

FACTSHEET | NOVEMBER 2019

Q&A: The Gambia v. Myanmar

Rohingya Genocide at The International Court of Justice

Starting in October 2016 and then again in August 2017, Myanmar’s security forces engaged in so-called “clearance operations” against the Rohingya, a distinct Muslim ethnic minority, in Rakhine State, Myanmar. 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. Reports have also shown that security forces were systematically planning for such an operation against the Rohingya even before the purported reason for the violence — retaliation for small scale attacks committed by the Arakan Rohingya Salvation Army (ARSA) — occurred. As a result, an estimated 745,000 people — mostly ethnic Rohingya — were forced to flee to Bangladesh.

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 evokes 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.

On November 11, 2019, The Republic of The Gambia filed suit against Myanmar in the International Court of Justice (“ICJ”) for violating the Genocide Convention. This momentous lawsuit brings a critical focus to Myanmar’s responsibility as a state for genocide and compliments ongoing investigations into individual accountability. **This fact sheet answers fundamental questions about the ICJ case, and seeks to clarify available avenues for justice for the crimes committed against the Rohingya population.**

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

There are currently 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 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. More clarity on The Gambia’s case are explained in the questions and answers below.

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, either in Myanmar or in third-party states, do not appear to be viable venues for accountability. As a starting point, [structural barriers](#) in Myanmar coupled with the Government’s categorical denials of wrongdoing make domestic avenues highly unlikely. As the Myanmar FFM found, “in light of the pervasive culture of impunity at the domestic level... the impetus for accountability must come from the international community.” In addition, while universal jurisdiction remains a possibility, no country has yet taken any steps toward pursuing such cases.

With regards to the ICC, on July 4, 2019 the ICC’s Office of the Prosecutor filed a request for authorization of an investigation into the crimes against the Rohingya. This includes alleged crimes against humanity, particularly deportation, other inhumane acts, and persecution. Specifically, the scope of the investigation is limited to those in which at least one element of the crime 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. This novel interpretation of jurisdiction under the Rome Statute represents an important, yet limited, opportunity to end the complete impunity for international crimes committed by Myanmar. However, 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 in theory also support cases claiming state responsibility.

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. How is the International Court of Justice different from the International Criminal Court?

The [International Court of Justice](#), or World Court, is the UN’s principal judicial organ. The Court plays two roles: (1) it settles international legal disputes between states (*contentious jurisdiction*); and (2) provides advisory opinions on questions of international law to certain UN organs and specialized agencies (*advisory jurisdiction*). The ICJ does not hear contentious cases brought by individuals or groups against a state — only states can bring cases against other states.

The [International Criminal Court](#), on the other hand, investigates and tries individuals for four categories of crimes: genocide, war crimes, crimes against humanity, and the crime of aggression. Through its cases, it determines the criminal responsibility of an individual for situations that fall under the Court’s jurisdiction. When the ICC concludes a case, an accused individual is either acquitted or found guilty of having committed a crime.

3. How is The Gambia Taking Myanmar to the ICJ?

Only states that have accepted the Court’s jurisdiction in one of three ways can be taken to the ICJ: (1) they have made a [declaration](#) under Article 36(2) of the ICJ’s statute granting the court compulsory jurisdiction over disputes under international law; (2) where a particular treaty provides the ICJ as its dispute resolution mechanism, such as under the [Genocide Convention](#) or the [Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment](#) (“CAT”); or, (3) by entering into a special agreement to submit the dispute to the Court.

Myanmar has not made a declaration under Article 36(2) of the ICJ Statute, so it is not under the Article 36(2) compulsory jurisdiction of the Court. It has, however, 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 made a [reservation](#) to Article IX may bring a case against Myanmar. The Gambia, which meets both of these criteria, is the first to do so.

4. Must a court determine a genocide occurred before a case can be initiated at the ICJ?

No. The ICJ, under the Convention, is itself imbued with the ability and authority to determine if a genocide occurred, and if a state in fact failed to comply with its obligations under the Convention. Therefore, if any Contracting Party

has a dispute with another Party as to the “interpretation, application or fulfillment” of any obligations under the Convention, they can bring a case to the ICJ over that dispute.

In addition, some of the obligations under the Convention, such as the duty to prevent genocide or an attempted genocide, do not require genocide to have occurred.

For example, the duty to prevent requires all Contracting Parties to take all possible measures within their power to prevent genocide once a “serious risk” of genocide is known.

5. How can a state be held accountable for a crime?

The Genocide Convention defines genocide as a crime under international law and assigns certain obligations to states who are parties to the Convention. This includes the explicit duties to prevent and punish genocide, as well as the implicit duty not to commit genocide through its organs or other entities whose conduct is attributable to the state.

Accordingly, while a state such as Myanmar cannot incur criminal responsibility for the commission of genocide, it can be held accountable for its failures to comply with its obligations under the Genocide Convention.

As a result, if a Contracting Party to the Genocide Convention believes that another state has failed to comply with its obligations, it can take that state to the ICJ to determine its responsibility. For example, this was done in the [Bosnia v. Serbia](#) case at the ICJ, where the Court [determined](#) that Serbia violated its duties to prevent and punish genocide under the Convention.

6. What Genocide Convention obligations has Myanmar potentially violated?

The presently known facts of the Rohingya genocide would permit a case to be filed against Myanmar for at least the following violations of its obligations under the Convention: (1) committing genocide; (2) failing to prevent genocide; (3) failing to punish those responsible for genocide; and (4) failing to enact necessary domestic legislation to effectuate the Genocide Convention.

With respect to the commission of genocide, [evidence supports](#) that four constitutive acts of genocide have occurred: (1) the killing of the Rohingya; (2) the causing of serious bodily or mental harm to the Rohingya; (3) the deliberate inflicting on the Rohingya conditions of life calculated to bring about their physical destruction in whole or in part; and (4) the taking of actions to prevent Rohingya births.

7. Who can bring a genocide case to the ICJ? Can a state that is not directly affected by the genocide still bring a case?

As stated above in Question 3, any Contracting Party to the Genocide Convention who itself has not reserved to Article IX of the Convention may bring a case against another state to the ICJ. 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 such cases, the ICJ has [made clear](#) that “all States can be held to have a legal interest in their protection.” Furthermore, specifically in the context of the Genocide Convention, the Court [has stated](#) that “In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the Convention.”

As a result, even though The Gambia has no physical connection to Myanmar or the Rohingya genocide, since The Gambia meets the Court’s jurisdictional requirements, it can bring a case to the Court against Myanmar.

8. Is there precedent for a state without a physical connection to the violation to sue another state in the ICJ?

Yes. In the *Belgium v. Senegal* case, Belgium brought a case against Senegal for its failure to either prosecute or extradite the former President of Chad, Hissène Habré, as it was required to do under CAT. In looking at this issue, the Court [determined](#) that it was sufficient for Belgium to be a party to CAT in order to assert jurisdiction against Senegal.

Specifically, the ICJ found that the obligations contained in CAT were similar to those under the Genocide Convention, and stated that “[t]he common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party.”

9. Can other states participate in the case brought by The Gambia?

Yes. The [rules and procedures of the ICJ](#) would allow for other Parties to the Genocide Convention to either join in the case filed by The Gambia, or file their own applications, which the Court could decide to consolidate in a range of ways. 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.

10. Who is bound by the judgement of the ICJ? How are the Court’s judgements enforced?

Article 94 of the UN Charter provides that all parties to a dispute must comply with the ICJ’s decisions and that where a party fails to comply with this obligation, the other party may go to the UN Security Council for the enforcement of the decision.

11. Doesn’t an ICJ case take a long time? Are there any immediate effects of a case being brought?

While an average ICJ 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), a case nevertheless can have an immediate impact.

First, through a procedure that allows the ICJ to issue what are known as [provisional measures](#), the Court can provide what is essentially a legal injunction against Myanmar, ordering it to immediately take certain measures related to its obligations under the Convention. For example, potential preliminary measures include, at a minimum, orders to: (1) cease ongoing genocide; and (2) prevent genocide from occurring in the future. Importantly, the ICJ can also enter critical provisional measures requiring Myanmar to immediately: (2) cease destroying evidence of genocide; and (2) take all steps necessary to preserve evidence of genocide. Since the FFM has found that Myanmar is engaged in the destruction of such evidence, a preservation order by the ICJ would serve not only the parties in its proceedings, but would also greatly enhance any chances of establishing proof of genocide in the ICC or other accountability proceedings.

Notably, in the *Bosnia v. Serbia* case, the ICJ entered provisional measures a mere 19 days after the application instituting proceedings was filed. Provisional measures [are binding](#) on the party against which they are ordered, and compliance with these measures can be monitored by both the Court and the UN Security Council.

Second, the filing of a case can in and of itself have a positive benefit. As noted above, Myanmar continues unabated in its discriminatory treatment of the Rohingya, and the international community as a whole [has failed](#) to take action to hold Myanmar accountable. This has allowed Myanmar to continue to enjoy the privileges of participation in the international community and economy, while pursuing a horrifying campaign of persecution and genocide against ethnic groups.

The filing of a case with the ICJ sends a strong signal to Myanmar’s government that the international community will no longer tolerate its actions and seek to hold it to account. As the fate of over one million Rohingya hangs in the balance, there is an urgent need for all measures that could force Myanmar’s government to end its genocidal campaign against the Rohingya and take measures to ensure justice, accountability, and their safe return.

12. 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 in Question 11, based on the breaches alleged and the injuries sustained by the party(ies) bringing a case. Equitable remedies, which will likely be most appropriate in the context of a case brought by a non-injured party such as The Gambia, might include:

- ▶ A finding on the merits recognizing that Myanmar committed genocide, and that Myanmar failed in its duty to prevent and punish genocide.
- ▶ An order on the merits requiring Myanmar to cooperate with justice and accountability mechanisms including the ICC and the new investigative mechanism, to allow access into the country for conducting investigations, and to clarify its own legal system.
- ▶ An order on the merits requiring Myanmar to enact legislation to criminalize genocide in line with the requirements of the Genocide Convention.
- ▶ An order on the merits requiring Myanmar to amend existing discriminatory laws that facilitated genocide and the violations of the Convention, including the 1982 Citizenship Law and amnesty provisions of the Constitution (at least with respect to genocide).

In the event that a party with a demonstrated injury in fact brings or intervenes in the case, compensatory and other remedies may be appropriate in addition to equitable remedies.

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.

13. How does this case relate to the efforts of the Fact-Finding Mission and the Impartial and Independent Mechanism for Myanmar?

The FFM and IIMM were created by the UN Human Rights Council in order to establish the facts and circumstances related to human rights abuses in Myanmar and to collect, consolidate, preserve, and analyze evidence of international crimes occurring in Myanmar, respectively. The ICJ, unlike the ICC or other criminal courts, does not engage in its own independent investigations or fact-finding. Rather, the state that brings a case to the Court bears the burden of providing sufficient evidence to substantiate its charges and prove its case. As a result, extensive expert documentation and analysis, such that conducted and produced by the FFM, and the IIMM in the future, will likely be drawn upon by the parties to the case and the Court.

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