

BN 2020/2024: 28 January 2020

IMPLEMENTATION OF THE ICJ'S PROVISIONAL MEASURES ON MYANMAR WILL BENEFIT ALL PEOPLE IN THE COUNTRY AND THE REGION

- **On 23 Jan 2020, the International Court of Justice (ICJ), in deciding to proceed with the case against Myanmar concerning genocide of the Rohingya people, imposed four provisional measures.**
- **The provisions are mainly focused on ensuring a halt to threats to life, livelihood, and wellbeing of the Rohingya, preservation of evidence of crimes, and regular reporting on efforts taken in this context.**
- **Implementation of the provisional measures will require systematic institutional and legislative changes, most importantly a halt to impunity for crimes by its security forces, a widespread and ongoing problem that affects all populations of Burma/Myanmar, including Rakhine, Kachin, Shan, Ta'ang people currently being subjected to crimes similar to those described before the ICJ.**
- **A halt to impunity, particularly for violent crimes that cause forcible displacement of civilians, will also strengthen regional stability.**
- **As the ICJ functions as the court of the United Nations and its rulings are considered binding, the international community is strongly urged to fulfil its obligation to ensure that Burma/Myanmar implements the provisional measures systematically and without delay.**

The ICJ has allowed the case against Myanmar to proceed, and imposed four provisional measures. Provisional measures are an extraordinary remedy called for by the Court when it fears there is a serious threat of further harm being done before it makes a final ruling. This Order, and the need for Myanmar to follow it, are particularly important because eight domestic investigations on Rakhine State since 2012 have failed to produce any accountability;¹ instead, these inquiries have failed to deliver accountability or prevent deterioration of conditions into the current crisis.

UN Secretary General Antonio Guterres welcomed the Order and encouraged Myanmar to comply, emphasising that "... pursuant to the (UN) Charter and to the Statute of the Court, decisions of the Court are binding."² The decision has also been lauded by states across the world. Malaysia called it "a step in the right direction,"³ with the United Kingdom also welcoming the provisional measures.⁴

The provisional measures provide a legal justification for diplomatic pressure on Myanmar. While the Court does not have its own enforcement mechanism, the binding nature of the Order should encourage Myanmar to comply, and the international community has a responsibility to ensure this.⁵

¹ For further information, see ALTSEAN-Burma (23 Aug 2018) Dodging Accountability and Whitewashing Crimes: Time for Burma/Myanmar International Investigation Mechanism

² UN News (23 Jan 2020) Top UN court orders Myanmar to protect Rohingya from genocide

³ Ministry of Foreign Affairs Malaysia (23 Jan 2020) Order by the International Court of Justice (ICJ) on The Gambia's Request for the Indication of Provisional Measures in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), 23 January 2020

⁴ Gov.uk (23 Jan 2020) ICJ's findings on Myanmar and the Rohingya: UK statement

⁵ See Order on Preliminary Measures, p.13 ("In view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity.

Halting these crimes, as well as related policies and institutional behaviors would benefit all groups in the country if implemented effectively and genuinely.

The government of Myanmar should apply the provisional measures thoroughly and systematically across the country, through administrative, legislative, and policy changes. These must include a halt to impunity for crimes committed by Myanmar's security forces and a genuine strengthening of the rule of law, including reforms to make laws fairer for everybody and provide protection to vulnerable groups.

The following sections summarize the provisional measures.

Preventing the State from harming Rohingya people (Provisional Measure 1):

The government must take all measures within its power to prevent the killing of Rohingya people; causing serious bodily or mental harm to them; deliberately inflicting conditions of life that would destroy at least part of the group; and imposing measures intended to prevent births.

In addition to crimes against the Rohingya, the Tatmadaw has committed—and continues to commit—crimes against other ethnic groups across Burma/Myanmar. Recent reports of serious crimes including killings, torture, sexual violence, forced labor and looting targeting communities in Rakhine, Kachin and Shan States add to the comprehensive documentation of crimes by UN experts such as the Special Rapporteur on the situation of human rights in Myanmar and the Independent International Fact-Finding Mission on Myanmar.⁶ For decades, the Tatmadaw carried out systematic killings and other harmful measures under its Four Cuts campaigns,⁷ and continues to block and/or restrict humanitarian aid to Rohingya, Rakhine, Kachin and Ta'ang communities.⁸

Myanmar's laws give impunity to powerful actors. The Myanmar Constitution (Articles 20(b), 293(b), 319 and 343(b)) and the 1959 Defense Services Act (Section 72) ensure that all military actors are tried by a military tribunal, with no civilian oversight. The 2016 Presidential Security Act prevent former presidents from being prosecuted for acts committed during their time in office.

The Population Control Law, which empowers the Myanmar authorities to impose mandatory birth-spacing on any specific community [when the authorities say the number of people is out of balance with the resources there or is negatively affecting development], remains, as one of four laws known as the Race and Religion Protection Laws enacted in 2015.

The government must, in implementing the provisional measures, make personnel, policy, administrative, and legislative changes aimed at halting acts and policies that contribute to and constitute genocide. Fundamentally, this should focus on eliminating the factors that perpetuate impunity and enable the military, security, and political actors responsible for atrocity crimes.

Preventing other groups from harming Rohingya people (Provisional Measure 2):

Myanmar must ensure that its military, as well as any irregular armed units directed or supported by it and any organizations and persons subject to its control, direction or influence, do not commit any acts described above.

Many crimes in Myanmar, and in particular against ethnic minorities, are committed by security forces and other armed groups that are associated with the Tatmadaw although they do not fall under its military command structure. Border Guard Forces in Karen and Rakhine States have killed, abused, tortured, and

That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.")

⁶ Report of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/64, paras. 88-89; Situation of human rights of Rohingya Muslims and other minorities in Myanmar, A/HRC/42/L.21; Report of the Special Rapporteur on the situation of human rights in Myanmar, A/72/382

⁷ See Report of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/64, para. 76.

⁸ BurmaLink (2 May 18) Humanitarian NGOs Call for Immediate Cessation of Hostilities, Protection of Civilians and Humanitarian Access in Kachin and Northern Shan, Myanmar; BNI (29 Nov 19) Military Blocks On Aid Creates Hardships for Shan State IDPs.

stolen property with impunity.⁹ Officers of the Myanmar Police Force have engaged in human rights violations including the clearance operations in Rakhine State.¹⁰

The 1995 Myanmar Police Force Maintenance of Discipline Law ensures that the Myanmar Police Force is tried in its own tribunal (Chapter 6) and under special laws with reduced sentences, even for flagrant abuses. The actions of BGF soldiers and commanders continue to avoid scrutiny.

Myanmar should address the problem of impunity for these other actors by removing laws and policies that unnecessarily shield these groups from prosecution, and by allowing for consistent trial and sentencing of these groups under civilian oversight; in other words, it should end impunity for them.

Preventing behavior that contributes to genocide (Provisional Measure 2):

Myanmar must ensure that none of these groups commit genocide (any of the act above), or conspiracy to commit genocide, or direct and public incitement to commit genocide, or attempt to commit genocide, or complicity in genocide.

The types of crimes in front of the court are encouraged by hate speech against minority groups, which is often not prosecuted or discouraged by the State.¹¹ Selective prosecution by the State often means that those producing hate speech are not tried, while those who publicly complain about harmful laws and practices are sent to prison.¹²

Several laws in Myanmar are used to prevent free speech by individuals and civil society (even when these statements are merely calling attention to hate speech). These include:¹³

- Telecommunications Act article 66(d);
- Electronic Transactions Law articles 33 and 34(d);
- The Unlawful Associations Act of 1908;
- The Official Secrets Act of 1923;
- The Peaceful Assembly and Peaceful Procession Law; and
- Myanmar Penal Code sections 124A (sedition), 295A (insulting religion), 499-500 (defamation) and 505 (incitement).

To address this problem, Myanmar should allow the judiciary to function independently and should choose to prosecute those producing hate speech against the country's minority groups. It should also amend or repeal laws that are manipulated to target free speech.

Preservation of evidence (Provisional Measure 3):

Myanmar must take effective measures to preserve evidence related to the crimes alleged in this case.

Destruction of evidence, harassment, and reprisals have all undermined accountability for atrocities committed against groups across Myanmar. For example, security forces took extensive measures in 2013 to cover up evidence of crimes committed in Rakhine State.¹⁴ More recently, government and military actors have tried to stop people from speaking up about atrocities, including:

⁹ See, e.g., Myanmar Times (4 Jan 2019) Shootout among Kayin Border Guard Force personnel kills four; VOA News (10 Dec 2019) A Journalist Looks Back as Myanmar's Government Faces Genocide Charges.

¹⁰ Peaceworks (2018) Myanmar's Armed Forces and the Rohingya Crisis; BBC News (10 Mar 2015) Myanmar riot police beat student protesters with batons

¹¹ Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/42/CRP.5.

¹² Frontier Myanmar (11 Apr 2019) The right to demonstrate? It depends who you are

¹³ Article 19 (May 2019) Myanmar Briefing Paper: Criminalisation of Free Expression

¹⁴ See Report of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/64, paras. 50,93.

- Judicial harassment, as in the case of Brang Shawng, a Kachin man charged with defamation and taken to court 45 times after complaining about the Tatmadaw killing his daughter and injuring him;¹⁶
- Imprisonment, as in the case of two Reuters journalists sentenced to two years for reporting about the Inn Din massacre in Rakhine State;¹⁷
- Threats, as in the case of Jamalida Begum, a Rohingya woman who fled Myanmar for fear of reprisal after reporting her rape and torture by soldiers;¹⁸ and
- An internet shutdown across nine townships in Rakhine and Chin States, so that no information could reach the outside while atrocity crimes were being committed there.¹⁹

The Court's order for Myanmar not to destroy evidence is crucial and it should absolutely be followed by the government of Myanmar, not only with respect to crimes against the Rohingya but others in Rakhine State and across the country. But in addition to refraining from destroying evidence, Myanmar must not take actions to threaten, harass, or punish those with information about these crimes.

Documentation and transparency (Provisional Measure 4):

Myanmar must submit regular reports to the Court on efforts to comply with the Order.

This measure will ensure transparency by Myanmar, and generate much-needed trust between the government and local communities, and between the government and the international community. Such transparency and accountability increases the space for technical assistance to be provided to Myanmar in order to ensure implementation is done in a comprehensive and sustainable manner.

The full text of the provisional measures from the Order is as follows:¹⁵

THE COURT,

Indicates the following provisional measures:

(1) Unanimously,

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, take all measures within its power to prevent the commission of all 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;

(2) Unanimously,

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;

(3) Unanimously,

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;

(4) Unanimously,

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.

¹⁵ ICJ (23 Jan 2020) Order on The Gambia's request for preliminary measures in the case of The Gambia v. Myanmar. Para 86

¹⁶ Achieving Justice for Gross Human Rights Violations in Myanmar, ICJ 2018, p.31.

¹⁷ Achieving Justice for Gross Human Rights Violations in Myanmar, ICJ 2018, p.36.

¹⁸ BBC (11 March 2017) Hounded and Ridiculed for Complaining of Rape.

¹⁹ UN News (24 June 2019) Government internet ban leaves parts of Myanmar 'in a blackout', UN expert calls for immediate lifting