

International Accountability: Myanmar, the ICJ and the Genocide Question

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The indomitable spirit of Raphael Lemkin, bibliophile, assiduous documenter of humanity’s dark deeds and inexcusable conduct, is bound to be an unsettled one. This brilliant, committed and peculiarly dedicated creature took years to come up with what would, in time, become a word so horrifying as to transfix judges of international law. The amalgam word of genocide stalks the conscience of state leaders, commanders and politicians, an insidious reminder of the inner prejudice that becomes a murderous plan, a design, a means of ridding one of enemies and counterparts.

Given the nature of international institutions, often weak and onerously bureaucratic, there are other aspects to the system of holding the genocidaire-types to account: inadvertent immunity for the perpetrators; the obstructions and impediments of governments; and the reluctance of even using the term to describe abuses.

The military regime in Myanmar will have been hoping for all three aspects to manifest. But in the International Court of Justice, such expectations may have to be revised. For one thing, the Myanmar junta would have been taken aback by The Gambia’s proceedings against their country alleging genocide. But in November 2019, this West African country, with the support of the Organisation of Islamic Cooperation (OIC) [filed](#) a case alleging that Myanmar’s military had been responsible for genocidal acts resulting in “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 ... intended to destroy the Rohingya group in whole or in part.”

The [UN Genocide Convention](#) (UNG) permits the ICJ, Under Article 9, to hear “[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the [UNG], including those relating to the responsibility of a State for genocide or any of the acts enumerated in Article III”.

The Gambia’s case involved a request for provisional protective measures for members of the Rohingya remaining in Myanmar. (In 2019, that [number](#) was put by the International

Independent Fact-Finding Mission in Myanmar at 600,000.) These measures required the military regime to prevent all genocidal acts against Rohingya, ensure that the security forces not commit acts of genocide, and take steps to preserve evidence related to the case.

In January 2020, the ICJ voiced agreement with the request. The Hague-based body further gave Myanmar a timeline of four months to report on the country's implementation of the order, followed by six-month deadlines to monitor performance.

Myanmar responded with a number of objections, all rejected by the judges by a vote of 15 to 1 on July 22. These included the claim that the Court lacked jurisdiction, or, alternatively, that the genuine applicant in the proceedings was the Organisation of Islamic Cooperation. Judge Xue Hanqin was the only judge to [accept the latter argument](#): that "The Gambia was tasked and appointed by the OIC to institute proceedings against Myanmar in the Court."

According [to the bench](#), "the applicant in this case is The Gambia"; the case involved an existing "dispute relating to the interpretation, application and fulfilment of the Genocide Convention" when the filing was made and "The Gambia, as state party to the Genocide Convention, has standing to involve the responsibility of Myanmar for the alleged breaches of its obligations under Articles 1, III, IV, and IV of the Convention."

In an illuminating, if logical development in the case, the judgment [favoured](#) a salient reading of the Genocide Convention, one binding all State signatories in a solemn act of deterring, preventing and punishing a crime considered *jus cogens* in international law and the community in general. The judgment quoted the reasoning of the Court's 1951 [Advisory Opinion](#) regarding reservations to the Genocide Convention: "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."

It therefore followed that,

"All the States parties to the Genocide Convention thus have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention."

Human Rights Watch, alongside other human rights organisations such as Fortify Rights, have also argued that other countries throw in their weight in supporting Gambia's efforts. The ICJ Statute also notes that that court's order for provision measures is relayed to the UN Security Council, where further pressure might be brought to bear.

While many an action goes to the Security Council to wither, the use of the ICJ in assessing state responsibility for grave human rights violations can only be cheered by advocates of that often nebulous idea known as the rule of law. The effectiveness of such processes must be seen alongside the work of prosecutors from the International Criminal Court, which has jurisdiction to try individuals.

Individual lawsuits are also being filed against the regime, building on the principle of universal jurisdiction. The Burmese Rohingya Organisation UK (BROUK), for instance, [convinced](#) the Argentinian judiciary in November 2021 to open a case against the Myanmar military, with specific reference to various senior figures of the junta, including Min Aung

Hlaing. The Second Chamber of the Appeal Court [reaffirmed](#) that “the gravity of the facts and the violation of *ius cogens* norms permit that those facts are investigated in our country”.

Sadly, the ICJ proceeding is bound to take years of cautious and lengthy deliberations, by which time the military sadists may well have achieved their venal goal of ridding the country of the Rohingya. In the [words](#) of a protest banner being sported outside the Peace Palace in The Hague, “The genocide survivors can’t wait for generations.”

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