

# Practical Prevention

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

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](https://ushmm.org/genocide-prevention).

This is the first 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 Republic of the Union of Myanmar is meeting its obligation to prevent the commission of genocide under the Convention on the Prevention and Punishment of the Crime of 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: A man stands outside of Sittwe, in Rakhine State, Myanmar, near camps for internally displaced Rohingya. *Courtesy of Paula Bronstein Getty Images Reportage for the United States Holocaust Memorial Museum*

# I. Introduction

Rohingya leaders and community members, legal analysts, researchers, and human rights institutions, including the United States Holocaust Memorial Museum (Museum),<sup>1</sup> have long sounded the alarm about the serious risk of genocide against the Rohingya in Myanmar.<sup>2</sup> These concerns stem from decades of violence and discrimination against the Rohingya population, which culminated in the Myanmar government's 2016 and 2017 attacks on Rohingya civilians. Following these events, the Museum determined that there was compelling evidence that the Myanmar government had committed genocide against the Rohingya population.<sup>3</sup> Despite international outcry, the Rohingya remain at serious risk of genocide today, as the United Nations's Independent International Fact-Finding Mission on Myanmar (FFM) concluded in September 2019.<sup>4</sup>

Myanmar has a binding legal obligation, as a party to the Convention on the Prevention and Punishment of the Crime of Genocide (Convention)<sup>5</sup> and under customary international law,<sup>6</sup> to prevent genocide. A case currently before the International Court of Justice (ICJ), *The Gambia v. Myanmar*, will determine whether Myanmar violated this obligation. In its January 23, 2020 order for provisional measures,<sup>7</sup> the ICJ ordered Myanmar to, *inter alia*, “take all measures within its power to prevent the commission of all acts within the scope of Article II [of the Genocide Convention]” and to submit regular reports to the Court on its progress. The Myanmar government is due to file its first report on May 23, 2020.<sup>8</sup>

Despite the importance of this order, it does not identify the concrete measures Myanmar should take to comply with its obligation to prevent genocide.<sup>9</sup> Indeed, the Convention itself does not elaborate on what the obligation to prevent genocide actually entails. Limited guidance can be found in the ICJ's jurisprudence, however. In the 2007 *Bosnia v. Serbia* judgment, the ICJ held that: “a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally learn of, *the existence of a serious risk* that genocide will be committed.”<sup>10</sup> This suggests that, to uphold the Convention, States<sup>11</sup> should identify and assess relevant risk factors in order to take all possible remedial actions to prevent genocide.<sup>12</sup> Important as this guidance is, it leaves unanswered critical questions, namely: *Which risk factors have a causal link to genocide? How should States identify these factors? How should States assess these factors in terms of a potential genocide? How should States address and mitigate these risk factors?*

This is the first in a series of reports from the Museum that will attempt to answer these important questions. This first report sets out the analytical framework that will be used to answer these important questions in subsequent reports. In reports that follow, which we will issue on a semiannual basis, the Museum will further explore:

- The importance of identifying genocide risk factors and early warning signs as part of the obligation to prevent genocide;
- The legal norms of international human rights and humanitarian law relevant to genocide;

- The causal relationship between the genocide risk factors and the different underlying acts of genocide laid out in the Convention, including the gender-related aspects of those risks; and
- Recommendations for specific actions that Myanmar should take to fulfill its obligation to prevent genocide.

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

## II. Framework for Reviewing Myanmar’s Measures to Prevent Genocide

### A. Identifying and assessing risk factors for genocide

In its September 2019 report in the section entitled “Serious risk of genocide,” the FFM observed that “[t]here is limited case law to assist the Mission in making its assessment of whether a risk is present and is serious in nature. The Mission made its assessment by comparing the current situation in Rakhine State with the genocide risk factors identified by the UN Office on Genocide Prevention and the Responsibility to Protect.”<sup>13</sup> These risk factors are set out in the *Framework of Analysis for Atrocity Crimes: A Tool for Prevention* (Atrocity Crimes Framework),<sup>14</sup> which identifies eight common risk factors<sup>15</sup> for “atrocity crimes,”<sup>16</sup> as well as two risk factors specific to the crime of genocide.<sup>17</sup> The second risk factor of the Atrocity Crimes Framework is a “record of serious violations of international human rights and humanitarian law.” As explained in the comment to this risk factor:

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, but they may include also severe restrictions to economic, social and cultural rights, often linked to patterns of discrimination or exclusion of protected groups, populations or individuals.<sup>18</sup>

The Jacob Blaustein Institute for the Advancement of Human Rights’ *Compilation of Risk Factors and Legal Norms for the Prevention of Genocide* (JBI Compilation), which was developed at the request of and in cooperation with the Office of the UN Special Advisor for the Prevention of Genocide, builds on the Atrocity Crimes Framework.<sup>19</sup> The Compilation identifies 22 risk factors<sup>20</sup> specific to genocide and the corresponding legal norms of international human rights and humanitarian law, and categorizes each into two groups: 1) discrimination-related risk factors, and 2) risk factors related to violations of the right

to life and personal integrity. By linking each genocide risk factor to severe and systemic violations of existing state obligations under international human rights and humanitarian law, the JBI Compilation refines and develops the substance of the second risk factor under the Atrocity Crimes Framework. The Compilation risk factors pertain to widespread or systematic violations<sup>21</sup> committed against persons on the basis of their membership in a protected group, per Article II of the Genocide Convention.<sup>22</sup> The widespread or systematic threshold serves to ensure that isolated incidents of abuse, though human rights violations, are not interpreted as necessarily<sup>23</sup> giving rise to a risk of genocide. As noted in the Compilation, the presence of one or more risk factors does not mean that a genocide will in fact take place; there is no specific formula to predict the onset of genocide. However, in terms of the obligation to prevent, the presence of one or more risk factors should put a State on notice about the existence of a serious risk that it should take measures to mitigate.

In addition to these two resources, in 2015, in cooperation with the Office on Genocide Prevention and the Responsibility to Protect, JBI published the *Manual on Human Rights and the Prevention of Genocide*, which offers practical guidance to States of specific mitigating measures that they may undertake when they have identified one or more of the genocide risk factors as being present.<sup>24</sup>

As such, the JBI Compilation and the Atrocity Crimes Framework, along with the Manual, complement each other. Together, they provide an invaluable resource for States to identify and stop severe and systematic human rights and humanitarian law violations that are associated with the risk of genocide and to more fully appreciate the scope of the obligation to prevent genocide under the Genocide Convention.

In its order, the ICJ instructed Myanmar to “take all measures within its power to prevent the commission of all<sup>25</sup> acts [of genocide],”<sup>26</sup> in particular:

- a) Killing members of the group;
- b) Causing serious bodily harm 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.

The Court’s directive underscored the importance of recognizing that the crime of genocide may be committed through both lethal and non-lethal acts. Official UN documents,<sup>27</sup> particularly the FFM’s September 2018<sup>28</sup> and 2019 reports, as well as consultations with local and international actors, have laid bare the complexity of the coordinated violations suffered by the Rohingya at the hands of their government, and make it clear that they continue to face a serious risk of such violations. As such, in order for any measures to effectively reduce the risk of genocide, it is important to consider Myanmar’s actions in light of each of the acts listed under Article II of the Genocide Convention, and the linked risk factors.<sup>29</sup>

## B. Risk factors of particular relevance to Myanmar

Drawing on the presence of genocide risk factors today in Myanmar identified by the FFM,<sup>30</sup> and the corresponding legal norms in the JBI Compilation, the Museum has defined a set of prevention obligations. It is critical that Myanmar take concrete and immediate steps to mitigate these risks. The risk factors set out below are not the only potential risk factors that the current situation in Myanmar presents. For this first report, the Museum has chosen to highlight certain risk factors of particular concern. Future reports will address additional genocide risk factors and further explore the risk factors identified below.

### Risk factors related to widespread and systematic discrimination:

#### 1. Systematic denial or revocation of the right to citizenship

The right to citizenship and nationality is central to ensuring an individual's full legal protection and enjoyment of other fundamental rights. Everyone has a right to a nationality and every child has the right to acquire a nationality.<sup>31</sup> Governments cannot directly or indirectly arbitrarily deprive individuals of their right to citizenship and nationality.<sup>32</sup> Myanmar's 1982 Citizenship Law grants full citizenship on the basis of "national races" identified by the Myanmar Government, which do not include the Rohingya. By passing this law, Myanmar stripped the Rohingya community of their citizenship. To this day, it continues to systematically deny this right through the use of National Verification Cards (NVC) and annual household list systems.<sup>33</sup> This has effectively denied the Rohingya access to education and health care, the ability to work, to participate in public affairs, to freedom of movement, and their right to property. Moreover, it threatens the right of the Rohingya to choose whether or not to self-identify as belonging to a group.<sup>34</sup> Every person has a right to whether to self-identify or not as a member of a group.<sup>35</sup> The Rohingya are forced to accept NVCs that do not permit them to self-identify as "Rohingya" and instead are often labeled as "Bengali," playing into the false narrative<sup>36</sup> that they are "foreigners" or "intruders" in Myanmar. Not only did the FFM find that the NVCs were a "tool" used to deny the Rohingya their right to citizenship, it also found that, "the manner in which the Government restricts citizenship also denies Rohingya their identity".<sup>37</sup> *For the Government of Myanmar to uphold its Genocide Convention obligations, it must cease systematically denying the right of the Rohingya to citizenship and a nationality, repeal or amend legislation and policies that arbitrarily deny these rights to the Rohingya on the basis of their ethnicity, and cease systematically forcing the Rohingya to identify as foreigners.*

#### 2. Systematic denial of the right to participate in public affairs

All citizens have a right to participate in public affairs, including the right to vote and to be a candidate for office.<sup>38</sup> Governments may not unreasonably restrict or deny this right based on discriminatory reasons, including membership in a protected group.<sup>39</sup> In Myanmar, the rights to be a candidate for public office, to form a political party, and to serve in civil service posts are limited to those with the status of "citizen". In 2015, the Rohingya were disenfranchised from voting in the general election. *In order to comply with its Genocide Convention obligations, the Government of Myanmar must not systematically*



*deprive the Rohingya of the right to vote and to present themselves as candidates for public office, including in the context of the upcoming general elections.*

### **3. Systematic denial or severe restrictions of the right to freedom of movement<sup>40</sup>**

Every person lawfully in a State has the right to liberty of movement within that State, and to not be arbitrarily denied the right to leave and enter his or her own country.<sup>41</sup> While restrictions on the right to movement may be imposed in exceptional circumstances, they must be strictly necessary, imposed for a legitimate purpose, and comply with the principle of non-discrimination.<sup>42</sup> Since the mass forced displacement of Rohingya in 2012, an estimated 126,000 Rohingya that remained in the country have been forced to live in internally displaced person (IDP) camps,<sup>43</sup> where their ability to move is severely and arbitrarily limited. More generally, the Rohingya population continues to face serious and discriminatory restrictions on their right to freedom of movement within Rakhine state and even across villages. This deprivation directly restricts their ability to access basic services and pursue gainful employment, and renders them particularly vulnerable to poverty, food insecurity, and negative health and education outcomes. *For the Government of Myanmar to uphold its Genocide Convention obligations, it must remove the discriminatory movement restrictions placed on the Rohingya population.*

### **4. Systematic denial or severe restriction of access to health care<sup>44</sup>**

Access to adequate health care is a critical right for ensuring the health and well-being of all people.<sup>45</sup> Denial of this right can lead to violations of other fundamental rights, particularly the right to life, and are often particularly harmful to women. For the Rohingya, the lack of adequate health facilities in Rakhine State is exacerbated by the discriminatory and onerous restrictions on movement, access to food, and land use enforced by the Myanmar government against the Rohingya. This results in a situation of extreme vulnerability and inhumane and unsafe living conditions.<sup>46</sup> *For the Government of Myanmar to uphold its Genocide Convention obligations, it must cease severely restricting access to health care for the Rohingya population.*

### **5. Systematic expropriation or destruction of property**

Everyone has the right to own and enjoy his or her property. Governments may not arbitrarily deprive a person of their property on the basis of their membership in a protected group.<sup>47</sup> Since the 2016-2017 attacks on the Rohingya, the Myanmar government has instituted a number of measures resulting in the destruction and expropriation of land that belonged to the Rohingya before they were forcibly displaced.<sup>48</sup> These actions have denied the Rohingya access to and the use of their own land, causing them significant economic and health hardships. *For the Government of Myanmar to uphold its Genocide Convention obligations, it must institute measures to stop the systematic expropriation and destruction of Rohingya property and, as much as is possible, return confiscated land and property to the Rohingya owners.*

## Risk factors related to life-integrity violations:

### 6. Systematic killing of members of a protected group, enforced disappearances, and targeting of community leaders and intellectuals

Everyone has the right to life and to security of their person without discrimination and a corresponding right to security and protection by their government against arbitrary violence and bodily harm, regardless of whether government officials or non-state actors inflict such harm.<sup>49</sup> The killing or enforced disappearance of members of a protected group on a widespread and systematic basis can indicate that other members of the group may be killed or suffer other violations of fundamental rights with impunity.<sup>50</sup> The systematic and widespread killing of Rohingya civilians, including prominent community members, during the Myanmar military's 2017 attack on the Rohingya has been extensively reported on through documentary and testimonial evidence. However, the Myanmar government, in its public statements, has minimized the extent to which these violations occurred and the vast majority of perpetrators have not been brought to justice, creating a culture of impunity. The Myanmar government has also not instituted any effective legislative or policy changes to prevent these acts from reoccurring. *For the Government of Myanmar to uphold its Genocide Convention obligations, it must ensure independent credible investigations into past allegations of widespread and systematic killings and enforced disappearances by the Myanmar military, and of private groups acting under their control or direction, against the Rohingya and must implement appropriate policies for the military and other armed forces under its control to prevent, stop, and punish killings and enforced disappearances against the Rohingya.*

### 7. Systematic use of rape and sexual violence

Rape and sexual violence are violations of the right to bodily integrity, the right to freedom from torture and unlawful or arbitrary interference with privacy, and the prohibition against discrimination against women and girls.<sup>51</sup> In carrying out the August 2017 attacks on Rohingya civilians, the Myanmar military committed widespread and systematic sexual violence and rape as a means to “degrade” the Rohingya population.<sup>52</sup> The perpetrators of these acts have not been brought to justice, nor has the Myanmar government instituted any effective policies or trainings to prevent these acts from reoccurring. *For the Government of Myanmar to uphold its Genocide Convention obligations, it must conduct independent credible investigations into past allegations of widespread and systematic sexual violence by the Myanmar military against the Rohingya and ensure that the appropriate policies are in place for the military and other armed forces under its control to prevent, stop, and punish rape and sexual violence against the Rohingya.*

### 8. Use of members of a protected group in forced labor

Forced labor (i.e., compelling a person against his or her will to perform work) violates a number of fundamental rights, including the right to liberty, freedom of movement, and the right not to be subjected to cruel, inhuman, or degrading treatment.<sup>53</sup> The FFM has consistently documented the Myanmar military's use of the Rohingya for forced labor.<sup>54</sup> In addition, the military abuses and subjects the Rohingya to violence while they carry out the tasks that they are forced to do.<sup>55</sup> *For the Government of Myanmar to uphold its Genocide Convention obligations, it must stop the practice of forced labor of the Rohingya.*



### III. Concluding Remarks

The Genocide Convention does not provide sufficient clarity on the scope of States' obligations to prevent genocide. Through this report series, the Museum hopes to contribute to addressing that gap and strengthening understanding of the Genocide Convention's prevention obligations. This report series may also serve as a guide for Myanmar to fulfill its obligations to prevent genocide and to protect the human rights of all its citizens. Most importantly, recalling the solemn but unfulfilled pledge of "never again," the Museum hopes to provide a public accountability tool to assess the measures Myanmar takes to ensure that the Rohingya people do not remain at serious risk of genocide, but instead live in dignity, without discrimination, and in full enjoyment of their human rights. For that goal to be achieved, concerned governments have a critical role to play in using the risk factors and legal norms outlined in this report to urge the Government of Myanmar to adhere to its prevention obligations.

# PREVENTION OBLIGATIONS AT A GLANCE

## Risk factors related to widespread and systematic discrimination:

1. **SYSTEMATIC DENIAL OR REVOCATION OF THE RIGHT TO CITIZENSHIP:** For the Government of Myanmar to uphold its Genocide Convention obligations, it must cease systematically denying the right of the Rohingya to citizenship and a nationality, repeal or amend legislation and policies that arbitrarily deny these rights to the Rohingya on the basis of their ethnicity, and cease systematically forcing the Rohingya to identify as foreigners.
2. **SYSTEMATIC DENIAL OF THE RIGHT TO PARTICIPATE IN PUBLIC AFFAIRS:** In order to comply with its Genocide Convention obligations, the Government of Myanmar must not systematically deprive the Rohingya of the right to vote and to present themselves as candidates for public office, including in the context of the upcoming general elections.
3. **SYSTEMATIC DENIAL OR SEVERE RESTRICTIONS OF THE RIGHT TO FREEDOM OF MOVEMENT:** For the Government of Myanmar to uphold its Genocide Convention obligations, it must remove the discriminatory movement restrictions placed on the Rohingya population.
4. **SYSTEMATIC DENIAL OR SEVERE RESTRICTIONS OF ACCESS TO HEALTH CARE:** For the Government of Myanmar to uphold its Genocide Convention obligations, it must cease severely restricting access to health care for the Rohingya population.
5. **SYSTEMATIC EXPROPRIATION OR DESTRUCTION OF PROPERTY:** For the Government of Myanmar to uphold its Genocide Convention obligations, it must institute measures to stop the systematic expropriation and destruction of Rohingya property and, as much as is possible, return confiscated land and property to the Rohingya owners.

## Risk factors related to life-integrity violations:

6. **SYSTEMATIC KILLING OF MEMBERS OF A PROTECTED GROUP, ENFORCED DISAPPEARANCES, AND TARGETING OF COMMUNITY LEADERS AND INTELLECTUALS:** For the Government of Myanmar to uphold its Genocide Convention obligations, it must ensure independent credible investigations into past allegations of widespread and systematic killings and enforced disappearances by the Myanmar military, and of private groups acting under their control or direction, against the Rohingya and must implement appropriate policies for the military and other armed forces under its control to prevent, stop, and punish killings and enforced disappearances against the Rohingya.
7. **SYSTEMATIC USE OF RAPE AND SEXUAL VIOLENCE:** For the Government of Myanmar to uphold its Genocide Convention obligations, it must conduct independent credible investigations into past allegations of widespread and systematic sexual violence by the Myanmar military against the Rohingya and ensure that the appropriate policies are in place for the military and other armed forces under its control to prevent, stop, and punish rape and sexual violence against the Rohingya.
8. **USE OF MEMBERS OF A PROTECTED GROUP IN FORCED LABOR:** For the Government of Myanmar to uphold its Genocide Convention obligations, it must stop the practice of forced labor of the Rohingya.

## List of Acronyms and Abbreviations

<b>FFM</b>	Fact Finding Mission
<b>ICJ</b>	International Court of Justice
<b>IDP</b>	Internally Displaced Person(s)
<b>JBI Compilation</b>	Jacob Blaustein Institute for the Advancement of Human Rights' <i>Compilation of Risk Factors and Legal Norms for the Prevention of Genocide</i>
<b>NVC</b>	National Verification Card
<b>UN</b>	United Nations

## REFERENCES

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<sup>1</sup> USHMM, “They Tried to Kill Us All: Atrocity Crimes Against Rohingya Muslims in Rakhine State, Myanmar”, November 2017.

Available at: <https://www.ushmm.org/m/pdfs/201711-atrocity-crimes-rohingya-muslims.pdf>

<sup>2</sup> 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.

<sup>3</sup> 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>

<sup>4</sup> “Detailed findings of the Independent International Fact-Finding Mission on Myanmar”, A/HRC/42/CRP.5, September 2019 (FFM September 2019 Report). See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Order, 23 January, 2020,, para. 72, referring *inter alia* to September 2019 Report, para. 242, where the FFM concluded that “the Rohingya people remain at serious risk of genocide”.

<sup>5</sup> 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”.

<sup>6</sup> The obligation to not commit genocide, as well as to prevent and punish genocide, is recognized as a part of customary international law, meaning that these obligations apply regardless of whether the State has ratified the Genocide Convention. Customary international law is derived from the consistent and general practice of States undertaken out of a sense of legal obligation. The ICJ has noted that “the [Genocide] Convention was intended to confirm obligations that already existed in customary international law”. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, para. 95. See also *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. 161 (*Bosnia v. Serbia* Judgment).

<sup>7</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order (Provisional Measures Order).

<sup>8</sup> Provisional Measures Order, para. 86. In addition to preventing the commission of acts of genocide and reporting to the Court on measures taken, the other provisional measures are: 2) 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, do not commit, conspire to commit, direct or incite to commit, or attempt to commit any acts of genocide; and 3) take effective measures to prevent the destruction and ensure the preservation of evidence related to acts of genocide.

<sup>9</sup> This silence does not leave Myanmar without guidance as to how to comply with the provisional measures order. In ordering provisional measures, the Court considered the actions that Myanmar indicated it was currently engaged in and held that “these steps do not appear sufficient in themselves to remove the possibility that acts causing irreparable prejudice to the rights invoked by The Gambia for the protection 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

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group under the Genocide Convention”. Provisional Measure Order, para. 73. Myanmar is therefore well aware that its current actions are insufficient. Further, Myanmar has at its disposable multiple sources that have suggested concrete measures that it should take, including those identified by the FFM, as well as those contained in the Final Report of the Advisory Commission on Rakhine State. 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, *Available at:* [http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport\\_Eng.pdf](http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf).

<sup>10</sup> *Bosnia v. Serbia Judgment* para. 431. [Emphasis added].

<sup>11</sup> The Genocide Convention requires all state parties to prevent and prosecute genocide. *See*, for a brief discussion, FFM September 2019 Report, paras 52-55, 243. However, the issue of the scope of third party states’ obligation to prevent genocide is outside of the scope of this report series.

<sup>12</sup> The ICJ has made clear that the obligation to prevent is one of “conduct and not of result”. The question is therefore whether the State took all measures available to it and not whether those measures were ultimately successful. *See* *Bosnia v. Serbia Judgment*, para. 430.

<sup>13</sup> FFM September 2019 Report, para. 239.

<sup>14</sup> This Framework was first published by the Special Advisor for the Prevention of Genocide and was replaced in 2014. *Available at:*

[https://www.un.org/en/genocideprevention/documents/about-us/Doc.3\\_Framework%20of%20Analysis%20for%20Atrocity%20Crimes\\_EN.pdf](https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf).

<sup>15</sup> These common risk factors are: 1) Situations of armed conflict or other forms of instability; 2) Record of serious violations of international human rights and humanitarian law; 3) Weakness of State structures; 4) Motives or incentives; 5) Capacity to commit atrocity crimes; 6) Absence of mitigating factors; 7) Enabling circumstances or preparatory action; 8) Triggering factors.

<sup>16</sup> War crimes, crimes against humanity, and genocide.

<sup>17</sup> These risk factors are: “Intergroup tensions or patterns of discrimination against protected groups” and “Signs of an intent to destroy in whole or in part a protected group.”

<sup>18</sup> Atrocity Crimes Framework, p. 19.

<sup>19</sup> 2011, *available at:* <https://www.jbi-humanrights.org/files/jbi-compilation-on-genocide-prevention.pdf>

<sup>20</sup> The JBI Compilation’s risk factors were identified based on studies of past genocides, particularly in regards to the period preceding these genocides.

<sup>21</sup> “Widespread” refers to the large-scale nature and number of persons targeted, whereas “systematic” refers to the organized nature of the violations, indicating that they were based on a plan as opposed to isolated or random incidents. *See*, for example, International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Kordić and Čerkez*, Judgment, December 17, 2004, IT-95-14/2-A, para. 94.

<sup>22</sup> Namely a national, ethnical, racial or religious group.

<sup>23</sup> This does not exclude *per se* the possibility that a single event of, for example, particularly important symbolic value to a protected group would not be sufficient to signal a risk of genocide.

<sup>24</sup> *Available at:* <https://www.jbi-humanrights.org/JBI%20Manual%20on%20Human%20Rights%20and%20Prevention%20of%20Genocide.pdf>.

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<sup>25</sup> Article II of the Genocide Convention lists five underlying acts, including (e) forcibly transferring children of the group to another group, which is not included in the provisional measures order.

<sup>26</sup> Provisional Measures Order, para. 86.

<sup>27</sup> See for example Provisional Measure Order, paras 70-73, wherein the Court refers to a number of UN official documents describing the situation of the Rohingya of which it has taken note.

<sup>28</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, A/HRC/39/CRP.2, , 17 September 2018.

<sup>29</sup> As one scholar has argued: “[the] limited understanding of warning signs is founded upon a disproportionate focus on the first constitutive act of genocide, that of killing members of the protected group.” S. Ashraph, Global Justice Center, *Beyond Killing: Gender, Genocide, & Obligations Under International Law*, December 2018.

<sup>30</sup> The FFM found that all eight of the common risk factors and both of the genocide-specific risk factors identified in the Atrocity Crimes Framework were present. See FFM September 2019 Report, para. 240. Based on the presence of all of these risk factors that the FFM concluded that the risk was sufficiently “serious” to trigger Myanmar’s prevention obligations under the Genocide Convention. *Id.*

<sup>31</sup> See UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 15.1 (UDHR); See 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); UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, Art. 7. The risk factors of “Systematic denial or severe restrictions of the right to freedom of movement” and Systematic denial or severe restrictions of access to health care”, discussed later in this section, along with the systematic denial of citizenship, operate in practice to render many Rohingya children stateless, which will be explored in future reports. See e.g. FFM September 2019 Report, para. 154, regarding the effect of movement restrictions on the health of the Rohingya.

<sup>32</sup> See UDHR, Art. 15.2.

<sup>33</sup> See FFM September 2019 Report, para. 102: “The Mission also concludes on reasonable grounds that the Government is using the NVC process and its annual household list as tools to deny the Rohingya [their right to citizenship and the fundamental human rights that stem from citizenship].”

<sup>34</sup> This fact pattern may also be relevant to the genocide risk factor of “Compulsory identification of members of a protected group against their will and subjecting them to severe discrimination and persecution”, which will be explored in future reports. See JBI Compilation and Manual.

<sup>35</sup> See ICCPR, art. 18.1.

<sup>36</sup> This false narrative contributes to the defamation of the Rohingya and imperils their physical well-being by making them vulnerable to violence and abuse. The aspect of how government officials refer to the Rohingya, as well as other relevant information, will be discussed in future reports in regards to the genocide risk factor of “Severe and Systematic Defamation or Dehumanization of a Particular Group and Failure to Punish Violence against Members of a Particular Group.”

<sup>37</sup> FFM September 2019 Report, para. 106.

<sup>38</sup> See UDHR, Art. 21.1.

<sup>39</sup> See ICCPR Art. 5.



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<sup>40</sup> This fact pattern may also be relevant to the genocide risk factor of “Forcible transfer and arbitrary displacement,” which will be explored in future reports.

<sup>41</sup> *See* UDHR, Art. 13.1; ICCPR, Art. 12.

<sup>42</sup> *See* ICCPR, Art. 12.3.

<sup>43</sup> FFM September 2019 Report, para. 111.

<sup>44</sup> Future reports will also explore health related issues under the genocide risk factor of “Deliberate Destruction of Food and Medical Supplies or Blocking Access to Such Supplies,” a risk factor which includes denying access to humanitarian aid.

<sup>45</sup> *See* UDHR, Art. 25; International Covenant on Economic, Social and Cultural Rights (ICESCR), Arts. 10, 12.

<sup>46</sup> *See* September 2019 Report, para. 154.

<sup>47</sup> *See* UDHR, Art. 17.1.

<sup>48</sup> *See* September 2019 Report, para. 139.

<sup>49</sup> *See* UDHR, Art. 3; ICCPR, Art. 6; International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5; International Convention for the Protection of All Persons from Enforced Disappearances, Art. 1.

<sup>50</sup> *See* Manual, p. 68, “Guidance for States.”

<sup>51</sup> *See* UDHR, Art. 3; ICCPR, Arts. 9, 17.

<sup>52</sup> A/HRC/42/50, para. 52.

<sup>53</sup> *See* ICCPR, Art. 8.

<sup>54</sup> September 2019 Report, paras 181-183.

<sup>55</sup> *Id.*, paras 190-191.

### **The Simon-Skjodt Center for the Prevention of Genocide**

of the United States Holocaust Memorial Museum works to prevent genocide and related crimes against humanity. The Simon-Skjodt Center is dedicated to stimulating timely global action to prevent genocide and to catalyze an international response when it occurs. Our goal is to make the prevention of genocide a core foreign policy priority for leaders around the world through a multi-pronged program of research, education, and public outreach. We work to equip decision makers, starting with officials in the United States but also extending to other governments, with the knowledge, tools, and institutional support required to prevent—or, if necessary, halt—genocide and related crimes against humanity.



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