on location of birth, not on nationality or religion. Meanwhile, the Burmese Government must immediately cease referring to the Rohingya as “Bengali.” As legal scholar John Packer points out³⁵, the ICJ has now embraced the Rohingya as a protected class: “The double recognition to ‘group identity’ as well as ‘group-based-suffering’ is of profound significance for the Rohingyas,” he adds.

The initial denials from the Government of Burma are not encouraging, nor is the violent and apparently heedless behavior of the Burmese military. Compliance will be difficult. But it is early yet, and with robust pressure from the international community, and with support from the long-suffering people of Burma, justice may still be possible

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APPENDIX APPENDED FROM THE
ARAKAN INFORMATION CENTER

SOME KILLINGS & WAR CRIMES
PERPETRATED BY THE BURMESE
MILITARY in FEBRUARY 2020

(attached as Excel Sheet)