

FEBRUARY 14, 2022

Developments in Gambia's Case Against Myanmar at the International Court of Justice

Questions and Answers
Published in

From February 21 to 28, 2022, the International Court of Justice (ICJ) in The Hague, Netherlands, will hold public hearings in the Case of *The Gambia v. Myanmar* concerning Myanmar's alleged violations of the Genocide Convention against the ethnic Rohingya population in Myanmar's northern Rakhine State. The following questions and answers address key issues regarding those hearings.



Abdul Kareem, a Rohingya Muslim, carries his mother, Alima Khatoon, to a refugee camp after crossing from Burma into Bangladesh on Sept. 16, 2017.

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1. What is the status of the case against Myanmar at the International Court of Justice?

In November 2019, Gambia – with the backing of the Organisation of Islamic Cooperation (OIC) – filed a case, *The Gambia v. Myanmar*, before the International Court of Justice in The Hague. The case alleged that Myanmar’s atrocities against the ethnic Rohingya in Rakhine State violated various provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Gambia, which ratified the Genocide Convention in 1978, brought the case under Article 9 of the convention, which allows for disputes between parties “relating to the responsibility of a State for genocide” and related acts to be submitted to the ICJ.

In December 2019, the court held hearings on Gambia’s request for provisional measures to protect the Rohingya remaining in Myanmar from genocide, which the court unanimously adopted in January 2020 (see below). In January 2021, Myanmar, then under the government led by Aung San Suu Kyi’s National League for Democracy, filed preliminary objections challenging the court’s jurisdiction and Gambia’s standing to file the case.

On February 1, 2021, Myanmar’s military staged a coup, overthrew the democratically elected government, and replaced it with a military junta, the State Administration Council. The case continues and the ICJ will hold public hearings on Myanmar’s preliminary objections from February 21 to 28, 2022.

2. Why is the genocide case against Myanmar important?

The Gambia v. Myanmar provides an unprecedented opportunity for the ICJ to scrutinize the abuses of Myanmar’s military. While the ICJ case focuses exclusively on alleged crimes against the Rohingya, the military has inflicted grave abuses across Myanmar. At the beginning of the case, ethnic groups both inside and outside the country issued statements backing the ICJ proceedings, noting similarities in the military’s brutal tactics against the Rohingya and other minority communities.

The Myanmar military’s well-documented abuses against the Rohingya and other ethnic minority groups in Myanmar span decades, but until Gambia brought a case before the ICJ, the government’s atrocities within Myanmar had been almost completely beyond the reach of justice. The impunity that the military has enjoyed since first taking power in 1962 enabled ongoing abuses and may have paved the way for the February 1, 2021 coup and the new military junta.

The United Nations-backed Independent International Fact-Finding Mission on Myanmar (“Fact-Finding Mission”) called for the investigation and prosecution of Myanmar’s military commanders, including Sen. Gen. Min Aung Hlaing for genocide, crimes against humanity, and war crimes related to the abuses in Rakhine, Kachin, and Shan States since 2011. As leader of the military junta, Min Aung Hlaing has also overseen a brutal crackdown over the past year against millions of anti-junta protesters. Since the coup, junta security forces have carried out mass killings, torture, sexual violence, arbitrary arrests, and other abuses that

Human Rights Watch believes amount to crimes against humanity. Security forces have killed over 1,500 people since the coup, including at least 100 children, and arbitrarily detained over 11,000 activists, politicians, journalists, and others.

3. How does the February 1 coup affect the ICJ case?

In 2019, Myanmar's government appointed State Counsellor Aung San Suu Kyi to lead its delegation to the ICJ. During the coup, the military arrested Aung San Suu Kyi and detained her. Junta-controlled courts have since sentenced her to six years in prison on fabricated charges. She still faces over 150 years combined on various additional charges.

On June 24, 2021, the junta announced it had appointed a panel of eight senior junta officials to represent Myanmar's delegation before the court: Foreign Minister Wunna Maung Lwin, serving as chair; Minister for International Cooperation Ko Ko Hlaing, as vice chair; Planning, Finance and Industry Minister Win Shein; Lt. Gen. Yar Pyae; Adj. Gen. Myo Zaw Thein; Union Attorney General Thida Oo; Deputy Foreign Minister Kyaw Myo Htut; and Khin Oo Hlaing.

In April 2021 members of the ousted elected civilian government, ethnic minority representatives, and civil society activists formed the National Unity Government (NUG), which has also expressed its intention to represent Myanmar in ICJ proceedings. On February 1, 2022, the NUG announced it had advised the ICJ that Myanmar accepts the jurisdiction of the court and withdraws all preliminary objections in the case.

While the court has yet to announce the representatives for Myanmar in the case, it is expected that the junta will represent the country at the preliminary objections hearing. The court's rules note that “[s]tates have no permanent representatives accredited to the court. They normally communicate with the Registrar through their Minister for Foreign Affairs, or their ambassador accredited to the Netherlands.” Myanmar has a joint ambassador to the Netherlands and Belgium, based in Brussels, who under these rules would communicate to the court on behalf of Myanmar. The current ambassador, Ambassador Soe Lynn Han, is loyal to the junta.

4. Does the junta's participation at the ICJ hearings have any bearing on its recognition as Myanmar's legitimate representatives at the UN?

The junta's participation at the February ICJ hearings has no bearing on its recognition at the United Nations as Myanmar's legitimate representatives. The UN General Assembly (UNGA) and its Credentials Committee are responsible for examining the credentials of UN member states' representatives (see Rule 28 of the Rules of Procedure of the General Assembly).

In December 2021, the Credentials Committee deferred a decision on Myanmar's representation, leaving in place the former UN representative, Kyaw Moe Tun, who had been appointed by the National League for Democracy government and has since aligned himself with the National Unity Government, effectively denying the junta's request for representation.

5. What will happen during the ICJ hearings on Myanmar's preliminary objections? How long will it take for the ICJ to hand down a decision?

Between February 21 and 28, 2022, representatives of Myanmar and Gambia will present arguments on whether the court has jurisdiction to examine Gambia's genocide claims against Myanmar. The hearings will take place in a hybrid format, including both in-person and virtual participants. Live streaming of the hearings will be available in English and French on the court's website and on UN Web TV.

The court does not have a set timeframe or deadline to issue a decision on Myanmar's preliminary objections. However, the court has shown an interest in resolving the case quickly and has previously set shorter time limits for pleadings given the "exceptional circumstances of the case and its gravity."

6. What are the preliminary objections that Myanmar raised in this case?

Although Myanmar's official preliminary objections are not yet public, the arguments it made during the court's December 2019 hearings on Gambia's request for provisional measures may be indicative of its current approach. The ICJ previously dismissed each of these arguments in its order on provisional measures. Myanmar may instead raise additional concerns or ask the court to revisit its prior reasoning at the upcoming hearing.

First, Myanmar previously argued that Gambia lacked standing because it filed its application as a "proxy" for a regional body, the Organisation for Islamic Cooperation, while the ICJ was established to preside over disputes between states. However, the court concluded that the case was filed by Gambia and the fact that it sought support from other states or intergovernmental organizations did not affect its standing before the court.

Second, Myanmar argued that there was no dispute between Gambia and Myanmar on the interpretation, application, or fulfillment of the Genocide Convention, as required by Article 9 of the convention. The court concluded that a dispute did not need to be explicit and could instead be inferred through public and private communications. The ICJ pointed to Gambia and Myanmar's differing views on the Fact-Finding Mission, which concluded that "the State of Myanmar breached its obligation not to commit genocide under the

Genocide Convention.” Gambia publicly called for the implementation of the Fact-Finding Mission’s recommendations, whereas Myanmar dismissed its findings as biased. The court held that these statements, among others, amounted to a dispute concerning the events that allegedly took place and Myanmar’s obligations under the Genocide Convention.

Third, Myanmar argued that its reservation to Article 8 of the Genocide Convention – which enables states parties to the Convention to call on competent UN organs to take action to prevent and suppress genocide – precludes states from pursuing actions at the ICJ, since it is a UN organ itself. However, the court concluded that Article 9 explicitly provides the ICJ with jurisdiction to adjudicate disputes over the application of the Genocide Convention. Therefore, the court found that the purposes of the two articles are distinct and that a reservation to Article 8 does not apply to Article 9. The court noted that Myanmar made no reservation to Article 9.

Finally, Myanmar argued that Gambia was unaffected by the alleged breaches of the Genocide Convention and therefore lacks standing – a legal right to bring a claim. The court found that all states parties to the convention share a common interest in ensuring the prevention and punishment of acts of genocide. As such, any state, not just those affected by the violations, can bring a claim against another to ensure compliance with the convention.

7. Why did Gambia file a case against Myanmar at the International Court of Justice?

Gambia, in its application to the ICJ, alleges that Myanmar’s actions violated various provisions of the Genocide Convention. The ICJ previously confirmed that all member states of the convention have a duty to prevent and to punish genocide.

In August 2017, the Myanmar military began a campaign of massacres, rape, and arson against the Rohingya in northern Rakhine State, killing thousands and forcing over 740,000 to flee to neighboring Bangladesh. These atrocities have been thoroughly documented by the United Nations, the media, and human rights groups, including Human Rights Watch.

The ICJ case, *The Gambia v. Myanmar*, is not a criminal case against individual alleged perpetrators, and it does not involve the International Criminal Court (ICC), a separate body (see below). Rather, the case is a “state-to-state” dispute between two parties to the Genocide Convention.

Gambia’s filing marks the first time that a country without any direct connection to the alleged crimes has used its membership in the Genocide Convention to bring a case before the ICJ. Myanmar has been a party to the Genocide Convention since 1956 and Gambia since 1978.

8. What are the provisional measures ordered against Myanmar to protect the Rohingya and how will the ICJ enforce these measures?

On January 23, 2020, the ICJ imposed provisional measures directing Myanmar to prevent all genocidal acts against the Rohingya, to ensure that the military and other security forces do not commit acts of genocide, and to take steps to preserve evidence related to the case. The court ordered Myanmar to report on its implementation and compliance of provisional measures within four months, and then every six months thereafter. The ICJ's provisional measures orders are legally binding on the parties to the case.

The Myanmar government submitted two implementation reports before the February 1, 2021 coup, and public reports indicate that the junta has continued to engage with the court on the reporting requirement. Gambia is permitted to review and respond to these reports, as well as to identify ongoing abuses in violation of these measures. While Rohingya groups have called for the reports to be made public, the reports can only be reviewed by the court and the parties to the case.

Despite the provisional measures, Human Rights Watch has continued to document abuses against the Rohingya remaining in Myanmar. In Rakhine State, about 600,000 Rohingya remain confined to camps and villages without freedom of movement or access to adequate food, health care, education, and livelihoods. An estimated 130,000 Rohingya have been arbitrarily held since 2012 in open-air detention camps in central Rakhine. These acts by the junta most likely amount to the crimes against humanity of persecution, apartheid, and severe deprivation of liberty. Since the coup, Rohingya face even greater movement restrictions and harsher punishments for attempting to leave Rakhine State.

Human rights groups contend that the military's ongoing efforts to restrict the movement of Rohingya in Rakhine State and restrictions on humanitarian assistance violate the provisional measures aimed at preventing genocidal acts against the Rohingya.

Other UN bodies could take steps to implement the ICJ's order and, by extension, increase the political cost on Myanmar should it fail to comply. Under Article 41(2) of the ICJ Statute, the court's provisional measures orders are automatically sent to the UN Security Council (UNSC). The Security Council could take concrete action, including through a binding resolution to address some of the indicators of genocidal intent outlined in the Fact-Finding Mission's 2018 report. For example, a Security Council resolution could direct Myanmar to lift restrictions on Rohingya's freedom of movement, eliminate unnecessary restrictions on humanitarian access to Rakhine State, repeal discriminatory laws, and ban practices that limit Rohingya access to education, health care, and livelihoods. However, the Security Council has been deadlocked on Myanmar, in part because China and Russia oppose action on Myanmar and have threatened to veto any resolution.

9. What has Gambia alleged in its complaint against Myanmar?

Establishing that genocide has taken place under the Genocide Convention requires demonstrating genocidal intent (meaning the intent to destroy a national, ethnic, racial, or religious group in whole or in part) and the commission of genocidal acts.

In 2018, the UN-backed Fact-Finding Mission presented a comprehensive analysis of the Rohingya's status as a protected group, genocidal acts, and indicators of genocidal intent and concluded that "the actions of those who orchestrated the attacks on the Rohingya read as a veritable check-list" on how to destroy the target group in whole or in part. The Fact-Finding Mission further concluded in 2019 that "the State of Myanmar breached its obligation not to commit genocide under the Genocide Convention."

Gambia's application in November 2019 identified two elements of Myanmar's persecution of the Rohingya as "particularly indicative of genocidal intent": its systematic denial of legal rights to Rohingya – including the restrictions on their ability to marry and bear children and severe restrictions on freedom of movement, including detention camps – and its support for, and participation in, pervasive hate campaigns aimed at demonizing and dehumanizing the group.

As for the genocidal acts, the application pointed to incidents from the October 2016 and August 2017 "clearance operations" including mass executions of Rohingya men, women, and children; the systematic burning of Rohingya villages "with the intent to destroy the group in whole or in part"; the targeting of children; and the commission of rape and sexual violence on a massive scale.

As for ongoing acts of genocide, the application highlighted continuing attacks on the Rohingya, notably the destruction of more than 30 villages between November 2018 and May 2019 and the denial of access to food. It also noted the Fact-Finding Mission's warning that the 600,000 Rohingya still in Myanmar live under the threat of further genocidal acts by Myanmar.

10. What relief can the ICJ provide to victims if it rules in favor of Gambia?

Under Article 94 of the UN Charter, all member countries must abide by ICJ decisions in cases to which they are a party, and in the event of noncompliance, the UN Security Council may "decide upon measures to be taken to give effect to the judgment."

Gambia has asked the ICJ to declare that Myanmar has breached, and continues to breach, its obligations under the Genocide Convention; that it must cease ongoing genocidal acts and fully respect its obligations moving forward; must ensure that those responsible for genocide are held to account before a competent

tribunal; and must provide reparations to Rohingya victims of genocidal acts, including “allowing the safe and dignified return” of those who have been forcibly displaced and “respect for their full citizenship and human rights and protection against discrimination, persecution and other related acts.” Gambia has also asked that Myanmar offer assurances and guarantees that it won’t repeat its violations of the Genocide Convention.

11. What other accountability efforts are underway?

In November 2019, the International Criminal Court’s judges gave the then-prosecutor, Fatou Bensouda, authorization to open an investigation into certain crimes against humanity, notably the forced deportation in 2017 of more than 740,000 Rohingya into Bangladesh, an ICC member state. ICC judges previously confirmed that the court had jurisdiction because the crime of deportation was completed in an ICC member state. The judges also ruled that the prosecutor can investigate other crimes, including future crimes, if they are within the ICC’s jurisdiction and are sufficiently linked to the situation described in the prosecutor’s request – which focused on crimes committed during two waves of violence, in 2016 and 2017 in Rakhine State – since Bangladesh joined the ICC in June 2010.

Myanmar is not a member of the ICC, so only the UN Security Council can refer all crimes in Myanmar to the ICC for investigation. An ICC referral remains critical to address the full scope of criminality in Rakhine State and in Kachin and Shan States, where the military has used many of the same brutal tactics against other ethnic minorities. An ICC referral would also give the court jurisdiction to address alleged war crimes and crimes against humanity by ethnic armed groups in Myanmar.

Also, in November 2019, a group of Rohingya and Latin American human rights organizations filed a criminal complaint in Argentina requesting an investigation of Myanmar’s top military and civilian leaders for crimes committed in Rakhine State. The case was filed under the principle of universal jurisdiction – an avenue for crimes so serious that all states have an interest in addressing them. The case was initially dismissed before a lower court that held that the more appropriate forum for such claims was the pending investigation before the ICC. The decision was overturned on appeal, with an appellate judge affirming Argentina’s jurisdiction to investigate the claims, arguing that “the investigation and eventual judgment of this type of crime is the primary responsibility of states.” The matter is now before an investigative judge.

Finally, in September 2018, the UN Human Rights Council (UNHRC) created the Independent Investigative Mechanism for Myanmar to collect evidence of the most serious international crimes and prepare case files for criminal prosecution “to facilitate and expedite fair and independent criminal proceedings” in national, regional, or international courts. Although the investigative mechanism’s primary function is to build case files against individuals for alleged violations of international criminal law, it is permitted to share information with the ICJ proceedings and has indicated that it is responding to requests from both Gambia and Myanmar in *The Gambia v. Myanmar* case.

The UN General Assembly has also condemned Myanmar's military junta for its actions following the coup and in June 2021 passed a resolution calling on Myanmar to “end the state of emergency, to respect all human rights of all the people of Myanmar and to allow the sustained democratic transition of Myanmar.” The resolution also called on UN member states to enact an arms embargo to prevent the flow of weapons to the junta.

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