# BURMA AND THE ICJ RULING

For the Month of March 2020



BURMA justice

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Justice For All is an NGO with Consultative Status at the United Nations (DPI), Justice for All is an Illinois registered nonprofit organization with its main office based in Chicago, with staff and volunteers in Washington DC, New York, Boston, Texas and other locations. The organization, which was incorporated in 1999, grew out of advocacy efforts on the human rights abuses experienced in Bosnia and later Kosovo during the break-up of the former Yugoslavia.

At that time, it was instrumental in shaping the discourse around the 'genocide' debate and campaigned to declare rape as a war crime in international law. Justice for All is funded by a broad range of faith community donors who take a keen interest in the furtherance of human rights both in the United States and outside its shores. Its broad mandate to educate fellow citizens on social justice concerns and provide guidance for action through regular newsletters and extensive media engagement.

On January 23, 2020, the International Court of Justice (ICJ) issued four "provisional measures" directing the government of Burma (Myanmar) to protect the Rohingya minority from the crime of Genocide. The Burmese government 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.

In our first monthly report<sup>2</sup>, the human rights advocacy NGO Justice for All/Burma Task Force<sup>3</sup> considered Burma's compliance with ICJ directives to protect the Rohingya minority from Genocide and to ensure government accountability. We determined that the government and military largely failed to abide by ICJ provisions in the month of February 2020.

In this second monthly update, we note the same disappointing patterns continue in March. Moreover, at a time when the safety of the population depends on communication, coordination and unity to fight the coronavirus pandemic, the government of Burma and the Burmese Army seem to see the health emergency as an opportunity to increase the level of repression, especially against Rohingya and other ethnic communities. Given the Rohingya people's extreme lack of access to health care, along with communications blackouts in Rakhine State, mass fatalities look increasingly inevitable.

In the two months since the rulings, the Burmese military does not appear to have adjusted its brutal ways in any discernable way. With the UN Secretary General calling for a global ceasefire in all nations for the duration of the health crisis, numerous ethnic armed organizations have agreed to lay down their arms, but the Burmese military continues killing innocent civilians<sup>4</sup>. Furthermore, additional restrictions now prevent the free flow of information. In late March, Burmese journalists reporting on the ethnic states' conflict were arrested and for the first time in nine years several ethnic media websites have been blocked.

Many ethnic groups have shown increased support for the Rohingya cause because of the ICJ hearings. Though the suffering of the Kachin people, among others, are highlighted in the UN Fact-Finding Mission report, they are not included in the ICJ case. Kachin Women's Association Thailand (KWAT) representatives have said that they hoped the ruling would allow for a greater discussion of other abuses against ethnic communities, in order to build greater support for pluralism in Burma<sup>5</sup>.

# • Requirements of the Court

The ICJ 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.

Though the Government of Burma took "note" of the ICJ ruling, some observers<sup>6</sup> remarked that it did not explicitly commit to compliance. The Burmese Foreign Ministry also released a statement 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 has been noted in the previous monthly report that the full ICOE report has never been released publicly, but only its Executive Summary<sup>7</sup>.



The Burmese military continues to enjoy impunity as it has for so many decades. Indeed, this monthly report will detail numerous deadly attacks on civilians and other serious human rights abuses that the Burmese military has perpetrated during the month of March 2020.

### Military Violence and Abuses

The Arakan Information Center (AIC)<sup>8</sup> has reported a significant increase in military violence towards civilians, affecting Rohingya and Rakhine neighbors alike. During March, a total of 42 Rakhine State residents were killed, with two thirds being ethnic Rakhine or Mro, and the rest Rohingya. This compares with only 18 killings in February. In addition, numbers of injured increased from 71 to 126; arrests increased from 13 to 36, and disappearances from 1 in February to 32 in March. These totals impacted 34 children 16 years and younger, mostly through injuries.

On March 23, the Government declared the Rakhine-directed Arakan Army (AA) a terrorist organization. This escalation indicates a determination to dominate Rakhine State through military means instead of negotiation. It indicates a strategy to destroy the AA by military might despite the wide level of popular support the militia has gained over the last year. The authorities seek to justify targeting of civilians by claiming links to terror. This impacts Rohingya as well as Rakhine villagers. It doubles down on the existing strategy of using the existence of the ARSA militia as a pretext to repress the Rohingya population.



According to Arakan Information Center (AIC), on March 2 in Tanbyak Kyi village, five residents were killed, 17 injured and 13 disappeared after fighting broke out near the village. In total, 14 were killed on that day, including 7 Rohingya in Butalone plus probably 4 more who were unidentified.

On March 3, a shell landed in Anoke Pyin village at 2 AM after fighting broke out between AA and Myanmar army and wounded a Rohingya father and his 16-year-old son. Two days later in the village of Thay Chun, the body of an unidentified man's body was found in Maungdaw township. Myanmar security force claimed they shot and killed two Rohingya Muslim men who possessed a hand-made gun and bombs.

AIC also reported that on March 6, a landmine exploded and killed a Rohingya Muslim boy and injured 5 other villagers in Paung Duke village in Mrauk U township. On the 13th, in the village of Poung Duck, Burmese soldiers shot four Rohingya villagers and wounded them critically. They



were taken to Myang Bwe hospital. Four additional villagers were slightly injured. On the morning of March 22 in Goke Pi Htung, a left-over shell exploded and injured villagers including Rohingya children.

In its decision, the International Court of Justice notes<sup>10</sup> that, at the hearings, the government of Burma stated that "it cannot be ruled out that disproportionate force was used by members of the Defense Services in some cases in disregard of international humanitarian law, or that they did not distinguish clearly enough between fighters and civilians."

There is no indication that the Burmese army has ceased to disregard international human rights norms, in Rakhine or any other ethnic state. The Shan Human Rights Council reported a range of military abuses in Shan State, including killings and lootings, throughout March<sup>11</sup>.

Though the Restoration Council of Shan State (RCSS) is signatory to the Nationwide Ceasefire Agreement with the government and military, combined forces from three battalions attacked an RCSS military camp near Mong Eis village on the morning of March 25<sup>12</sup>. Soon after, a village headman and his son were arrested in Mongton Township, eastern Shan State<sup>13</sup>.

On March 27 the Karen Women's Organization called for the immediate withdrawal of the Burma Army from civilian areas in Rakhine and Chin States and for the Internet blackout to be lifted<sup>14</sup>. However, on the evening of 31st March, the Burmese Army killed Saw Thet Mee, a Karen community leader while he was shopping for food along with other villagers. He had been assisting IDPs fleeing the army with food and supplies<sup>15</sup>.

The International Court of Justice ruling notes (p.22) 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. Moreover, the Court cannot ignore that the General Assembly has, as recently as on 27 December 2019, expressed its regret that "the situation has not improved in Rakhine State to create the conditions necessary for refugees and other forcibly displaced persons to return to their places of origin voluntarily, safely and with dignity<sup>16</sup>"

Even if it does not target only the Rohingya, the escalation of military violence in Rakhine and other ethnic states does demonstrate that despite Burmese government claims, conditions for Rohingya refugee return are far from ready. Indiscriminate military violence has spread to Chin state and its border area with Rakhine State. Indeed, on April 1, 2020, the US State Department expressed deep concern regarding "escalating violence in northern Rakhine State and Chin State, where dozens have been killed and thousands have been displaced in recent months...

The current situation is exacerbated by ongoing restrictions on humanitarian and media access, and the prolonged internet blackout, which cut communities off from lifesaving assistance and vital information. Access to humanitarian assistance and information are all the more important during the COVID-19 pandemic. We call on the Government of Burma to allow unhindered humanitarian access and to restore internet access.<sup>17</sup>"

# Ongoing Displacement and Crowded Camps

The Burmese military blockade and internet blackout in Rakhine State may well be intended to prevent collection of evidence as well as to hide ongoing human rights abuses of the local population. Given the increasingly difficult conditions imposed on Rakhine State and the resulting lack of access to any outside organizations or journalists, in the coming months countless Rohingya may lack treatment for Coronavirus, and even access to food.



According to Burmese Government statistics in January 2020, there were 128 IDP camps with a total population of 184,333 in 24 townships in Kachin State, Kayin State, Shan State and Rakhine State.<sup>18</sup>



However, according to an OCHA Report on March 31, "over 4,000 people were newly displaced in Kyauktaw Township in Rakhine State between 23 to 27 March due to the conflict between the Myanmar Armed Forces and the Arakan Army (AA). This makes a total of over 8,000 people currently displaced in the township, of which more than half are women. According to government figures and reports from humanitarian partners, in a little over 12 months some 70,000 people are now currently displaced in 154 sites in Rakhine and southern areas of Chin State – close to 40 per cent increase compared with the figures reported in December 2019. The active conflict is also causing civilian deaths and injuries on an almost daily basis. A single incident of shelling in Minbya Township of Rakhine on 24 March killed a child and injured at least 15 civilians.<sup>197</sup>

The European Civil Protection and Humanitarian Operations (ECHO) report for March 2020 states that "Myanmar authorities estimate that more than 61,000 people are recently displaced in Rakhine State since 16 March, representing an increase of approximately 10,000 people, compared to the previous month. They are sheltered across 133 sites. Families forced to flee, have sought shelter in neighboring villages and communities. They are mainly taking refuge in religious buildings, schools, and with host families.<sup>20</sup>"

In mid-March, over 100 representatives of civil society groups, local and international non-governmental organizations, the United Nations, Western embassies and other international agencies met in Myitkyina at a conference entitled the "Internally Displaced Persons-Related Multi-Stakeholder Meeting for Kachin and Northern Shan States", to discuss government failure to close camps housing over 100,000 civilians displaced from their homes since the resumption of conflict between the government and Kachin Independence Organization in June 2011. Currently, there are over 107,000 internally displaced persons recorded in 173 camps in Kachin State and northern Shan State.<sup>21</sup>

In Northern Rakhine State and adjoining Chin State, starvation conditions have been exacerbated by restrictions on freedom of movement 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 since then 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.

Access to Rakhine State is tightly controlled by the Information Ministry<sup>22</sup>. In late March, the government imposed new restrictions on websites of ethnic organizations<sup>23</sup> and on journalists<sup>24</sup> Despite some reluctance<sup>25</sup>, Telenor did shut down all 221websites as the government demanded. UN experts<sup>26</sup> Rohingya leaders and NGOs including Human Rights Watch<sup>27</sup> have called for an end to internet bans during the global Coronavirus crisis.

Because of ongoing conflict, displacement, internet bans, the people of Rakhine State face a COVID catastrophe<sup>28</sup>. Add to these challenges, Burma's refusal to allow Rohingya access to healthcare, and it becomes clear that their survival is at stake. While the enormous refugee camps in Bangladesh face similar dangers<sup>29</sup>, these are at least served by international humanitarian agencies.

Burma has 6.1 doctors per 10,000 people, falling short of the World Health Organization's recommended minimum. In rural and conflict-affected areas like Rakhine State the availability of health personnel drops steeply; according to a March 30th Human Rights Watch report, "one Rakhine State township has only one doctor per 83,000 people, or 0.12 per 10,000. With just one laboratory in the country that can process COVID-19 tests and enough kits to test only 1,700 people at present, Myanmar is ill-equipped to handle the growing caseload that has overwhelmed health systems elsewhere. The government has yet to designate a hospital in Rakhine State for the handling of coronavirus cases."<sup>30</sup>

The Human Rights Watch report also note that "None of the camps have the minimum amount of space per person of 45 square meters recommended by international standards. The average is 20 square meters per person, less than half the minimum standard. In the most crowded camp, 12,500 Rohingya have an average of just 7 square meters per person."

UN experts<sup>31</sup>, Rohingya leaders and NGOs including Human Rights Watch<sup>32</sup> have called for an end to internet bans during the global Coronavirus crisis. Though Burma allowed many of its migrants to return home for the duration of the health crisis, there seems to be no plan to integrate its ethnic IDPs into the national disaster plan, as many international groups are calling for<sup>33</sup>. This would be difficult indeed, given the continued belligerence of the Burmese army. Health is a human right. Considering the government's ongoing failure to reform discriminatory laws (Race and Religion, 1982 Citizenship Laws), will the right to health remain yet another basic right that the Rohingya are denied?

#### 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 resulted in a dismaying level of food insecurity. Because of harsh government policies of restricted access, large multinational programs<sup>34</sup> such as World Health Organization in Yangon are not able to reach many displaced Rohingya populations, especially in Northern Rakhine State. As we discuss in our February 2020 report, this year, eight out of seventeen townships in Burma's Rakhine State have been off limits to most aid groups.<sup>35</sup>

Another long-established aspect of the Rohingya genocide is the systematic denial of education



to Rohingya children, especially in Rakhine State<sup>36</sup>. 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 Bangladesh<sup>37</sup> though schools will be shut for the duration of the health crisis.



There is no evidence that the Government of Burma has restored rights to the Rohingya people. Current concerns may focus on issues of basic survival. The protection of law must extend to all people, without fear or favor. Unfortunately, all too often, the law is distorted to put Rohingya at disadvantage. Land-grabbing continues to impact the Rohingya on a local level. For example, land belonging to the Rohingya-owned Nyaung Chaung Market in Buthidaung was seized with the connivance of local authorities, Rohingya Today and Rohingya Vision both reported on March 23<sup>38</sup>. The creation of quarantine housing for Buddhist migrants in Maungdaw also provoked Rohingya fears that the government would send the contagion into their midst, rather than build services to take care of their community.<sup>39</sup>

# Legal Hurdles and Political Will

Impunity is built into the Burmese legal system. 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."<sup>40</sup> However, the ICJ decision may have strengthened her hand in negotiations with her military partners. At the end of her term in office this month, UN Special Rapporteur Yanghee Lee observed that despite the many negative developments, Suu Kyi does still have the power to make legal and legislative reforms if she wishes.<sup>41</sup>

Currently, according to the Legal Aid Network<sup>42</sup>, 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.



#### Conclusion

For Burma to comply with the ICJ rulings, leaders must reform laws that demonize and marginalize the Rohingya, such as the 1982 Citizenship Laws, and the so-called Race and Religion laws of 2015. 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 out<sup>43</sup>, 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." The anti Rohingya sentiments in Burma call for public education campaigns, and we commend the current grassroots "Genocide is Un-Burmese" campaign<sup>44</sup> working to fully embrace diversity: a sign of hope.

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. Monthly memos will communicate the urgency of the ongoing genocide of this minority population. Communication is key during all crisis situations, and the rising health crisis will test the Government of Burma. It will soon become clear by their actions whether the authorities will grant legal protection and access to emergency services to the Rohingya, or if they will further isolate them into a quarantine from which they may never emerge.



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