

Practical Prevention

How the Genocide Convention's Obligation to Prevent Applies to Myanmar

Report #2: The Denial of the Right to Citizenship and the Right to Participate in Public Affairs

LEGAL BRIEF



UNITED STATES
HOLOCAUST
MEMORIAL
MUSEUM

SIMON-SKJODT CENTER
FOR THE PREVENTION OF GENOCIDE

THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM (Museum) teaches that the Holocaust was preventable, had the warning signs been recognized and acted upon. In this spirit, the Museum's Simon-Skjoldt Center for the Prevention of Genocide (SCPG) strives to encourage worldwide action to prevent, halt, and promote justice and accountability for modern day acts of genocide and related crimes against humanity. Mindful of the irreparable devastation, harm, and trauma caused to victims and survivors, SCPG places particular importance on developing and strengthening efforts to prevent genocide through its research, policy engagement, education, and outreach activities. Learn more at ushmm.org/genocide-prevention and visit the Museum's new online exhibit, "Burma's Path to Genocide," at <https://exhibitions.ushmm.org/burmas-path-to-genocide>.

This is the second in a series of reports from SCPG's Ferencz International Justice Initiative that aims to assist states and other interested parties in reviewing whether the government of the Republic of the Union of Myanmar is meeting its legal obligations to prevent the commission of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. The second report focuses on the denial of the right to citizenship and the right to participate in public affairs as risk factors to genocide.

The Museum expresses its gratitude to all of the individuals and groups who have participated in shaping this report series.

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Cover: Sittwe, March 6, 2015. *Courtesy of Paula Bronstein Getty Images Reportage for the United States Holocaust Memorial Museum*

I. Introduction

A. Overview of the Report Series and Present Report

In May 2020, the Ferencz International Justice Initiative at the U.S. Holocaust Memorial Museum’s Simon-Skjodt Center for the Prevention of Genocide (SCPG) issued the first¹ in a series of reports that examine whether the government of Myanmar² is complying with the International Court of Justice’s (ICJ or Court) provisional measures order of January 23, 2020.³ The order relates to Myanmar’s obligation to “take all measures within its power” to prevent the commission of genocide⁴ under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).⁵

The report series is a part of the Museum’s longstanding commitment to call attention to the decades-long persecution of the Rohingya people,⁶ which culminated in the government’s 2016 and 2017 attacks—events that the Museum found constituted compelling evidence that Myanmar had committed genocide against the Rohingya.⁷ This report series does not focus on the genocidal acts already committed, which is the subject of the case, *The Gambia v. Myanmar*, currently before the ICJ. Rather, it explores what measures the Myanmar government should take to *prevent* the reoccurrence of genocide against the Rohingya. This inquiry is not merely a theoretical one, but rather is driven by grave real-world urgency, recognized by the ICJ in its provisional measures order⁸ and reflected in the Rohingya’s daily lived experience, that “the Rohingya people remain at serious risk of genocide.”⁹

The goals of the report series are to highlight the importance of genocide-related risk factors and early warning signs to the obligation to prevent, and to strengthen understanding of the legal norms of international human rights and humanitarian law that are relevant to preventing genocide. The Museum hopes to provide a useful guide to the government of Myanmar for fulfilling its obligations to prevent genocide and a tool for interested states and other parties to evaluate Myanmar’s compliance with the ICJ’s order.

The first report set out the framework used throughout the series, namely by examining whether risk factors for the crime of genocide, identified as such in the United Nations Office on the Prevention of Genocide and the Responsibility to Protect’s *Framework of Analysis for Atrocity Crimes: A Tool for Prevention* (UN Atrocity Framework)¹⁰ and in the Jacob Blaustein Institute for the Advancement of Human Rights’ *Compilation of Risk Factors and Legal Norms for the Prevention of Genocide* (JBI Compilation),¹¹ remain present in Myanmar. If present, the report series examines whether the Myanmar government is taking adequate steps to mitigate these risks, as so ordered by the ICJ, and makes recommendations to Myanmar of concrete measures that it should take. The eight risk factors that are the focus of this report series relate to serious violations of international human rights and humanitarian law,¹² namely:

1. Systematic denial or revocation of the right to citizenship
2. Systematic denial of the right to participate in public affairs
3. Systematic denial or severe restrictions of the right to freedom of movement
4. Systematic denial or severe restrictions of access to health care

5. Systematic expropriation or destruction of property
6. Systematic killing of a protected group, enforced disappearances, and targeting of community leaders and intellectuals
7. Systematic use of rape and sexual violence
8. Use of members of a protected group in forced labor

The present report examines two of these risk factors: the systematic denial of 1) the right to citizenship (nationality) and 2) the right to participate in public affairs. The report analyzes how these risk factors have impacted the Rohingya in Myanmar, how the continued presence of these risk factors increase the vulnerability of the Rohingya people and may represent a risk for the reoccurrence of genocide, and whether the Myanmar government is taking appropriate action to mitigate these risks. As is set out in the below analysis, the Museum concludes that Myanmar is not taking all measures within its power to mitigate these two risk factors and is therefore not in compliance with the ICJ's provisional measures order to prevent genocide. Based on this non-compliance, the report concludes with recommendations of concrete measures to the Myanmar government that it should take and to other interested states and United Nations bodies regarding actions that they can take to encourage Myanmar to comply with its obligation to prevent genocide.

B. Preliminary Legal Issue: The Obligation to Prevent Genocide in the Context of a Provisional Measure

The imperative of prevention reflects the fact that genocide is “one of the most heinous crimes known to mankind.”¹³ It is an act of “inconceivable, dehumanized brutality” whose consequences when it comes to the physical and mental health and psychological trauma of survivors endure well after the genocide has ended and continue to impact future generations.¹⁴ While perpetrators can be held accountable after the fact, the harm caused to victims, their families, and entire societies is oftentimes irreparable. Acknowledgment of this immensity of harm gives added weight to the importance of states taking all measures possible to prevent genocide from occurring and for the ICJ to take a proactive approach to ensure compliance with its provisional measures order.

Yet, as detailed in the first report in this series,¹⁵ there is very limited guidance as to what the obligation to prevent genocide entails, even though it constitutes a core pillar of the Genocide Convention. In addition, it is not clear how to assess whether a state, *prior to genocide taking place*, is meeting its prevention obligations. In this respect, the JBI Compilation acknowledges that:

“[T]here is no formulaic approach to definitively determine whether or to what extent a country is at risk of genocide, even when risk factors and special circumstances are present. The presence of one or more risk factors, therefore, does not necessarily mean that genocide will take place[.]”¹⁶

Furthermore, the ICJ's jurisprudence in the case of *Bosnia v. Serbia*, distinguishes between when a state's prevention obligation arises (at the moment the state knows or should have known of the existence of a serious risk that genocide will be committed)¹⁷ and when a state can be held accountable for a failure to

prevent (only following the actual occurrence of genocide, which is a prerequisite to a breach of the obligation to prevent).¹⁸

Thus, unlike in *Bosnia v. Serbia* which involves a post-genocide finding of a breach of the obligation to prevent, the ICJ provisional measures order presents a different question, namely how and when the ICJ should assess Myanmar's actions to prevent the commission of genocide *as a provisional measure*, i.e. before the judgment on the merits of the case.

While recognizing that the Court has held that “judgment on the merits is the appropriate place for the Court to assess compliance with [] provisional measures,”¹⁹ this jurisprudence arises from a territorial and water dispute,²⁰ and more importantly potential harms, that differ substantially from that raised in this case where there is a serious risk of genocide occurring. The Court has ordered the Myanmar government to submit reports every six months on its progress.²¹ Therefore, recalling the extraordinary degree of harm caused by genocide, the Court should, following the submission of each progress report, assess whether the concrete measures put forward by Myanmar in that report are sufficient for purposes of complying with the Court's order. If they are not, as suggested by other commentators,²² the Court should proceed under article 75 of the Rules²³ to issue further provisional measures or amend the provisional measures by providing more specific instructions under article 76 of the Rules. In this way, Myanmar can receive immediate guidance on whether it is in compliance and can adjust its policy responses accordingly.

It is noteworthy that, in relation to the actions that Myanmar indicated it was currently conducting, the Court found, that:

“[these actions] do not appear sufficient in themselves to remove the possibility that acts causing irreparable prejudice to the rights [] of the Rohingya in Myanmar could occur. In particular, the Court notes that Myanmar has not presented to the Court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention.”²⁴

Thus, the government of Myanmar is on notice that its actions up until the order are insufficient. With respect to the three directives²⁵ issued by Myanmar following the provisional measures order, these directives appear to be mainly aimed at the second²⁶ and third²⁷ provisional measures. The third directive, banning hate speech and incitement to violence, is a positive development, but falls well short of “concrete measures aimed specifically at *recognizing and ensuring* the right of the Rohingya to exist” (emphasis added) that Myanmar must take to comply with the first provisional measure obliging it to prevent the commission of genocide.

In this respect, the risk factors identified in the UN Atrocity Framework and the JBI Compilation and which are the subject of this report series highlight serious violations of international human rights law, but “do not create any new obligations for states. Rather, they represent existing obligations[.]”²⁸ In this same regard, at the United Nations' 2005 World Summit on the Responsibility to Protect,²⁹ the Myanmar government accepted that it “has the responsibility to protect its populations from genocide.”³⁰ Mitigation of these risks and compliance with its existing obligations require that Myanmar take positive actions, namely by implementing legislative and policy changes. Therefore, the ICJ should require that concrete

legislative and policy changes that address the ongoing human rights violations against the Rohingya be a part of the measures Myanmar must take in order to comply with its order, even absent a final determination as to whether Myanmar has breached its prevention obligation under the Genocide Convention. In this respect, Myanmar has at its disposal multiple resources outlining concrete measures that it should take, including those identified by the Independent International Fact-Finding Mission on Myanmar (IFFM),³¹ as well as those contained in the Final Report of the Advisory Commission on Rakhine State.³²

II. Serious Violations of International Human Rights Norms as Risk Factors to Genocide

“As history has demonstrated, atrocity crimes in general and genocide in particular are preceded by less widespread or systematic serious violations of international human rights and humanitarian law. These are typically violations of civil and political rights[.]”³³

— Comment to the second risk factor of the UN's Atrocity Crimes Framework

The United States Holocaust Memorial Museum teaches that the Holocaust was preventable, had the warning signs been recognized and acted upon. Two of the risk factors present in the lead-up to the Holocaust during the 1930s were the Nazi regime's campaigns to strip German Jews of their citizenship³⁴ and to exclude them from all aspects of participation in public affairs, including, but not limited to, the ability to work in civil service,³⁵ serve as public school teachers, and work in municipal social welfare services.³⁶ The revocation of citizenship and exclusion from public life were incremental steps in the Nazi campaign to define German Jews as “aliens” in their own country and to reinforce this notion in German society.³⁷ These discriminatory measures not only contributed to the persecution and vilification of Jews, but equally denied Jews their identity and rights as Germans.

While there is no hierarchy of genocide risk factors, and the presence of any one factor does not necessarily indicate that genocide will occur, particular attention should be paid when these two risk factors are present in tandem. This is because of the important role that citizenship plays in terms of the ability to enjoy other fundamental human rights, particularly economic and social human rights. When these two risk factors are present, it means that a group is being deprived of numerous other human rights, while simultaneously being excluded from the very arena where decisions regarding those same rights are made and could otherwise potentially be influenced. When these rights are denied from a group as a whole on the basis of ethnicity, race, or religion, they also strip members of the targeted group of their national identity and sense of belonging, causing psychological harm to members of the group and communicating a message of “otherness” and inferiority about the group to the rest of society. This can lay the groundwork for subsequent discriminatory measures and risks heightening hostility towards the targeted group within the society at large.

A. The Right to Citizenship

“[Loss of citizenship is] the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself.”

— US Supreme Court, explaining why the 8th Amendment bars denaturalization as a form of punishment³⁸

While having distinct meanings, the terms “citizenship” and “nationality” are used interchangeably in international human rights law. Due to it often being the basis for accessing other rights, the right to citizenship is commonly referred to as “the right to have rights.”³⁹ JBI’s *Manual on Human Rights and the Prevention of Genocide* explains that: “Nationality is typically the basis for enjoying the State’s full protection of the rights to establish residency and to move freely within the State; to vote and participate in public life; and, in some cases, to access health services and higher education, to work legally, and to rent or own property.”⁴⁰ As will be further explored in later reports, the denial of the right to citizenship has had a profoundly negative effect on the Rohingya’s ability to exercise their right to freedom of movement, to access medical care, and earn a livelihood.

1. The Relevant Legal Norms

The right to nationality is a fundamental human right contained in numerous treaties to which Myanmar is a party,⁴¹ including notably in article 15 of the Universal Declaration of Human Rights and the Convention on the Rights of the Child, and is a part of customary international law, binding upon Myanmar.⁴²

Under international human rights law, everyone has a right to a nationality and every child has the right to acquire a nationality.⁴³ Under article 8 of the Convention on the Rights of the Child, states must “respect the right of the child to preserve his or her identity, *including nationality*,” (emphasis added) and, if deprived of his or her identity, must take steps to “re-establish [it] speedily.” Governments cannot directly or indirectly arbitrarily deprive individuals of their right to citizenship and nationality,⁴⁴ and may not deprive an individual of nationality or citizenship on the basis of race or national or ethnic origin in violation of the principle of non-discrimination.⁴⁵

In addition to the full revocation of citizenship, government actions that may constitute the systematic denial of the right to citizenship of members of a protected group include conditioning citizenship on membership in a dominant group or on the renunciation of the group identity to which the individual belongs, and the discriminatory exclusion of a protected group from a national census, or other national registration processes.⁴⁶

2. The Right to Citizenship in Myanmar

“It will take us a hundred years to get back to the life we had been living since our forefathers.”

— Ayub, a Rohingya man

Despite references to the Rohingya residing in Myanmar that appear as far back as the 17th century,⁴⁷ being recognized as an indigenous population following its independence in 1948, and obtaining citizenship during that time period,⁴⁸ the Myanmar government has since then increasingly sought to restrict the Rohingya’s right to citizenship.⁴⁹ In doing so, the Myanmar government has attempted to recast the Rohingya as “foreigners” in Myanmar.

Following independence from the British, Myanmar adopted the 1947 Constitution, which provided that citizens were: 1) any person whose parents were members of the “indigenous races of Myanmar”; 2) any person born in Myanmar with at least one grandparent who was a member of an “indigenous race”; and 3) any person born in Myanmar whose parents were citizens of Myanmar.⁵⁰ Article 3 of the 1948 Union Citizenship Law defined “indigenous races” as: “Arakanese, Burmese, Chin, Kachin, Karen, Kayah, Mon or Shan race and such racial group as has settled in any of the territories included within the Union as their permanent home from a period anterior to 1823.” The term “such racial group” was not further defined in the law. In 1949, the state required citizens to register under the Residents of Myanmar Registration Act. Upon registration, citizens were provided with a National Registration Card (NRC). The NRCs functioned as *de facto* citizenship cards, given that foreigners were registered under the Registration of Foreigners Act.⁵¹ While the Rohingya are not listed as an “indigenous race”⁵² in the 1948 Citizenship Act, they appear to have been recognized as one of the groups contained in the catch-all “such racial groups” category in the 1948 Union Citizenship Law, which is evidenced by the large number of Rohingya who acquired NRCs during this time period. Published Burmese-language documents also demonstrate that the Rohingya were recognized by the government as a distinct ethnic group within Myanmar during this time period, through “public statements, official radio broadcasts, government-printed books, and government-issued licenses.”⁵³

However, in the 1960s, following the military coup and the government becoming a military dictatorship, led by General Ne Win, hostility toward the Rohingya increased along with efforts to erase their connection and history in Myanmar. These efforts culminated in the passage of the 1982 Citizenship Law.⁵⁴

Public statements made in the lead-up to the Citizenship Law’s introduction show that the government’s understanding of the concept of “citizen” was explicitly ethnically-based and that the Law’s intent was to exclude the Rohingya from being recognized as citizens based on their ethnicity.⁵⁵ This intent is also evident from the substance of the law itself. The 1982 Citizenship Law creates three levels of citizenship: “full” citizen,⁵⁶ associate citizen, and naturalized citizen. The rights associated with the two latter categories of citizens, associate and naturalized, are subject to limitation by decision of the government.⁵⁷ Under the Law, qualifying as a citizen requires belonging to one of eight national ethnic groups set out in the law itself or being a member of an ethnic group recognized by the Myanmar government.

At the time of the Law's drafting, Myanmar was operating under the 1972 Constitution, which transferred political power to a semi-parliamentary system, called the People's Assembly, that established councils, such as the Council of State. These councils were headed by Ne Win's military officials.⁵⁸ Article 4 of the 1982 Citizenship Law states that: "The Council of State may decide whether any ethnic group is a national or not",⁵⁹ giving absolute power to Ne Win and members of the military to decide which ethnic groups were to be included or excluded. Based on this process, 135 ethnic groups have been recognized by Myanmar, thereby providing a potential pathway for those groups to obtain the status of citizen. The Rohingya are not among those listed.

The Citizenship Law does provide that persons who were citizens at the time that the law went into force would retain their citizenship.⁶⁰ However, in practice, this provision was only applied to those persons who were members of the 135 recognized ethnicities and was not available to the Rohingya. UNHCR summarized the application of the law to the Rohingya:

In 1989, a nationwide citizenship scrutiny exercise was carried out during which the 1982 Citizenship Law and its 1983 Procedures were applied. For those who were "scrutinized" and found to fulfil the requirements of the new citizenship law, the Citizenship Scrutiny Card (CSC) replaced their National Registration Card (NRC). Individuals whose mother and father were considered as belonging to the 135 recognized "national ethnic groups" under the law retained their citizenship status without difficulty. **Others, in particular the Rohingya, a proportion of whom had been issued with NRCs like other citizens prior to 1989, did not have their NRCs replaced with CSCs. Following the introduction of CSCs in 1989, the Rohingya population that applied for a CSC never received a decision regarding their status.** Furthermore, persons who were not granted CSCs but retained the NRCs that they had previously been issued are no longer considered Myanmar citizens by the relevant competent authorities."⁶¹ [Emphasis added.]

The Law also provides that the statuses of associate and naturalized citizenship can be attained by an applicant providing "conclusive evidence" that they resided in Myanmar prior to 1948 or have a parent with some form of citizenship status.⁶² However, few Rohingya have the type of documentation required to meet this standard. According to the FFM:

"In a country where over 25 percent of the population lacks official documents and where many have lost documents due to violence or departures, a large portion of the population, in particular the Rohingya, is unable to meet these requirements and so is unable to claim any of these categories of citizenship."⁶³

Furthermore, as explained above, the Myanmar government has refused to acknowledge the previously recognized citizenship status of Rohingyas who received NRCs. According to UNHCR, "the way in which the 1982 Citizenship Law was applied to members of the Rohingya led to the deprivation of Myanmar citizenship for an estimated one million people."⁶⁴

Subsequent citizenship verification processes undertaken by Myanmar beginning in 2012 required Rohingyas to self-identify as "Bengali," a term that implies that the bearer is actually from neighboring

Bangladesh, thus emphasizing their foreignness and suggesting a ground for deportation. In addition, being successfully “verified” did not confer any rights of citizenship.⁶⁵ For example, in 2014, the government conducted a national census that excluded the Rohingya population, as the census only included individuals who were a member of one of the officially recognized ethnic groups.⁶⁶ Myanmar officials refused to permit Rohingyas to register for the census as “Rohingya,” stating that “If a household wants to identify themselves as “Rohingya”, we will not register it” and required Rohingya to register as “Bengali.”⁶⁷ Exclusion from the census has resulted in the government directing less socioeconomic development and aid into Rakhine State,⁶⁸ where the majority of Rohingya reside, as well as leading to Rohingya receiving fewer benefits from these programs, exacerbating inequality and tensions⁶⁹ between the Rohingya and the Rakhine population.⁷⁰

In 2015, the government launched a pilot project for a new verification process, referred to as the National Verification Card (NVC) process,⁷¹ which targeted mainly displaced Rohingya, but also included other displaced minority groups. However, this pilot was widely considered a failure because few Rohingya participated due to being required to self-identify as “Bengali” and the process not setting out a clear framework for how the rights of (full) citizenship could be realized.⁷² Indeed, even in the few cases in which full citizenship was successfully proven, the rights associated with citizenship were not conferred on the individuals, as they remained subject to restrictions on their movement, education, and medical care. While the process was slightly changed in 2016, the problematic aspects of the pilot highlighted above remain in place.

It should be highlighted that the 1982 Citizenship Law stripped citizenship from the Rohingya as a group on the basis of their identity and ethnicity. Yet, under the NVC process, the potential restoration of citizenship is only available at the individual level. This creates divisions within the Rohingya community between those individuals who, for example, receive associate or naturalized status, and those who were rejected or chose not to apply.⁷³ Furthermore, in practice and as documented with regard to the pilot project in 2015, the process does not in fact restore full citizenship even at the individual level. Among those who were rejected are former public servants and prominent citizens.

Framed as a concern about retaining “national integrity,” Myanmar officials have increasingly expressed concerns that the Rohingya would outnumber other “recognized” ethnic groups. This led to the passage of the 2015 Race and Religion Laws, a set of laws that regulate marriage and birth rates.⁷⁴ In Rakhine State, this has been enforced through local orders that “imposed marriage restrictions on Rohingya, as well as restrictions on the permissible number and spacing of children.”⁷⁵ Myanmar also does not have any domestic procedures to ensure that Rohingya children are registered at birth and able to acquire citizenship.

With regard to Rohingya who are outside of Myanmar, nearly 900,000 Rohingya⁷⁶ are now seeking refuge in Bangladesh, in what has become the world’s largest refugee camp. They, along with Rohingya in other states such as Thailand and Malaysia, are subject to the actions of their host countries, including restrictions on their ability to move freely, work, pursue a formal education, and organize politically, and do not have the rights and protections associated with Myanmar citizenship under international relations treaties, such as the Vienna Convention.

3. Analysis

“By denying us citizenship, they are denying our entire existence, our struggle, and our survival”⁷⁷

— A Rohingya community leader

On its face, the 1982 Citizenship Law is discriminatory and arbitrarily deprives the Rohingya of their right to citizenship on the basis of their ethnicity.⁷⁸ The Law’s provisions for the creation of the list of “recognized ethnic groups” is procedurally deficient in that the list was prepared without providing for a public referendum or input; lacks any evidentiary, historical or anthropological basis for the decision to include or exclude an ethnic group; and does not provide for any review or challenge process. Furthermore, despite operating under a new constitution since 2008, Myanmar still applies the 1982 Citizenship Law, without questioning whether the process aligns with international human rights or democratic principles. The Law is also based on an outdated governmental structure, rendering unclear which organ of the present structure now has the Council of State’s mandate⁷⁹ to decide whether any ethnic group is recognized or not. This lack of clarity prevents the Rohingya from being able to effectively petition or appeal to the government regarding their non-inclusion on the list of recognized ethnic groups.

The NVC process put in place by the Myanmar government also does not provide a legitimate path to obtaining citizenship. To the contrary, the manner in which this process has been implemented contributes to the arbitrary deprivation of citizenship suffered by the Rohingya.⁸⁰ Furthermore, even if the NVC process did provide a meaningful pathway to citizenship, by requiring the Rohingya to identify as “Bengali” and not permitting self-identification as Rohingya, the process violates international human rights law by conditioning citizenship on the renunciation of the Rohingya group identity.

The denial of citizenship has particularly affected Rohingya women and children and the human right to form a family. The 2015 Race and Religion Laws are premised on the supposed “threat” posed by the Rohingya as “foreigners” in Myanmar, and are thus linked to the denial of citizenship. These laws are discriminatory towards women and, in implementation, discriminatorily target the Rohingya as a group based on their identity and ethnicity. The 1982 Citizenship Law also violates the Convention on the Rights of the Child by not providing for the registration at birth of Rohingya children and by preventing Rohingya children from being able to acquire citizenship, effectively rendering entire future generations of Rohingyas born in Myanmar stateless.⁸¹

The Myanmar government has targeted the Rohingya on the basis of their ethnicity and made continuous efforts to restrict and revoke their citizenship for more than a half century. As a result of this sustained campaign, more than a million Rohingya have been deprived of their right to citizenship. As such, these acts clearly rise to the level of a severe and systematic violation of the international human right to citizenship and, accordingly, this genocide risk factor remains present in Myanmar today.

In addition, since the issuance of the ICJ’s provisional measures order, Myanmar has not publicly indicated that it intends to begin a process of repealing or amending the 1982 Citizenship Law and 2015 Race and Religion Laws, or reforming the NVC process,⁸² nor has it introduced any relevant legislation or

procedures in this regard. Accordingly, due to the failure to take concrete measures to mitigate this risk factor, Myanmar is not in compliance with the ICJ’s provisional measures order.

B. The Right to Participate in Public Affairs

The ability to participate in public affairs is a critical safeguard to preventing and stopping discriminatory or harmful government actions because it provides an avenue for those targeted groups to be a part of, and potentially influence, decision-making processes that affect their rights and provides a forum in which their concerns can be aired and addressed. The right to participate in public affairs is closely intertwined with the rights of freedom of expression and association. As already mentioned, this right is also connected to the right to citizenship, as the right to participate in public affairs is often restricted, completely or in part, to those with the status of citizen.

This report is being issued in advance of Myanmar’s 2020 national elections, in which all indications suggest the Rohingya are and will be disenfranchised. The Museum is deeply concerned by this situation and will also be issuing a policy brief with detailed recommendations specifically addressing the 2020 elections.⁸³

1. The Relevant Legal Norms

Under international human rights law, all citizens have a right to participate in public affairs.⁸⁴ Governments may not unreasonably restrict or deny this right based on discriminatory reasons, including membership in a “protected group,” which is defined as “a national, ethnical, racial or religious group” per article II of the Genocide Convention.⁸⁵

Government actions that may constitute the systematic denial of the right to participate in public affairs include denial of the right to vote, to be a candidate for office, and to be employed in the public sector.⁸⁶

2. The Right to Participate in Public Affairs in Myanmar

“They are making us valueless.”

— Bodru, a Rohingya man

Since Myanmar’s independence, Rohingyas have stood as candidates, formed political parties, served in office, participated in elections, and worked as civil servants in government positions. Indeed, the extensive contributions made by Rohingyas to the improvement of Myanmar through their participation in public affairs makes the Myanmar government’s more recent actions to erase this rich history and exclude the Rohingya all the more troubling.

In Myanmar, the right to participate in public affairs is limited to those who hold the status of citizen. Despite the 1982 Citizenship Law revoking their citizenship status, the Law was not immediately fully implemented with respect to participation in public affairs. As a result, the Rohingya were able to work in government jobs and participate in the 1990 and 2010 national elections through voting, running as candidates, and forming Rohingya-led political parties. Voter lists including Rohingyas were established for both of these elections.

In 1990, Rohingyas not only voted, but elected four Rohingya Members of Parliament (MPs) as a part of the National Democratic Party for Human Rights (NDPHR).⁸⁷ In 2010, election participation was facilitated by Temporary Registration Cards, also known as “White Cards,” which were issued beginning in 1995 for the purpose of identifying Rohingya and other ethnic minorities that were not a part of the recognized ethnic groups under the Citizenship Law. While these cards did not confer any rights of citizenship, they did enable the Rohingya to vote in the election and to form Rohingya-led political parties.⁸⁸ Three Rohingya MPs were elected in the 2010 elections.⁸⁹

However, in the lead-up to the 2015 national elections, the Myanmar government began to apply the citizenship requirement to the right to participate in elections as voters and candidates. Before the election, in February 2015, the government enacted a law permitting White Card holders to vote. This decision triggered protests and, in response, the government canceled the White Cards. Separately, Myanmar’s Constitutional Tribunal ruled that White Card holders were ineligible to vote in the upcoming election. Months later, Myanmar’s Union Election Commission (UEC) held that all of the Rohingya candidates were not qualified to stand for office on the basis of not having established their citizenship status in accordance with the 1982 Citizenship Law.⁹⁰ The three serving Rohingya MPs were disqualified and not permitted to contest the election.⁹¹ In sum, more than 500,000 Rohingya were removed from the voter rolls and stripped of their right to vote and no Rohingya candidates were deemed eligible to stand as a candidate.

The 2020 national elections are scheduled for November 8. All indications are that the Rohingya will once again be disenfranchised from voting. In August 2020, the UEC disqualified six Rohingya candidates, including Kyaw Min who was elected in the 1990 elections, on the basis that they had failed to prove that their parents were citizens at the time of their birth.⁹² In addition, the nearly 900,000 Rohingya living in UN refugee camps are currently unable to vote in the Myanmar elections and the Bangladesh government has imposed restrictions on civil society activity in the camps, preventing the Rohingya from engaging in political activity.⁹³

With regard to working as civil servants in government positions, the situation for the Rohingya is equally troubling. According to Rohingya former civil servants, many Rohingyas held these positions as recently as the 1990s.⁹⁴ However, beginning in that time period, the government began to actively enforce its policy of excluding Rohingya from these positions.⁹⁵ Since then, the government has removed almost all Rohingyas from the civil service. According to these individuals, the government used various tactics to accomplish this, including pressuring Rohingya civil servants to resign, denying them promotions, and no longer recruiting Rohingya for new positions as they became available.⁹⁶ One Rohingya former civil servant emphasized that not having the ability to work in public service deprived the Rohingya as a group

of social and economic opportunities, explaining that these positions represent “an important form of stability” that is no longer available to the Rohingya.⁹⁷

3. Analysis

The right to participate in public affairs in Myanmar is determined by citizenship status, which, as set out above, has been arbitrarily denied to the Rohingya as a group on the basis of their ethnicity. As such, in these circumstances, using citizenship status to deny Rohingyas the right to participate in public affairs unreasonably denies this right based on discriminatory reasons, namely the Rohingya’s membership in a protected ethnic group. As a result of the discriminatory application of the right to citizenship to the right to participate in public affairs, the Rohingya as a group have been disenfranchised from voting, denied the right to stand as candidates, and denied the right to work in the civil service.

These acts clearly rise to the level of a severe and systematic violation of the international human right to participate in public affairs and, accordingly, this genocide risk factor remains present in Myanmar today.

With regard to ensuring that the Rohingya have the right to vote and stand as candidates,⁹⁸ the Myanmar government has had almost five years to address this issue.⁹⁹ It has not done so. Instead, it appears that Myanmar is headed towards repeating in 2020 the same violations it committed in 2015. Myanmar also has taken no steps to ensuring that the Rohingya are able to work in civil service positions. Accordingly, due to the failure to take concrete measures to mitigate this risk factor, the Myanmar government is not in compliance with the ICJ’s provisional measures order.

C. The Relationship Between the Identified Risk Factors and the Commission of Genocide

“The situation of the Rohingya in Rakhine State has been aggravated by their gradually increasing exclusion from the Myanmar nation since the 1960s, amid decades of State-sponsored stigmatization, leading to their being *de facto* stateless and reviled by much of the population. [...] While other ethnic and religious minorities are accepted, at least in theory, as belonging to the nation under their “national race” status, the Rohingya’s lack of status has dramatically increased their vulnerability and contributed to the extreme scale and intensity of the violence against them.”¹⁰⁰

— FFM 2018 Report

The denial of the Rohingya’s right to citizenship and to participate in public life not only harms the Rohingya as a group, but also increases their marginalization through the denial of these rights and heightens the broader society’s tolerance and even support for the state’s implicit and explicit violence against the Rohingya.

The 1982 Citizenship Law, the NVC process, the procedures around the 2014 census, and the 2015 Race and Religion Laws demonstrate the Myanmar government's intent to deny the existence of the Rohingya people, as a group, in Myanmar and are used by the government to suggest that there are no Rohingya who lawfully reside in Myanmar or who have demographic roots in the country. This not only tangibly harms the Rohingya, but it also encourages the rest of Myanmar society to view the Rohingya as an alien and threatening presence in their country. The denial of citizenship heightens the vulnerability of the Rohingya, rendering them more susceptible to other human rights violations and escalating violence at the hands of the military and other non-Rohingya civilians.

Similarly, the denial of the right to participate in public affairs (including being disenfranchised from voting, denied the right to stand as candidates, and denied the right to work in the civil service) is not only directly harmful to the Rohingya individually and as a group, but also creates a segregated society that negatively affects the manner in which the Rohingya view themselves and how they are viewed by other members of society. In terms of civil service, the Rohingya cannot see themselves or their culture reflected in schools, law enforcement, the legal profession, or administrative services. This serves to alienate Rohingya in their daily public interactions and activities, as well as preventing them from being able to ameliorate their living conditions through the democratic process, while equally rendering the Rohingya invisible to the broader Myanmar society.

Additionally, the denial of these rights may contribute to the formation of genocidal intent with respect to a future reoccurrence of genocide. In this regard, the FFM stated that:

“The Rohingya have not only been denied an identity; they have been systematically referred to in derogatory and dehumanizing terms. The apparent intent and purpose of such rhetoric have been to exclude them from the Myanmar nation to which they once belonged, in pursuit of an exclusionary vision based on “national races.” This process of “othering” the Rohingya has resulted in them systematically being called “Bengali” or “illegal immigrants” who will overrun and Islamise the country. They are portrayed as an existential threat both to the nation and to its Buddhist character. [...] The use of derogatory language toward members of the targeted group is a relevant indicator of genocidal intent. It demonstrates a willingness to debase and humiliate a group, in an attempt to strip it of its humanity in the eyes of the eventual direct perpetrators, and as such it is often a precursor to acts of violence to come.”¹⁰¹ [Footnotes omitted.]

In sum, the denial of the Rohingya's right to citizenship and to participate in public affairs contributes to the creation of an environment conducive to the perpetuation of additional serious human rights abuses against them, increases their vulnerability to such violations, and increases the likelihood that the broader community will tolerate and even support abuse and violence directed against the Rohingya, by othering and dehumanizing them. These denials contribute to the formation of a society where genocide may more plausibly be committed. It is also critical to underscore that for the Rohingya, the denial of citizenship causes extreme “mental anguish, fear, and uncertainty about their fate in Myanmar and beyond.”¹⁰² The continued denial of this right, and to participate in public affairs, serve as an urgent warning sign to Myanmar and the international community that genocide may be committed against the Rohingya. This conclusion is further strengthened by the fact that the risk is that genocide will be committed *again*

against the Rohingya. In this respect, the JBI Compilation includes, in addition to the genocide risk factors, a “list of special circumstances,” which are not derived from legal norms, but are historical and sociological.¹⁰³ The first special circumstance is “a prior history of genocide or violence against a particular group.” The JBI Compilation explains that, “[t]ogether with one or more risk factor, [the existence of a special circumstance] could make it more likely that genocide will occur.”¹⁰⁴

III. Recommendations

August 25th, 2020 marked the three year anniversary of the start of the 2017 genocide of the Rohingya people. It is sobering that only three years removed from this horrific event, the Rohingya are again at serious risk of genocide reoccurring.¹⁰⁵ Further, the denial of the right to participate in public affairs, which represented an important escalation in the persecution of the Rohingya, occurred a mere two years before the situation deteriorated into genocide. Yet, despite the ICJ’s provisional measures order, this wholesale denial and other policies of exclusion persist today.

Through its continued systematic denial of the Rohingyas’ rights to citizenship and to participate in public affairs, the government of Myanmar is not in compliance with the provisional measures ordered by the ICJ, specifically that Myanmar “take all measures within its power to prevent the commission of all acts [of genocide].” Due to Myanmar’s failure to take concrete steps to mitigate these risk factors, the Rohingya remain at serious risk of genocide reoccurring. There are a number of concrete actions to mitigate these genocide risks that are within Myanmar’s power to enact. Ensuring that Myanmar complies with the provisional measures order and takes timely concrete, meaningful action to mitigate these risk factors is an important tool to prevent history from repeating itself.

Recommendations for the International Court of Justice:

- Require that concrete legislative and policy changes that address the ongoing human rights violations against the Rohingya be a part of the concrete measures Myanmar must take in order to comply with its provisional measures order.
- Following the submission of each of Myanmar’s progress reports, assess whether the measures put forward by Myanmar in that report are sufficient for purposes of complying with the Court’s order. If not, proceed under article 75 of the Rules to issue further provisional measures or amend the provisional measures under article 76 of the Rules.

Recommendations for the Myanmar Government

In order to comply with the ICJ's provisional measures order requiring Myanmar to take all measures within its power to prevent the commission of acts of genocide, *the Myanmar government should:*

Right to Citizenship:

- Restore citizenship to the Rohingya, by:
 - Amending or repealing and replacing the 1982 Citizenship Law so that citizenship status is not based on ethnicity and complies with democratic and human rights principles and laws.
 - Publicly recognizing the Rohingya people as an ethnic group indigenous to Myanmar.
 - Replacing the NVC process with an administrative process that permits individuals to obtain “full” citizenship status on the basis of official citizenship documents that are no longer in use, such as the NRC cards.
 - Reversing the burden of proof for citizenship “verification” purposes from the Rohingya people to the government with respect to any individuals who have or are applying on the basis that they or their parents already received the status of citizen.
 - Conducting a full audit of all citizenship related documents issued by the government since independence or received from Rohingya individuals during any “verification” process.
- Put in place a system for registration of births for Rohingya children in Myanmar and request the assistance of the government of Bangladesh and other countries for such a process to be carried out in Rohingya refugee camps.
- Take immediate steps to restore the identity, including nationality, of Rohingya children born in Myanmar and in refugee camps.
- Ensure that the 2014 census results do not disadvantage the Rohingya in regards to the distribution of aid and determining development projects in Rakhine State.
- Repeal the 2015 Race and Religion Laws.
- Create conditions that allow Rohingya refugees to return to Myanmar in a safe, dignified, and voluntary manner and to claim their citizenship rights.

Right to Participate in Public Affairs:

- Ensure that the Rohingya are able to vote in the 2020 election, including by resorting to previous voter roll lists to identify eligible voters.
- Ensure that refugees outside of Myanmar can vote in the 2020 election.
- Recognize as eligible for citizenship qualification purposes any previous candidate or elected official standing as a candidate for election.
- Halt discriminatory policies and practices of exclusion of Rohingya and Muslims from public service.

Recommendations for Other States

The obligation to prevent applies to all state parties to the Genocide Convention.¹⁰⁶ However, the issue of the scope of third party states' obligation to prevent genocide is outside of the scope of this report series. The following recommendations are made in the context of policy recommendations. ***Other states should:***

- Support The Gambia's case at the International Court of Justice.
- Express in clear terms the unacceptable disenfranchisement of the Rohingya people from Myanmar's elections. Officials should issue statements before the election outlining the criteria for free, fair, and inclusive elections and publicly address any shortcomings on those criteria after the election.
- If the elections disenfranchise the Rohingya based on their identity, condemn such an exclusion and stress the need for all communities in Myanmar to benefit from any democratic process, in both public statements and private communications.
- Closely monitor the involvement or exclusion of Rohingya voters and candidates from the election, trends in hate speech targeting Rohingya and other minorities, and arrests or charges levied against civil society and members of the media during the lead-up and immediate aftermath of the election.
- Press the Myanmar government to develop a measurable and time-bound policy that restores citizenship rights of the Rohingya, as well as other Muslims and other ethnic minority communities that have been disenfranchised. Withhold additional non-humanitarian assistance until such benchmarks for improvement have been met.
- Press the Myanmar government to comply with its obligations under the Convention of the Rights of the Child.
- Press the Myanmar government to create conditions that allow Rohingya refugees to return in a safe, dignified, and voluntary manner, and to claim their citizenship rights.
- Press the Myanmar government to repeal the 2015 Race and Religion Laws.

Recommendations for Relevant United Nations Bodies

Relevant United Nations bodies, including the Security Council, the Secretary General, Special Rapporteur on the situation of human rights in Myanmar, and the Special Envoy on Myanmar should:

- Support the above recommendations in communications with Myanmar and other interested states.
- Closely monitor the actions taken by the government of Myanmar in response to the ICJ's provisional measure order and encourage Myanmar to implement policy and legislative changes to comply with the order.
- Amplify and echo the concerns of the Rohingya in communications with the state of Myanmar.
- Clearly and publicly state that the disenfranchisement of the Rohingya is an unacceptable status quo.

- The Special Rapporteur on the situation of human rights in Myanmar should continue to call attention to the disenfranchisement and human rights abuses against the Rohingya.
- The Security Council should ensure that the situation in Myanmar is on its agenda and should consider convening a public meeting to discuss Myanmar's compliance with the ICJ's provisional measures order.

THE GENOCIDE CONVENTION AT A GLANCE

ARTICLE I prohibits the commission of genocide and establishes the obligation to prevent and punish the commission of genocide. These obligations apply to all state parties to the Convention. They are also considered to be a part of international customary law and therefore binding on all states, whether or not a state has ratified the Genocide Convention.

ARTICLE II defines genocide as any of the following acts:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to 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;
- (d) Imposing measures intended to prevent births within the group; and
- (e) Forcibly transferring children of the group to another group.

These acts must be committed with the intent to destroy, in whole or in part, a “protected group.” A “protected group” is defined as a national, ethnical, racial, or religious group.

ARTICLE III provides that the following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide; and
- (e) Complicity in genocide.

Individuals who commit any of the acts in Article III shall be punished, regardless of whether they are heads of state, public officials, or private individuals (**ARTICLE IV**).

State parties must enact legislation to give effect to the Genocide Convention and, particularly, to provide effective penalties for individuals found guilty of committing any of the acts in Article III (**ARTICLE V**).

Note: *In evaluating the actions of the Myanmar government and military before and during the “clearance operations” of 2017, the FFM found that there was a reasonable basis to conclude that Myanmar had committed genocide against the Rohingya under four of the five acts set out in the Genocide Convention¹⁰⁷ and concluded, based on the government’s current actions and behavior towards the Rohingya, that the Rohingya still remain at serious risk of genocide.¹⁰⁸ Similarly, in its application beginning proceedings at the ICJ and requesting provisional measures,¹⁰⁹ The Gambia argues both that the government of Myanmar has, in violation of its obligations under the Genocide Convention, committed all of the underlying acts of genocide¹¹⁰ against the Rohingya and that the Rohingya remain at “grave danger of further genocidal acts.”¹¹¹*

THE INTERNATIONAL COURT OF JUSTICE'S PROVISIONAL MEASURES ORDER AT A GLANCE

On January 23, 2020, the judges of the ICJ in the case of *The Gambia v. Myanmar* unanimously ordered four provisional measures against the Republic of the Union of Myanmar.

Provisional measures are binding orders that the ICJ can issue while a case is ongoing and prior to reaching a final decision on the merits of a case. The Court will issue provisional measures if it determines *inter alia* that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision.

The four provisional measures that Myanmar must implement are:

1. To take all measures within its power to prevent the commission of all acts within the scope of Article II of the Genocide 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. To 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 of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, or complicity in genocide;
3. To prevent the destruction and ensure the preservation of evidence related to allegations of acts of genocide;
4. To 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.

List of Acronyms and Abbreviations

FFM	Independent International Fact-Finding Mission on Myanmar
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
ICJ or Court	International Court of Justice
JBI Compilation	Jacob Blaustein Institute for the Advancement of Human Rights' <i>Compilation of Risk Factors and Legal Norms for the Prevention of Genocide</i>
MPs	Members of Parliament
Museum or USHMM	United States Holocaust Memorial Museum
NPDHR	National Democratic Party for Human Rights
NRC	National Registration Card
NVC	National Verification Card
SCPG	Simon-Skjodt Center for the Prevention of Genocide
UEC	Myanmar Union Election Commission
UN Atrocity Framework	United Nations Office on the Prevention of Genocide and the Responsibility to Protect's <i>Framework of Analysis for Atrocity Crimes: A Tool for Prevention</i>

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¹ *Practical Prevention: How the Genocide Convention's Obligation to Prevent Applies to Myanmar (First Report)*. Available at: https://www.ushmm.org/m/pdfs/Practical_Prevention_-_Legal_Brief.pdf.

² While the Museum traditionally uses the name “Burma,” for consistency and ease of reference, this report refers to Myanmar, in light of the International Court of Justice and the United Nations’ use of that name.

³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order ([Provisional Measures Order](https://www.icj-cij.org/en/case/178/orders)). Available at: <https://www.icj-cij.org/en/case/178/orders>.

⁴ *Ibid*, para. 86 (1).

⁵ UN General Assembly, Resolution 260/III, 9 December 1948, entered into force 12 January 1951, 78 U.N.T.S. 277, Art. 1: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”.

⁶ To learn more about SCPG’s work on the plight of the Rohingya, see <https://www.ushmm.org/genocide-prevention/countries/burma>.

⁷ USHMM, “Museum Finds Compelling Evidence Genocide was Committed Against Rohingya, Warns of Continued Threat,” December 2018. Available at: <https://www.ushmm.org/information/press/press-releases/museum-finds-compelling-evidence-genocide-was-committed-against-rohingya-wa>.

⁸ [Provisional Measures Order](https://www.ushmm.org/information/press/press-releases/museum-finds-compelling-evidence-genocide-was-committed-against-rohingya-wa), para. 72.

⁹ See “Detailed findings of the Independent International Fact-Finding Mission on Myanmar”, A/HRC/42/CRP.5, September 2019 ([FFM September 2019 Report](https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf)), para. 242. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf.

¹⁰ United Nations Office on the Prevention of Genocide and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, 2014, available at: https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf.

¹¹ Jacob Blaustein Institute for the Advancement of Human Rights, *Compilation of Risk Factors and Legal Norms for the Prevention of Genocide*, 2011, available at: <https://www.jbi-humanrights.org/files/jbi-compilation-on-genocide-prevention.pdf>.

¹² [UN Atrocity Framework](https://www.jbi-humanrights.org/files/jbi-compilation-on-genocide-prevention.pdf), risk factor 2. The JBI Compilation identifies 22 risk factors that are derived from legal norms of international human rights and humanitarian law. See [First Report](https://www.ushmm.org/information/press/press-releases/museum-finds-compelling-evidence-genocide-was-committed-against-rohingya-wa), pp. 4-5.

¹³ [JBI Compilation](https://www.jbi-humanrights.org/files/jbi-compilation-on-genocide-prevention.pdf), p. v.

¹⁴ Heide Rieder and Thomas Elbert, “Rwanda - Lasting Imprints of a Genocide: Trauma, Mental Health and Psychosocial Conditions in Survivors, Former Prisoners and their Children,” *Conflict and Health* 7, no. 6 (2013): 1-13, <https://doi.org/10.1186/1752-1505-7-6>; Patricia Dashorst et al., “Intergenerational Consequences of the Holocaust on Offspring Mental Health: A Systematic Review of Associated Factors and Mechanisms,” *European Journal of Psychotraumatology* 10, no. 1 (2019), 1654065, <https://doi.org/10.1080/20008198.2019.1654065>.

¹⁵ See [First Report](https://www.ushmm.org/information/press/press-releases/museum-finds-compelling-evidence-genocide-was-committed-against-rohingya-wa), p.3. See also [JBI Compilation](https://www.jbi-humanrights.org/files/jbi-compilation-on-genocide-prevention.pdf), Foreword, p. vi, wherein the Special Advisor of the United Nations Secretary-General on the Prevention of Genocide makes a similar point: “The Genocide Convention clearly establishes the obligation incumbent on States parties ‘to prevent’ genocide; however, while the treaty stipulates this obligation, it does not elaborate further on its scope. This ambiguity has given rise to one of the most

significant challenges my office faces in fulfilling its mandate—identifying a universally acceptable threshold for the existence of the risk of genocide.”

¹⁶ [JBI Compilation](#), p. xiii.

¹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, para. 431 ([Bosnia v. Serbia Judgment](#)). Available at: <https://www.icj-cij.org/en/case/91/judgments>.

¹⁸ *Ibid.* The ICJ held that: “Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs.”

¹⁹ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), Judgment, 16 December 2015, para. 126. Available at: <https://www.icj-cij.org/en/case/150/judgments>.

²⁰ The ICJ “Overview of the Case” describes the request for provisional measures as: On 18 November 2010, Costa Rica also filed a Request for the indication of provisional measures aimed at protecting its ‘right to sovereignty, to territorial integrity and to non-interference with its rights over the San Juan River, its lands, its environmentally protected areas, as well as the integrity and flow of the Colorado River’. By its Request, Costa Rica sought in particular to obtain the withdrawal of all Nicaraguan troops from the territory in dispute, the immediate cessation of the construction of the canal and the suspension of the dredging of the Colorado River.” Available at: <https://www.icj-cij.org/en/case/150>.

²¹ [Provisional Measures Order](#), para. 86 (4). The first report was due on May 23, 2020, four months after the issuance of the provisional measures order. Subsequent reports are to be filed every six months.

²² See Prachiti Venkatraman and Ashley Jordana, “Myanmar’s Compliance with the ICJ Provisional Measures Order & the Road Ahead”, UK Human Rights Blog, 3 September 2019, available at: <https://ukhumanrightsblog.com/2020/09/03/myanmars-compliance-with-the-icj-provisional-measures-order-the-road-ahead/>.

²³ See <https://www.icj-cij.org/en/rules>.

²⁴ [Provisional Measures Order](#), para. 73.

²⁵ Republic of the Union of Myanmar, Office of the President, Directive No.1/2020, 8 April 2020 (instructing all entities and persons under its control not to commit acts of genocide and to report any credible information in this regard to the office of the Presidency), available at: <https://www.president-office.gov.mm/en/?q=briefing-room/announcements/2020/04/09/id-10002>; Directive No.2/2020, 8 April 2020 (dealing with the preservation of evidence), available at: <https://www.president-office.gov.mm/en/?q=briefing-room/news/2020/04/09/id-10003>; Directive No. 3/2020, “Prevention of incitement to hatred and violence (or) Prevention of proliferation of hate speech”, 20 April 2020, available at: <https://www.president-office.gov.mm/en/?q=briefing-room/news/2020/04/21/id-10007>.

²⁶ See [Provisional Measures Order](#), para. 86 (2), providing that: “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.”

²⁷ *Ibid.*, para. 86 (3), providing 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.”

²⁸ [JBI Compilation](#), p. viii.

²⁹ See <https://www.globalr2p.org/resources/2005-world-summit-outcome-a-60-1-1/>.

³⁰ UN General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, available at: <https://www.refworld.org/docid/44168a910.html>.

³¹ “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, A/HRC/39/CRP.2, 17 September 2018, paras. 1671-1726 ([FFM 2018 Report](#)). Available at: <https://undocs.org/A/HRC/39/CRP.2>.

³² Advisory Commission on Rakhine State, “Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine, Final Report of the Advisory Commission on Rakhine State,” August 24, 2017 ([Advisory Commission Final Report](#)). Available at: http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf.

³³ [UN Atrocity Crimes Framework](#), p. 19.

³⁴ See USHMM, “Nuremberg Race Laws”, last edited September 2019, available at: <https://encyclopedia.ushmm.org/content/en/article/nuremberg-laws>; USHMM, “Remembering the Nuremberg Laws: The True Meaning of Citizenship”, November 9, 2015 ([The True Meaning of Citizenship](#)), available at: <https://www.ushmm.org/genocide-prevention/blog/remembering-the-nuremberg-laws-the-true-meaning-of-citizenship>.

³⁵ See USHMM, “Antisemitic Legislation 1933-1939”, available at:

<https://encyclopedia.ushmm.org/content/en/article/antisemitic-legislation-1933-1939>.

³⁶ *Ibid.*

³⁷ See [The True Meaning of Citizenship](#).

³⁸ *Trop v. Dulles*, 356 U.S. 86 (1958), pp. 101-102.

³⁹ *Ibid.*, p.102: “While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, **the expatriate has lost the right to have rights.**” [Emphasis added.] See also Hannah Arendt, “Decline of the Nation State and the End of the Rights of Man,” in *The Origins of Totalitarianism* (New York: Houghton Mifflin Harcourt, 1973), 267-302.

⁴⁰ See Manual on Human Rights and the Prevention of Genocide, Jacob Blaustein Institute for the Advancement of Human Rights, 2015, p.14 ([JBI Human Rights Manual](#)). Available at:

<https://www.jbi-humanrights.org/JBI%20Manual%20on%20Human%20Rights%20and%20Prevention%20of%20Genocide.pdf>. See also [The True Meaning of Citizenship](#): “[T]he millions of people who are denied citizenship of the country where they reside often have no rights, no protections, and no recourse for the redress of grievances. The simplest of life’s activities—opening a bank account, getting a driver’s license, or even attending elementary school—becomes a risky and humiliating process fraught with unpredictable dangers and the threat of harassment, arrest, and often deportation.”

⁴¹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Art. 15.1 (UDHR); UN General Assembly, Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3, Art. 7 (CRC) (ratified by Myanmar on July 15, 1991); UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 U.N.T.S. 13 (CEDAW) (ratified by Myanmar on July 22, 1997). See also UN General Assembly, Resolution 2200A (XXI), International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Art. 5 (ICCPR). Myanmar has not ratified the ICCPR. See for additional legal analysis in this respect, “Tools of Genocide”, Fortify Rights, 3 September 2019, pp.67-69 ([Fortify Rights Report](#)). Available at: <https://www.fortifyrights.org/downloads/Tools%20of%20Genocide%20-%20Fortify%20Rights%20-%20September-03-2019-EN.pdf>. For a list of Myanmar’s

ratification status of international treaties, as well as for the related individual complaints and inquiries procedures, *see* https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN.

⁴² *See* [First Report](#), p. 3, fn. 6.

⁴³ UDHR Art. 15.1; CRC, Art. 7.1.

⁴⁴ UDHR, Art. 15.2.

⁴⁵ UDHR, art. 2; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (d) (iii) (ICERD).

⁴⁶ ICERD, General Recommendation XXIV.

⁴⁷ Azeem Ibrahim, “War of Words: What’s in the Name “Rohingya”?”, YaleGlobal Online (June 16, 2016), noting that: “Before 1824, the British referred to the region as Rohang and those who lived there as Rohingyas. Later reports from the 19th century, including the 1852 Account of the Burman Empire, Compiled from the Works of Colonel Symes, Major Canning, Captain Cox, Dr. Leyden, Dr. Buchanan, Calcutta, D’Rozario and Co, refer to how the local Muslims called themselves “Rovingaw” or “Rooinga.” Likewise, a 1799 study of languages spoken in the Burmese area divides the natives of Arakan state between Yakain and Rooinga.” Available at: <https://yaleglobal.yale.edu/content/war-words-whats-name-rohingya>.

⁴⁸ *See* [Fortify Rights Report](#), p. 34, fns. 3, 21.

⁴⁹ *See* *Ibid.*, pp. 34-35 for a detailed explanation of the efforts to restrict Rohingya citizenship from the period following the military coup until the passage of the 1982 Citizenship Law,

⁵⁰ 1947 Constitution of the Union of Burma, sec. 11.

⁵¹ *See* Nyi Nyi Kyaw, “Unpacking the Presumed Statelessness of Rohingyas”, *Journal of Immigrant & Refugee Studies* 15, no. 3 (2017): 276.

⁵² The concepts of “indigenous groups”, “indigenous races”, and “ethnic groups” appear to have been used somewhat interchangeably by the Myanmar government. Early terminology seems to focus on indigenous “groups” or “races”, with the term “ethnic groups” appearing later.

⁵³ Gregory B. Poling, Center for Strategic & International Studies, “Separating Fact from Fiction about Myanmar’s Rohingya”, February 13, 2014, available at: <https://www.csis.org/analysis/separating-fact-fiction-about-myanmar%E2%80%99s-rohingya>, referring to Maung Zarni, “The official evidence of the Rohingya ethnic ID and citizenship which the Burmese ethno- and genocidists don’t want you to see”, available at: <http://www.rohingyablogger.com/2013/05/the-official-evidence-of-rohingya.html?zx=3808580a19bfa20c>

⁵⁴ Socialist Republic of the Union of Burma, *Burma Citizenship Law*, 15 October 1982 ([Burma Citizenship Law](#)). Available at: <https://www.refworld.org/docid/3ae6b4f71b.html>.

⁵⁵ *See e.g.* [Fortify Rights Report](#), pp. 35-36, referring to a speech delivered by Ne Win, the former president of Myanmar, explaining the rationale behind the Citizenship Law.

⁵⁶ This first category is “citizen” under the terms of the law, but is referred to as “full citizen” herein to distinguish it from the other categories.

⁵⁷ *See* [FFM September 2019 Report](#), paras 62-63. *See also* UNHCR, Study on Community Perceptions of Citizenship, Documentation and Rights in Rakhine State, August 2016, p.6 ([UNHCR Study](#)). Available at: https://themimu.info/sites/themimu.info/files/assessment_file_attachments/Community_Perceptions_FINAL.PDF. *See also* [Fortify Rights Report](#), p. 37.

⁵⁸ Mya Maung, *The Burma Road to Poverty*, PRAEGER (1991), pp. 146-147.

⁵⁹ [Burma Citizenship Law](#), art. 4.

⁶⁰ *Ibid.*, art. 6.

⁶¹ [UNHCR Study](#), p. 6.

⁶² [Burma Citizenship Law](#), art. 42-44.

⁶³ [FFM September 2019 Report](#), para. 63.

⁶⁴ [UNHCR Study](#), p.6.

⁶⁵ *Ibid.*

⁶⁶ International Crisis Group, *Counting the Costs: Myanmar's Problematic Census*, Asia Briefing N° 144, 15 May 2014 ([Counting the Costs: Myanmar's Problematic Census](#)), p. 4, available at: <https://www.crisisgroup.org/asia/south-east-asia/myanmar/counting-costs-myanmar-s-problematic-census/>. The 2014 national census, according to the government, only counted those persons who were a part of the eight national ethnic groups or one of the government recognized 135 ethnic groups.

⁶⁷ BBC, "Burma census bans people registering as Rohingya", March 30, 2014. The quote is attributed to government spokesman Ye Htut. Available at: <https://www.bbc.com/news/world-asia-26807239>. See also [Counting the Costs: Myanmar's Problematic Census](#), p. 2.

⁶⁸ Interview notes, on file with the author. The Rakhine are an ethnic minority group in Myanmar.

⁶⁹ See in this respect [Counting the Costs: Myanmar's Problematic Census](#), p. 13, noting that: "While the humanitarian situation in Rakhine State has long been a cause for concern, and may have deteriorated regardless, the census has further inflamed existing tensions, and has also been used as an excuse – or opportunity – by Rakhine extremists to further isolate the Rohingya population and create additional hurdles to the provision of humanitarian assistance."

⁷⁰ The Rakhine are an ethnic minority group in Myanmar.

⁷¹ NVC refers to the National Verification Cards that are issued under the citizenship verification process, which were initially in 2015 referred to as ICNVs (Identity Cards of National Verification).

⁷² [UNHCR Study](#), p.6.

⁷³ Interview notes, on file with the author.

⁷⁴ [FFM 2018 Report](#), para. 1409.

⁷⁵ *Ibid.*

⁷⁶ For recent estimates of the refugee populations in Cox's Bazar, Bangladesh in need of humanitarian assistance, see https://data2.unhcr.org/en/situations/myanmar_refugees.

⁷⁷ See Naomi Kikoler, Testimony before the US Commission on International Religious Freedom: Citizenship Laws and Religious Freedom, March 4, 2020. Available at: <https://www.usmmm.org/genocide-prevention/blog/simon-skjodt-center-director-testifies-on-citizenship-laws-and-religious-fr>.

⁷⁸ Numerous other bodies have come to the same conclusion. See e.g. [FFM September 2019 Report](#), para. 101: "the 1982 Citizenship Law is discriminatory, is inconsistent with Myanmar's international human rights obligations and arbitrarily denies Rohingya the possibility of attaining full citizenship."; [Advisory Commission Final Report](#), p. 29: "Several aspects of the 1982 Citizenship Law are not in compliance with international standards and norms – such as the principle of non-discrimination under international law – as well as international treaties signed by Myanmar."

⁷⁹ See *supra* p. 10 for a discussion of the Council of State's creation and mandate under the 1972 constitution.

⁸⁰ See [FFM September 2019 Report](#), para. 106. The FFM found that the NVCs were a "tool" used to deny the Rohingya their right to citizenship.

⁸¹ See Guy Goodwin-Gill and Jason Pobjoy, "Joint Legal Opinion on the Government of Myanmar's Compliance with the Convention on the Rights of the Child in the Context of the Treatment of Rohingya Children Following the Events of 25 August 2017," Save the Children Norway, 12 June 2018. Available at: https://resourcecentre.savethechildren.net/node/13627/pdf/joint_legal_opinion_-_myanmar.pdf.

⁸² Reports from within Myanmar and in the refugee community in Bangladesh indicate that Myanmar continues to pressure Rohingyas to participate in the NVC process. Interview notes, on file with the author.

⁸³ See the 2020 election policy briefer here:

https://www.usmmm.org/m/pdfs/Burma_Election_Brief_-_Final.pdf

⁸⁴ UDHR, art. 21.1.

⁸⁵ ICERD, art. 5; ICCPR, art. 25.

⁸⁶ CEDAW, art. 7; ICCPR, art. 25 (c).

⁸⁷ See “The Rohingya Minority: Fundamental Rights Denied,” Amnesty International, ASA 16/005/2004, 18 May 2004, p. 12. Available at:

<https://www.amnesty.org/download/Documents/92000/asa160052004en.pdf>. It should be noted that the military junta did not recognize the results of the 1990 election.

⁸⁸ [FFM 2018 Report](#), para. 489.

⁸⁹ *Ibid.*

⁹⁰ See “Burma: Election Fundamentally Flawed,” Human Rights Watch, 4 November 2015. Available at: <https://www.hrw.org/news/2015/11/04/burma-election-fundamentally-flawed>.

⁹¹ See U Shwe Maung, The New York Times, “Myanmar’s Disenfranchised Rohingya,” November 2, 2015. Available at: <https://www.nytimes.com/2015/11/03/opinion/myanmar-election-disenfranchised-rohingya.html>.

⁹² Al Jazeera, “Rohingya Politicians Excluded From Myanmar’s Upcoming Election,” 25 August 2020. Available at: <https://www.aljazeera.com/news/2020/8/25/rohingya-politicians-excluded-from-myanmars-upcoming-election>.

⁹³ See Daniel Sullivan, “A Voice in Their Future: The Need to Empower Rohingya Refugees in Bangladesh,” Refugees International, 5 February 2020, pp 19-23. Available at: <https://www.refugeesinternational.org/reports/2020/2/5/a-voice-in-their-future-the-need-to-empower-rohingya-refugees-in-bangladesh>.

⁹⁴ Interview notes, on file with the author. See also [Rohingya Politicians Excluded From Myanmar’s Upcoming Election](#),” 25 August 2020 (stating that candidate Abdul Rasheed’s father was a civil servant).

⁹⁵ Interview notes, on file with the author.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ See generally [Advisory Commission Final Report](#), pp. 27-34, 48-49; [FFM 2018 Report](#), paras 1678-1698. These recommendations address the obligations of the Government of Myanmar to protect the political rights of minority groups in Rakhine State by reforming citizenship and administrative processes.

⁹⁹ See “[Burma: Election Fundamentally Flawed](#),” 4 November 2015.

¹⁰⁰ [FFM 2018 Report](#), para. 1377.

¹⁰¹ *Ibid.*, paras 1420-1421.

¹⁰² See [Fortify Rights Report](#), p. 76.

¹⁰³ [JBI Compilation](#), p. 5.

¹⁰⁴ *Ibid.*

¹⁰⁵ [FFM September 2019 Report](#), para. 242.

¹⁰⁶ *Ibid.*, paras 52-55, 243.

¹⁰⁷ [FFM September 2019 Report](#), para. 220. In relation to the first underlying act of killing members of the group, FFM stated that: “The Tatmadaw and other security forces (often in concert with civilians) intentionally and unlawfully killed Rohingya men, women and children throughout the period under review, that is, since 2011, but particularly since 25 August 2017. **These deaths were a direct or indirect result of the severe and systemic oppressive measures imposed on the Rohingya** and the “clearance operations” in 2016 and 2017 in which they culminated.” [Emphasis added.] [FFM 2018 Report](#), para. 1394. The FFM

found that there were reasonable grounds to conclude that the Rohingya suffered both serious bodily and mental harm from the 2016 and 2017 “clearance operations” based on the evidence of physical injuries, rape, sexual violence and the severe mental trauma that witnessing and experiencing these events caused to survivors. *Ibid*, paras 1397-1398. In relation to imposing conditions of life intended to bring about the physical destruction of the group, the FFM found that Myanmar had imposed many of the acts identified in the jurisprudence of the international courts on the Rohingya, stating that “collectively these measures have eroded the ability of the Rohingya to support themselves and to survive as a community in Rakhine State. They have exposed them to destitution, immediate and long-term health risks, and preventable deaths.” *Ibid*, para. 1403. Finally, in relation to measures intended to prevent births within the group, the FFM found that “within this context of obsession with the procreation of the Rohingya, and the imperative of changing the demographic balance in Rakhine State, the high prevalence of rape and other brutal forms of sexual violence against women and girls in Rakhine State, in particular in the context of the “clearance operations,” may have been aimed at affecting their reproductive capacity.” *Ibid*, para. 1410.

¹⁰⁸ [FFM September 2019 Report](#), para. 242.

¹⁰⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), [Application instituting proceedings and Request for the indication of provisional measures](#), 11 November 2019, available at: <https://www.icj-cij.org/en/case/178/institution-proceedings>.

¹¹⁰ *Ibid*, para. 2.

¹¹¹ *Ibid*, para. 131.

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