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Briefing Paper: Myanmar's case at the International Court of Justice

Special Advisory Council for Myanmar



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Myanmar

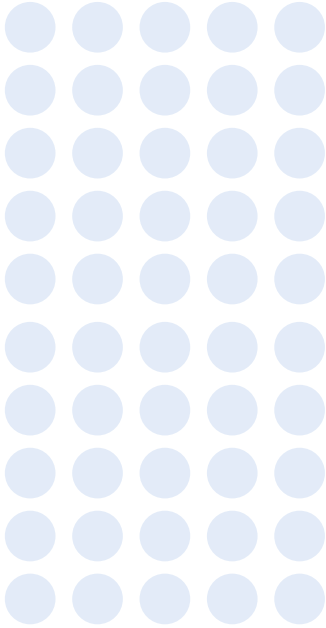


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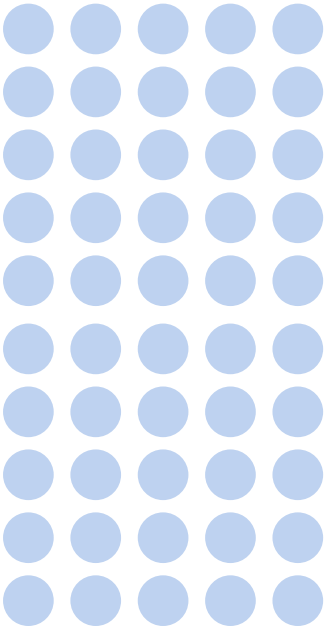
Introduction

The International Court of Justice (ICJ) is currently hosting legal proceedings between The Gambia and Myanmar regarding Myanmar's alleged non-compliance with the Genocide Convention. The Gambia considers that genocidal acts were committed against the Rohingya during the 2016 and 2017 "clearance operations" conducted by the Myanmar military and other security forces.

This briefing paper gives a short explanation of the ICJ, the Genocide Convention and the dispute between The Gambia and Myanmar. It provides a review of the case so far and addresses the issue of Myanmar's representation before the ICJ, before offering concluding remarks.



The ICJ



The ICJ is part of the UN and is often called the “World Court.” It was established in 1945 directly by the Charter of the UN and is located in The Hague. It is one of the six principal bodies (called ‘organs’) of the UN. It has fifteen judges, each of whom must be individually elected by a two-thirds majority of both the Security Council and the General Assembly.

The ICJ can adjudicate (make a judgement on) disputes between UN Member States, making decisions that are legally binding on the States involved in the dispute. It can also provide authoritative advisory opinions on any legal issue referred to it by the UN. Its opinions and rulings serve as sources of international law.



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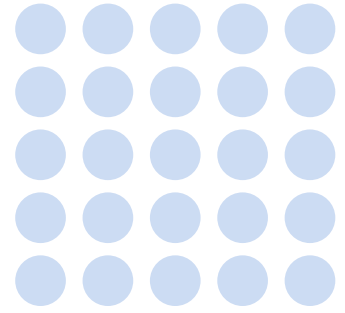
The ICJ is not an investigation body or a criminal court. It is concerned with State responsibility. That means it considers what a State’s obligations are under international law and whether a State is responsible for breaching its obligations under international law. The ICJ does not consider whether individuals have committed international crimes.



REMEMBER THE VICTIMS
PREVENT GENOCIDE

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The Genocide Convention



The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) is an international treaty that was unanimously adopted by the UN General Assembly in 1948. UN Member States that join the Convention confirm that genocide is a crime under international law which they commit to prevent and to punish. 152 UN Member States have joined the Genocide Convention.

The Convention provides a definition of genocide and a list of prohibited acts that are punishable under the Convention. Genocide is defined in the Convention as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."

There is a common misunderstanding that genocide involves killing or attempting to kill an entire group. In fact, genocide does not require this. Genocide can include any one or more of the five prohibited acts, committed with the intent to destroy all or part of a particular group. This specific intent, or "genocidal intent", is the most difficult element of the crime to prove.

The prohibited acts are:

- (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;

- (e) forcibly transferring children of the group to another group.

States that have joined the Genocide Convention can be responsible for breaching their obligations under the treaty if they do not prevent acts of genocide from taking place in their territory. States can also be responsible for breaching their obligations if they fail to punish individuals who commit genocide; conspire to commit genocide; incite genocide; attempt to commit genocide; or are complicit in genocide.

It is very challenging and complicated for the ICJ to determine whether genocide has occurred. But the ICJ works on the basis of a lower "standard of proof" than in criminal trials. Criminal conviction requires proof "beyond reasonable doubt". The ICJ does not have a formal standard of proof but gives individual judges wide scope within which to make their own decisions. However, for the Court to decide that something as serious as genocide has occurred, it needs to see and hear evidence that is "fully conclusive", meaning that there can be no other explanation (*Bosnia and Herzegovina v. Serbia and Montenegro*, 2 ICJ Rep. 209 (2007)). Therefore, it is very difficult for the ICJ to make a finding of genocide. Many victims' groups believe a legal determination is not required to find that genocide took place. Nonetheless, the hearing of a case under the Genocide Convention in the ICJ is very significant and very rare.



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The dispute between The Gambia and Myanmar

The Gambia and Myanmar are both parties to the Genocide Convention. Myanmar ratified the Convention in 1956 and The Gambia acceded to the Convention in 1978. The Gambia considers Myanmar to be in breach of its obligations under the Genocide Convention, which Myanmar denies. This represents a dispute between the two UN Member States upon which the ICJ must adjudicate, and this is the basis of the proceedings before the Court.

The Gambia says that from around October 2016 the Myanmar military and security forces began widespread and systematic “clearance operations” against the Rohingya group, and that genocidal acts were committed during these operations intended to destroy the Rohingya as a group, in whole or in part, by the use of mass murder, rape and other forms of sexual violence,

as well as the systematic destruction by fire of their villages, often with inhabitants locked inside burning houses. From August 2017 onwards, the genocidal acts continued with more “clearance operations” this time on a much larger scale.

The Gambia says that these acts constitute violations of the Genocide Convention which Myanmar has failed to prevent or punish. The Gambia’s case is largely based upon facts investigated and published by UN human rights investigators, including the UN Special Rapporteur on the situation of human rights in Myanmar, the UN Independent International Fact-Finding Mission on Myanmar and the UN Office of the High Commissioner for Human Rights. The UN Independent Investigative Mechanism for Myanmar has shared information with the ICJ to inform the proceedings since 2020.



The case so far

The Gambia filed an application at the ICJ in November 2019 to begin proceedings against Myanmar for breaching its obligations under the Genocide Convention. The case is still in the procedural stages, meaning that the Court has not yet begun to consider the substance of the dispute between The Gambia and Myanmar. It has first had to consider The Gambia's request for provisional measures and must now consider the preliminary objections that were made by Myanmar before the illegal military coup began on 1 February 2022 and have been maintained by the junta since.

Provisional Measures

When it filed its application, The Gambia requested that the Court indicate "provisional measures" that should be taken immediately to protect Rohingya against further harm, as it considered them to still be at serious risk in Myanmar. In any dispute, the Court has the authority to order States to undertake provisional measures to ensure compliance with international law. This does not constitute a judgement on the substance of the dispute; it is rather an interim measure. ICJ proceedings can take a long time, and in the case of genocide any delay may result in a missed chance to address real and serious situations. (In a Genocide Convention dispute filed by the Republic of Bosnia and Herzegovina, the ICJ took 14 years to finalise its judgement). This is why provisional measures can be made, and they can be a useful tool to address urgent issues such as the situation of Rohingya in Myanmar.

The Court held public hearings on the request for provisional measures over three days in December 2019. The Gambia provided

details and testimony of the atrocities inflicted on Rohingya by the Myanmar military and security forces. Myanmar argued that the events were part of an internal armed conflict and denied genocidal intent.

The judges deliberated and decided unanimously that the situation did require provisional measures. They ordered Myanmar to take four provisional measures: prevent any genocidal acts; ensure the military and other security forces do not commit any genocidal acts; ensure the preservation of evidence related to possible acts of genocide; and submit regular reports to the Court detailing the State's implementation of these measures. Myanmar acknowledged the issuance of these provisional measures – but continued to deny genocide – and has been submitting regular reports (generally every six months) with information about their implementation. Those reports have not been made public.

Preliminary objections

Myanmar filed "preliminary objections" in January 2021, before the illegal coup began. Preliminary objections are procedural issues that States can raise and ask the Court to adjudicate on before it can consider the actual dispute. If the Court agrees with the preliminary objections, then the case may not proceed at all.

Myanmar's preliminary objections have not been made public, but they relate to whether the Court has jurisdiction in the case and whether The Gambia's application is admissible (acceptable). Like all Member States of the UN, Myanmar accepts the general jurisdiction of

the ICJ as the world's highest court. Underlining this point, Myanmar has been represented in proceedings at the Court by high level officials. The Genocide Convention states that any disputes can be adjudicated in the ICJ, and Myanmar has accepted the Court's general jurisdiction in relation to such disputes. However, lawyers for Myanmar have previously argued that The Gambia does not have the "standing" to submit this dispute to the Court, including because the situation of Myanmar does not concern The Gambia, a far-away country in West Africa. The Gambia has disputed this, including by citing its duty under the Convention to take steps to prevent genocide, anywhere. Initial comments by the judges suggest that Myanmar's objections will not be accepted. The Court has announced that public hearings on

the preliminary objections will be held from 21 to 28 February 2022.

However, the National Unity Government of Myanmar (NUG) announced on 2 February 2022 that it has told the ICJ that Myanmar withdraws all preliminary objections and accepts the jurisdiction of the Court in the case. The NUG explained that the reason for withdrawing the preliminary objections is that they are procedural matters that do not address the substance of the case, and Myanmar no longer views them as appropriate. The Court has not yet indicated its response to this notification. If the notification is accepted, the hearings from 21 February 2022 may not proceed as they will be unnecessary.

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Myanmar's representation

Only States can be parties to a case before the ICJ. States are represented by their governments. The coalition government of the National League for Democracy and the military, in which Daw Aung San Suu Kyi was State Counsellor and Foreign Minister, represented Myanmar in the case before the ICJ from 2019 until January 2021. Following the Myanmar military's attempted coup on 1 February 2021, both the National Unity Government (NUG) and the illegal junta have communicated to the Court that they will now be representing Myanmar in the proceedings.

The junta is not the government of Myanmar and should not represent Myanmar before the Court. The UN General Assembly, which was also established by the UN Charter and is another principal organ of the UN, has already rejected the junta's attempts to represent Myanmar in the General Assembly. Myanmar continues to be represented by Ambassador U Kyaw Moe Tun in the UN General Assembly, the appointee of the NUG. The NUG should be recognised internationally as the legitimate

government of Myanmar (see, [SAC-M Briefing Paper: Recognition of Governments](#)) and is the only entity with the authority to represent Myanmar in the ICJ.

When States are party to a case before the ICJ, their governments appoint an "agent" to the Court. In public hearings the agent opens the argument on behalf of the government and lodges the submissions. Agents are sometimes assisted by co-agents, deputy agents or assistant agents and always have legal counsel or advocates to assist them in preparing the "plea" (a formal statement to the Court) and delivering oral arguments. In December 2019, Myanmar appointed Daw Aung San Suu Kyi as agent to the Court and U Kyaw Tint Swe as alternate agent. Both Daw Aung San Suu Kyi and U Kyaw Tint Swe are being arbitrarily detained by the military and so are unable to represent Myanmar in the ICJ. Therefore, a new agent is needed to appear before the Court for Myanmar. Ambassador U Kyaw Moe Tun has been appointed as a second alternate agent by the NUG. The illegal junta has also purported to appoint new agents.

Conclusion

Cases in the ICJ can take a long time, and the timing of judgements is hard to predict. Disputes involving the Genocide Convention typically take longer than other cases, because there are particularly complex factual and legal considerations. A final judgement could determine whether genocide took place in Myanmar. Or it could determine whether Myanmar was meeting its obligations to prevent genocide. There are many possible scenarios for a judgement. As genocide is very hard to prove, it is possible that the Court is unable to make a legal determination that genocide occurred.

The main legal proceedings still need to take place to adjudicate the dispute between The Gambia and Myanmar. As noted above, the case is still in the early procedural stages. If it progresses and Myanmar continues to defend the case and deny genocide, the full proceedings could be lengthy and expensive

Justice for the Rohingya and an end to acts of genocide committed against them are the most important outcomes to be gained from the proceedings. The National Unity Government has expressed its commitment to this. The most straightforward option would be for Myanmar to accept The Gambia's submissions and take meaningful steps to prevent further genocide against the Rohingya and punish the perpetrators.

The Special Advisory Council for Myanmar is a group of independent international experts, who came together in response to the February 2021 military coup in Myanmar, to support the peoples of Myanmar in their fight for human rights, peace, democracy, justice and accountability. For information about SAC-M and details of our work, please visit - <https://specialadvisorycouncil.org/>
