

## The Gambia v. Myanmar: An Analysis of the ICJ's Decision on Jurisdiction under the Genocide Convention

### Introduction

On July 22, 2022, the International Court of Justice (ICJ) decided, by fifteen votes to one, that it has jurisdiction under the Genocide Convention to hear the application filed by The Gambia against Myanmar in November 2019.<sup>1</sup> The Gambia's application alleges that Myanmar's military and other security forces perpetrated genocide by systemically destroying—through mass murder, rape, and other kinds of sexual violence—villages of the Rohingya in Rakhine province of Myanmar. While in the past, states have brought cases before the ICJ under the Genocide Convention, this is the first time that a state has invoked its jurisdiction to seek redress for alleged genocidal acts committed against the citizens of another state. This *Insight* discusses the major findings of the ICJ's decision and what lies ahead in the litigation.

### Key Findings of the Court

The Court's opinion address five principal lines of argument, each of which are summarized below.

#### *Jurisdiction of the Court*

Myanmar's first objection was that The Gambia was not the real, interested party seeking to establish its own legal rights; rather, it was a mere purveyor of the Organisation of Islamic Cooperation (OIC), which, as an international organization, lacked standing to

invoke the ICJ's contentious jurisdiction.<sup>2</sup> To support this contention, Myanmar referred to the recommendation of the OIC's *Ad Hoc* Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas, which had been approved by the OIC's Council of Ministers to bring legal proceedings as well as The Gambia's press release, which indicated that it was not filing the case in its own right.<sup>3</sup> The Gambia did not deny the OIC's support, but argued that such support did not render it any less a genuine party.<sup>4</sup>

Referring to its judgment in *Nicaragua v. Honduras*,<sup>5</sup> the Court stressed that its judgment is of a legal character; as such, the motivation of the party to sue is immaterial.<sup>6</sup> In that case, the Court held that there may be political aspects in any dispute brought before it.<sup>7</sup> The underlying political motivation of the state party invoking the ICJ's jurisdiction is not a relevant consideration for the Court and cannot be a ground to mount a jurisdictional challenge. The ICJ also held in the current case that the political or economic support of an organization cannot deprive a state of its legal right to file a case before it.<sup>8</sup>

### *Admissibility*

Myanmar contended that even if the Court were to hold that it retains jurisdiction in the case, the ICJ should decide that the case was inadmissible because it was an abuse of process on The Gambia's part.<sup>9</sup> The Gambia argued the contrary: instead of an abuse of the process, the filing of the case has received international praise from the Secretary-General of the U.N. and the U.N. General Assembly, which welcomed the Court's order granting provisional measures.<sup>10</sup> Citing its decision in the *Certain Iranian Assets Case*,<sup>11</sup> and noting that no evidence had been presented to support an abuse of process claim, the Court rejected Myanmar's objection.<sup>12</sup> It also noted that only in very rare cases would it reject a claim based on abuse of process, despite possessing jurisdiction.<sup>13</sup>

### *Existence of a Dispute*

Myanmar further alleged that there was no existing legal dispute between the two state parties since, in its view, the reports of the Independent International Fact-Finding Mission on Myanmar (IIFMM) and the statement and counter-statement of the states' leaders in the U.N. were not enough for it to constitute a legal dispute between the two parties.<sup>14</sup> (Established in March 2017 by the United Nations Human Rights Council, the IIFMM concluded in September 2018 that there was a prima facie case of genocidal intent in Rakhine.) The Gambia responded that the respondent state's mere knowledge of the existence of the applicant's opposing view should suffice to meet the threshold of the existence of a dispute. To require a higher threshold, it concluded, would effectively give the respondent a veto as to the existence of a dispute.<sup>15</sup>

Referring to its decision in the *Marshall Islands*<sup>16</sup> and *Nicaragua v. Colombia*, the Court observed that for a dispute to exist, the two parties must hold opposite views on the matter.<sup>17</sup> Any factual or legal disagreement or conflicting legal views or conflicts interests could suffice for meeting the threshold of legal disputes as per the judgments of this line of cases. The ICJ further held that the explicit rejection of the applicant's legal position is not required to establish the existence of a dispute; rather, the mere *silence* of the respondent state may connote that there *is* a legal dispute.<sup>18</sup> Recalling its decision in *Georgia v. Russia*,<sup>19</sup> the ICJ pointed out that for a state to invoke a treaty before the Court, it is not necessary that it must have relied on the treaty when it first raised the issue with the other state, so long as the subject matter of the dispute is clear.<sup>20</sup> Based on the Fact-Finding Mission reports, the exchange between the parties at the U.N. General Assembly, and The Gambia's Note Verbale (as well as Myanmar's non-response to that note), the ICJ concluded that there was a legal dispute between the parties.<sup>21</sup>

#### *Reservation to Article VIII by Myanmar*

Myanmar argued that it had made a reservation to Article VIII of the Genocide Convention, which concerns the power of "competent organs of the [U.N.] to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide."<sup>22</sup> The Court, as an organ of the U.N., could not therefore exercise its jurisdiction over Myanmar.<sup>23</sup> By referring to its observation in the *Genocide Convention Case (Bosnia v. Serbia)*,<sup>24</sup> the Court held that Article VIII refers to the discretionary function of other U.N. organs to decide on what may be necessary to prevent genocide at the political level, which is different from the judicial function of the ICJ to be exercised in accordance with law.<sup>25</sup>

Further noting that Article IX of the Convention constitutes the basis for the ICJ's jurisdiction, the Court concluded that the two articles have distinct areas of application: Article IX provides the conditions for recourse to the ICJ, while Article VIII allows a state to appeal to other competent U.N. organs, even where the Court is not engaged. A reservation made to the latter would thus not preclude the seisin of the ICJ in this case.<sup>26</sup>

#### *Gambia's Alleged Lack of Standing as an Injured State Party*

Finally, Myanmar sought to argue that even if The Gambia had a right to invoke its right to legal responsibility, it did not possess the right to bring a claim before the Court as it was not itself an injured state party. If any state could have the right to bring proceedings,

it would have been Bangladesh as the host state of many Rohingya who are victims of the alleged genocide.<sup>27</sup>

In response, the Court pointed that in the *Genocide Convention Case*, it had observed that the Convention is not about any individual advantage or disadvantage of a state, but rather for the achievement of common purposes.<sup>28</sup> It concluded that the breach of *erga omnes* obligations such as those contained in the Genocide Convention, even without establishing any special interest in the matter, is plausible.<sup>29</sup> The Court noted that Bangladesh had been affected by the influx of a huge number of the Rohingya, but held that its reservation to Article IX of the Genocide Convention could not in any way affect the *locus standi* of The Gambia to file the case in its own right as a party to the Convention.<sup>30</sup> In making this observation, the ICJ referred to its advisory opinion in *Reservations to the Genocide Convention*<sup>31</sup> in which it noted that the Convention had been adopted with a pure humanitarian and civilizing objective.<sup>32</sup>

### **Key Observations of the Dissenting Opinion**

Judge Xue delivered the Court's sole dissenting opinion. In essence, Judge Xue raised her concern that the decision of the majority allowing a dispute to be admitted without any direct link between the applicant and the respondent state opened the door for what is effectively a collective action.<sup>33</sup> In so doing, she observed that the ICJ's jurisdiction in this case could open doors for similar cases of this nature in the future, such as protection of the environment.<sup>34</sup> One perplexing observation of Judge Xue was her reference to the 2017 report of the Advisory Commission on Rakhine State chaired by Kofi Annan (though the majority of members were Myanmar citizens), in which it stated that the situation in Rakhine is "a development crisis, a human rights crisis, and a security crisis".<sup>35</sup>

### **What Next?**

Now that the Court has held that it has jurisdiction, The Gambia has to prove genocidal acts committed by Myanmar authorities. In view of the various reports, in particular the IIFFMM, which established that the atrocities were committed, this may not appear to be too complicated. Proving that such acts were committed with the "genocidal element," however, will be more challenging.

On March 21, 2022, U.S. Secretary of State, Antony J. Blinken unequivocally stated that, based on the U.S. State Department's detailed analysis of the relevant facts and laws, the U.S. had concluded that the Rohingyas in the Rakhine Province were subject to crimes against humanity and genocide.<sup>36</sup> The U.S. making such a determination is quite

rare; it is only the eighth time that it has ever done so.<sup>37</sup> Notably, the United States is not a state whose material interest is affected by the current litigation, aside from the fact that, as a party to the Genocide Convention, it has an *erga omnes* obligation to prevent and punish genocide.

It may be mentioned that regarding the probative value of reports by independent or official bodies, the Court, in *Bosnia v. Serbia*, observed that “[t]heir value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process).”<sup>38</sup> The U.S. determination would appear to meet the first criterion, and it seemingly would also pass the second, as its analysis is much more thorough and fact-based than anonymous press reports have been.

The finding of the experts appointed by the U.S. State Department also corroborates, inter alia, the findings of the IIFFMM.<sup>39</sup> The U.S. determination should therefore also serve to corroborate the IIFFMM report and, hence, support for the case brought by The Gambia. In this regard, it is worth noting that Secretary Blinken’s statement also asserts that the U.S. has shared information with The Gambia regarding the ICJ litigation. Thus, there may yet be additional information at the disposal of the Gambian legal team.

## Conclusion

While this case may be understood as the ICJ taking a liberal approach to the issue of jurisdiction, one should not lose sight of the Court’s observation as to the humanitarian and civilizing nature of the Genocide Convention. It has categorically pronounced “the right of all other Contracting Parties [those who may not be materially affected] to assert the common interest in compliance with the obligations *erga omnes partes* under the Convention.”<sup>40</sup> Only time will tell whether the approach of the Court on a different kind of *erga omnes* right will remain the same. In a similar vein, it would also be left to the future whether this case opens the door for a third state to espouse the case of the victim who are not its nationals. And if the Court were to hold Myanmar liable, it will be important to observe whether it moves beyond financial damages in determining the appropriate remedy.

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<sup>1</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Judgment on Preliminary Objections (July 22, 2022), <https://www.icj-cij.org/public/files/case->

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[related/178/178-20220722-JUD-01-00-EN.pdf](#) [hereinafter Judgment]. While Judge *Ad hoc* Kress voted with the majority of the Court, he appended a separate declaration. Judge Kress raised his concern as to the Court not adequately dealing with the issue of change in Myanmar's representatives in the proceedings before the Court happening as a consequence of the military coup in February 2021.

<sup>2</sup> *Id.* ¶ 35.

<sup>3</sup> *Id.* ¶¶ 36-37.

<sup>4</sup> *Id.* ¶ 41.

<sup>5</sup> Judgment on Jurisdiction and Admissibility, 1988 I.C.J. Rep. 69, ¶ 52 (Dec. 20).

<sup>6</sup> Judgment, *supra* note 1, ¶ 44.

<sup>7</sup> Judgment on Jurisdiction and Admissibility, *supra* note 5.

<sup>8</sup> Judgment, *supra* note 1, ¶ 44.

<sup>9</sup> *Id.* ¶ 47.

<sup>10</sup> *Id.* ¶ 48.

<sup>11</sup> Certain Iranian Assets (Iran v. U.S.), Judgment on Preliminary Objections, 2019 I.C.J. Rep. 7, ¶ 113 (Feb. 13).

<sup>12</sup> Judgment, *supra* note 1, ¶ 49.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* ¶¶ 53-56.

<sup>15</sup> *Id.* ¶ 57.

<sup>16</sup> Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment on Jurisdiction and Admissibility, 2016 I.C.J. Rep. 255, ¶ 34 (Oct. 5); Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.), Preliminary Objections, Judgment, I.C.J. Reports 2016, 3, ¶ 50.

<sup>17</sup> Judgment, *supra* note 1, ¶ 63.

<sup>18</sup> *Id.* ¶ 71.

<sup>19</sup> Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment on Preliminary Objections, 2011 I.C.J. Rep. 70, ¶ 30 (Apr. 1).

<sup>20</sup> Judgment, *supra* note 1, ¶ 72.

<sup>21</sup> *Id.* ¶¶ 71-77.

<sup>22</sup> *Id.* ¶¶ 78-79.

<sup>23</sup> *Id.* ¶¶ 78-82.

<sup>24</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 159 (Feb. 26).

<sup>25</sup> Judgment, *supra* note 1, ¶ 89.

<sup>26</sup> *Id.* ¶ 91.

<sup>27</sup> *Id.* ¶ 99.

<sup>28</sup> *Id.* ¶ 106.

<sup>29</sup> *Id.* ¶ 108.

<sup>30</sup> *Id.* ¶ 113.

<sup>31</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, ¶ 23 (May 28).

<sup>32</sup> Judgment, *supra* note 1, ¶ 113.

<sup>33</sup> Dissenting opinion of Judge Xue Hanqin.

<sup>34</sup> *Id.* ¶ 25.

<sup>35</sup> *Id.* ¶ 41.

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<sup>36</sup> Press Release, Antony J. Blinken, Secretary Antony J. Blinken on the Genocide and Crimes Against Humanity in Burma, U.S. Department of State (Mar. 21, 2022), <https://www.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum/>.

<sup>37</sup> *Id.*

<sup>38</sup> *Bosn. & Herz. v. Serb. & Montenegro*, *supra* note 24, ¶ 227.

<sup>39</sup> *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, U.N.H.R.C. (Sept. 10–28, 2018), ¶¶ 1399, 1407, 1421, 1422, 1427, 1430, 1431, 1440, 1441, [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/A\\_HRC\\_39\\_CRP.2.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf).

<sup>40</sup> Judgment, *supra* note 1, ¶ 113.