

FACTSHEET | MAY 2020

## **Q&A: The Gambia v. Myanmar**

### *Rohingya Genocide at The International Court of Justice*

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On 11 November 2019, the Republic of The Gambia filed suit against the Republic of the Union of Myanmar in the International Court of Justice (“ICJ”) for violating the Genocide Convention. Two months later at the request of The Gambia, the ICJ ordered the government of Myanmar to take certain actions to protect the Rohingya via “provisional measures” while the case proceeds. This historic lawsuit brings a critical focus to Myanmar’s responsibility as a state for the Rohingya genocide.

The Gambia’s case focuses on the actions of Myanmar’s security forces, starting in October 2016 and then again in August 2017, where they engaged in so-called “clearance operations” against the Rohingya, a distinct Muslim ethnic minority, in Rakhine State. The operations, in particular those that started in August 2017, were characterized by brutal violence and serious human rights violations on a mass scale. Survivors report indiscriminate killings, [rape and sexual violence](#), arbitrary detention, torture, beatings, and forced displacement. As a result, an estimated 745,000 people – mostly ethnic Rohingya – were forced to flee to Bangladesh. The “clearance operations” followed decades of institutionalized discrimination and systematic persecution of the Rohingya, including the passage of laws that stripped the Rohingya of their citizenship and restricted their religious freedoms, as well as reproductive and marital rights.

According to the UN Human Rights Council-mandated [Independent International Fact-Finding Mission on Myanmar](#) (“FFM”), the treatment of the Rohingya population during the “clearance operations” [amounts to genocide](#), crimes against humanity, and war crimes, the commission of which evoke specific obligations and responsibility under international law. In its final [report](#), published in September 2019, the FFM concluded that “the State of Myanmar breached its obligation not to commit genocide” and found that Myanmar “continues to harbor genocidal intent” towards the Rohingya, emphasizing the need for accountability.

This fact sheet answers fundamental questions about the ongoing ICJ case, Myanmar’s responsibility for genocide, and its impact on the Rohingya population. (Answers to questions about the early stages of the lawsuit are [here](#).)

#### **1. What efforts are currently under way to hold either the state of Myanmar or individuals accountable?**

There are two major pathways to justice and accountability for the crimes committed against the Rohingya: (1) Myanmar’s responsibility as a state; and (2) individual criminal responsibility of those who planned, participated in, or sanctioned crimes.

Concerning Myanmar’s responsibility as a state, The Gambia’s ICJ lawsuit under the Genocide Convention is the first and, so far, the only effort in a court to formally establish Myanmar’s responsibility for genocide. While some states and institutions have imposed sanctions on Myanmar, the state has otherwise not been challenged on its responsibility for international crimes. Similarly, politics at the UN Security Council have rendered any sort of action on Myanmar by the Council impossible thus far. The answers below provide more clarity on The Gambia’s case.

Potential venues for holding individuals to account include domestic courts in Myanmar, domestic courts in third party states under the theory of [universal jurisdiction](#), and the International Criminal Court (“ICC”).

At present, domestic courts in Myanmar do not appear to be viable venues for such accountability. As a starting point, [structural barriers](#) in Myanmar coupled with the Government’s categorical denials of wrongdoing and a lack of meaningful action to hold perpetrators accountable make credible domestic avenues for accountability highly unlikely. This includes the Myanmar’s Independent Commission of Enquiry (“ICOE”), which submitted its

final report on 20 January 2020. The ICOE has [serious flaws](#) in its independence, impartiality, and methodology, as well as its narrative and findings and its report, which categorically rejects evidence of crimes of sexual and gender-based violence, notably gang rape, and superficially dismisses the possibility of genocide. The ICOE’s work does not, contrary to the government’s assertions, lay the groundwork for accountability. This is supported by the FFM’s determination that the ICOE “will not and cannot provide a real avenue for accountability, even with some international involvement,” concluding that “accountability at the domestic level is currently unattainable.”

In November 2019 the Burmese Rohingya Organisation UK, supported by Grandmothers of the Plaza de Mayo and the Fundación Servicio Paz y Justicia, filed a case in an Argentinian court under the principle of universal jurisdiction, urging the criminal prosecution of senior officials from Myanmar who are responsible for the Rohingya genocide. At the time of publication, the lawsuit is being reviewed by the prosecutors.

With regards to the ICC, on 4 July 2019 the ICC’s Office of the Prosecutor filed a request for authorization of an investigation into the crimes against the Rohingya. Specifically, the scope of the request was limited to investigation of those crimes in which at least one element occurred in Bangladesh (which is a party to the Rome Statute), and those that took place within the 2016 and 2017 “clearance operations,” as well as other crimes “sufficiently linked” to these events.

In November 2019 Pre-Trial Chamber III of the ICC authorized the Chief Prosecutor to proceed with an investigation into crimes under the ICC’s jurisdiction. The Chamber determined that “there exists a reasonable basis to believe widespread and/or systematic acts of violence may have been committed that could qualify as the crimes against humanity of deportation across the Myanmar-Bangladesh border and persecution on grounds of ethnicity and/or religion against the Rohingya population.” While this represents an important advancement for individual responsibility for the crimes committed against the Rohingya, absent a full referral to the ICC by the UN Security Council, the ICC’s efforts will remain limited.

While not an accountability body in its own right, the UN’s Independent Investigative Mechanism for Myanmar (“IIMM”), established by the UN Human Rights Council in September 2018, is collecting evidence and preparing case files for the most serious international crimes and violations of international law occurring in Myanmar. The IIMM’s case files are intended to contribute to prosecutions of individuals in national, regional, or international criminal proceedings, but could also support cases claiming state responsibility, including in *The Gambia v. Myanmar*.

Crucially, ensuring individual criminal and state responsibility are two complementary efforts to achieve justice and accountability for the crimes that Myanmar’s security forces committed against the Rohingya.

## **2. What is the ICJ and what types of cases are under its jurisdiction?**

[The International Court of Justice](#), or World Court, is the UN’s principal judicial organ. The ICJ has jurisdiction over two types of cases: contentious (settling international legal disputes between states) and advisory (providing advisory opinions on question of international law to certain UN organs and specialized agencies).

The *Gambia vs. Myanmar* is a contentious case between two states. Contentious cases cannot be brought by individuals or groups against a state — only states can bring contentious cases against other states. However, in filing this case *The Gambia* is seeking to enforce the right of the Rohingya to be protected from genocide.

## **3. How did *The Gambia* take Myanmar to the ICJ?**

Only states that have accepted the Court’s jurisdiction can be taken to the ICJ. This includes instances when a particular treaty provides the ICJ as its dispute resolution mechanism, such as under the Genocide Convention.

Myanmar has ratified the Genocide Convention which, under its Article IX, provides that “[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

Importantly, while Myanmar has made a [reservation](#) to Articles VI and VIII of the Genocide Convention (meaning it has unilaterally attempted to exclude or modify the legal effect of those articles), it has not reserved to Article

IX. As a result, any Contracting Party to the Convention that has not itself made a reservation to Article IX may bring a case against Myanmar. The Gambia, which meets both of these criteria, filed a lawsuit against Myanmar for violating the Genocide Convention on 11 November 2019. In its 23 January 2020 provisional measures order, the ICJ affirmed that The Gambia met prima facie the Court's jurisdictional standards for a case under the Genocide Convention.

#### **4. Can other states intervene in the case brought by the Gambia?**

All parties to the Genocide Convention have international legal obligations to take action to prevent and punish genocide against the Rohingya. One option of such action is for Contracting Parties to the Convention to make a legal intervention for their government to provide its interpretation of the Genocide Convention in this case. Canada and the Netherlands have publicly welcomed The Gambia's application before the ICJ and expressed their intention "to jointly explore all options to support and assist the Gambia in these efforts," while the Republic of Maldives has announced its intention to file an intervention at the ICJ "in support of the Rohingya people." In addition, where a third-party state [that is not a Contracting Party to the Convention](#) has a legal interest in the case, they can also [seek to intervene](#).

At minimum, all states can issue public statements indicating their government's support for the case brought by The Gambia.

#### **5. What Genocide Convention obligations has Myanmar potentially violated?**

In its [application](#), citing the findings of the UN Special Rapporteur on the situation of human rights in Myanmar, the UN Special Adviser on the Prevention of Genocide, the FFM, and other sources, The Gambia asserted that Myanmar committed the following acts against members of the Rohingya group listed under Article II of the Genocide Convention: "killing, causing serious bodily and mental harm, inflicting conditions that are calculated to bring about physical destruction, imposing measures to prevent births, and forcible transfers."

Additionally, The Gambia asserted that Myanmar has violated other fundamental obligations under the Genocide Convention, including "attempting to commit genocide; conspiring to commit genocide; inciting genocide; complicity in genocide; failing to prevent and punish genocide," and failing to pass legislation giving effect to the Genocide Convention (Articles I, III and V).

#### **6. The Gambia is not directly affected by the Rohingya genocide. How can it bring a case against Myanmar?**

As stated above, any Contracting Party to the Genocide Convention may bring a case against another state to the ICJ (as long as neither the applicant nor the responding state have reserved to Article IX). Article IX provides no requirement that a party have a connection to a particular situation to bring a case; rather, it provides that any disputes relating to the "interpretation, application or fulfillment" of the Convention, including "the responsibility of a State for genocide," can be brought to the Court. In addition, the obligations under the Genocide Convention are what are known as [erga omnes partes obligations](#), meaning that they are owed by a state towards all the States parties to the Convention.

In its 23 January order, the ICJ affirmed this understanding of obligations under the Genocide Convention and stated that "all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention." As a result, even though The Gambia has no physical connection to Myanmar or the Rohingya genocide, it can bring such a suit.

It should be noted that the ICJ's 23 January conclusion on jurisdiction was made on a prima facie basis, meaning that it was looking at the issue "on its face" because of the urgent nature of the provisional measures request. At later stages in the case it is possible that Myanmar will challenge The Gambia's arguments on jurisdiction, at which point the ICJ will look at the issue more deeply.

## 7. What has the ICJ done so far?

While a genocide case from start to finish can take a long time (for example, it took nearly 15 years from when Bosnia first filed a case against Serbia in 1993 to the issuance of the final judgement on the merits in 2007), the Court has stated that it finds the case at hand to be of exceptional gravity in justifying a shorter schedule than that requested by the parties for the initial case filings.

In addition, the case has already made a tangible impact. Through a procedure that allows the ICJ to issue what are known as [provisional measures](#), the Court provided what is essentially a legal injunction against Myanmar, ordering it to immediately take certain measures related to the Rohingya's and The Gambia's rights under the Convention.

The Gambia requested the ICJ to issue provisional measures in order “to protect against further, irreparable harm to the rights of the Rohingya group under the Genocide Convention.” On 23 January, the ICJ concluded that the conditions required for it to indicate provisional measures were met and issued four provisional measures with which Myanmar must comply – prevent genocidal acts, ensure military and police and other forces within its control do not commit genocidal acts, preserve all evidence of genocidal acts, and report on compliance with these measures. The first report by Myanmar to the ICJ was ordered to be submitted within four months from the date of the provisional measures order (23 May 2020) – and the subsequent reports every six months thereafter, until a final decision on the case is rendered by the Court.

Provisional measures orders [are binding](#) and compliance with these measures will be monitored by the Court. If Myanmar fails to comply, The Gambia can ask the Court to issue additional measures and the issue can and should be taken up by the UN Security Council.

## 8. How Has Myanmar Responded to Date?

Following the issuance of the provisional measures order by the ICJ on 23 January, Myanmar's Ministry of Foreign Affairs said the order presented a “distorted picture of the situation” and noted that the government-mandated ICOE found no evidence of genocide. A spokesperson for the ruling National League for Democracy told the media that the government was “already doing most of the orders.” The front page of state-run newspaper the *Global New Light of Myanmar* read the day after the ruling: “Myanmar takes note of ICJ decision. There was no genocide in Rakhine.”

On 3 February, Myanmar's government re-imposed a mobile internet blackout in four townships in Rakhine State, home to the vast majority of the remaining Rohingya in Myanmar. At present seven townships remain under an internet blackout in Rakhine State. While the internet restrictions were imposed in the context of the Myanmar military's conflict with the Arakan Army, an armed group seeking greater autonomy for the ethnic Rakhine Buddhist population, it has serious implications for the Rohingya community and the ICJ case. The information blockade makes it difficult for the international community to monitor the situation in Rakhine State, where the Rohingya, Rakhine, and other ethnic communities are at an ongoing risk of atrocities, and verify Myanmar's compliance with the ICJ ruling. In March Myanmar's authorities also blocked hundreds of websites, including outlets that cover the ongoing fighting in Rakhine State, further restricting reporting on the area where an estimated 600,000 Rohingya live.

During April the Office of the President of Myanmar issued three directives. Released months after the ICJ's order and without any clear guidelines for implementation and monitoring, the timing of the issuance of the directives suggests that they were released in preparation to show superficial compliance ahead of the first report required by the provisional measures order. The first directive is addressed “to all Ministries and all Regions and States Governments” requesting them to “ensure that its personnel, officers, staff...and local people do not commit the acts mentioned in Articles II and III of the Genocide Convention.” The second directive focuses on “preservation of evidence and property in areas of northern Rakhine State” and prohibits “all Ministries and the Rakhine State government” from destroying evidence of acts described in Article II of the Genocide Convention. The third directive urges officials to “take all possible measures to denounce and prevent all forms of hate speech.”

Besides issuing the directives, the government of Myanmar has not taken any meaningful and practical steps to

dismantle existing discriminatory structures, including the process of repealing or amending laws and policies that target the Rohingya, bringing the military under civilian control, and ending military impunity for international crimes, including sexual violence. To comply with the provisional measures, civilian authorities should: declare such reforms a government priority and begin the process of amending the 1982 Citizenship Law; take steps to ease movement restrictions for the Rohingya; and grant the Rohingya equal access to healthcare, education, employment, and legal representation, among the rights enjoyed by other communities in Myanmar.

## 9. What happens if Myanmar is found responsible? Will someone go to jail? Will the government have to pay reparations?

The ICJ can order a variety of remedies, in addition to the provisional measures outlined above, based on the breaches alleged and the injuries sustained by the party bringing a case. The Gambia requested that the ICJ adjudge and declare that Myanmar:

- ▶ Has breached and continues to breach its obligations under the Genocide Convention,
- ▶ Must immediately cease any such ongoing internationally wrongful act and fully respect its obligations under the Genocide Convention,
- ▶ Must ensure that persons committing genocide are punished by a competent tribunal, including before an international penal tribunal,
- ▶ Must perform the obligations of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group, including but not limited to allowing the safe and dignified return of forcibly displaced Rohingya and respect for their full citizenship and human rights and protection against discrimination, persecution, and other related acts, and
- ▶ Must offer assurances and guarantees of non-repetition of violations of the Genocide Convention.

In the event that a party with a demonstrated injury intervenes in the case, compensatory and other remedies may be appropriate in addition to the remedies sought by The Gambia. In addition, while the ICJ cannot determine the individual criminal responsibility of those whose conduct would be attributable to Myanmar, the Court can order Myanmar to take actions to fulfill its duty to punish under the Convention, including through the measures outlined above.

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