



***CHALLENGING  
STATE  
IMPUNITY:***

**THE PLIGHT OF  
THE ROHINGYA PEOPLE  
AND THE GAMBIA'S  
CLAIMS THAT MYANMAR'S  
GOVERNMENT HAS  
COMMITTED GENOCIDE**



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# TABLE OF CONTENTS

<b>Sr. No.</b>	<b>Topic</b>	<b>Page Number</b>
1.	Historical Context	2
2.	The Legal Dispute	3
3.	Bibliography	7

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On 11 November 2019, The Gambia filed a case against Myanmar in the International Court of Justice (ICJ). The Gambia claims Myanmar has breached its duties under the Genocide Convention, violating international law.<sup>1</sup> The case is based upon alleged atrocities committed by the Myanmar government against ethnic Rohingyas in the Rakhine State of Myanmar between October 2016 and September 2019.

1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Pending Application for Institution of Proceedings) 11 November 2019 [111] (The Gambia Application).

## Historical Context:

The Rohingya are Muslims who speak their own language. They are an ethnic and religious minority in the region, which is primarily comprised of ethnic Rakhine, who are predominantly Buddhist and speak a regional dialect of Burmese. Myanmar does not recognize the Rohingya ethnic group, and instead refers to such individuals as Bengali, demonstrating their desire for the Rohingya to flee Myanmar in favour of neighbouring Bangladesh.<sup>2</sup>

In 2018, the UN summarised the conditions faced by the Rohingya as “severe, systematic and institutionalised oppression from birth to death.”<sup>3</sup> The institutionalised subjugation of the Rohingyas is considered to have begun in 1989, when they began to suffer extrajudicial killings, torture, detention, forced disappearances, sexual assaults, and forced labour at the hands of the Myanmar government.<sup>4</sup> However, Myanmar's laws reflect pre-existing discriminatory plans and policies. The 1982 Citizenship Law, which continues to be in force, provides citizenship and legal rights only to those who belong to State identified national races. The Rohingya do not fall within one of these recognized national races, and therefore have no rights. Subsequent laws make it illegal for Rohingya to marry, have children, or travel freely within the region.<sup>5</sup>

2. Ibid [32].

3. UNHRC Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar (17 September 2018) UN Doc A/HRC/39/CRP.2 [458], [748] (2018 Report).

4. The Gambia Application (n 1) [29].

5. Ibid [32] - [35].

## The Legal Dispute:

### a. The International Court of Justice's Jurisdiction:

The International Court of Justice (ICJ) is the United Nations' (UN) primary judicial organ, established via the UN Charter in 1945. The ICJ is responsible for settling legal disputes between nations under international law. In making its determinations, the ICJ largely relies upon international conventions, customary international law, and general principles of law recognized by all nations.<sup>6</sup> Conventions or treaties signed by States sometimes include a specific provision explicitly granting the ICJ jurisdiction for issues that may arise between State Parties regarding their obligations under these agreements. The Genocide Convention is such an instrument.<sup>7</sup>

### b. The Genocide Convention:

The Convention defines genocide via five specific actions intended to destroy, in whole or part, a national, ethnic, racial, or religious group. Those five types of prohibited acts include:

- a) Killing members of the group.
- b) Causing serious bodily or mental harm to members of the group.
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part.
- d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.<sup>8</sup>

The Statutes for the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, and the Rome Statute for the International Criminal Court have all adopted this definition of genocide verbatim.<sup>9</sup> Under the Convention, the culpable acts related to genocide encompass the actual commission of genocide, conspiracy to commit genocide, public incitement of genocide, attempt to commit genocide, and complicity in the commission of genocide.<sup>10</sup>

The Convention entered into force on 12 January 1951. Article IX of the Convention provides that

6. Statute of the International Court of Justice (adopted 26 June 1945) 33 UNTS 993 art 38(1).

7. Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 9 (Genocide Convention).

8. Ibid art 2.

9. Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993) UN Doc S/RES/827 (1993) art 4; Statute of the International Criminal Tribunal for Rwanda, (8 November 1994) UN Doc S/RES/955 (1994) art 2; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 171 art 6 (Rome Statute).

10. Genocide Convention art 3.

“[d]isputes between Contracting Parties relating to the interpretation, application or fulfilment of the...Convention, including those relating to the responsibility of a State for genocide or any other acts enumerated in [the Convention], shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”<sup>11</sup> The Gambia became a party to the Genocide Convention on 29 December 1978. Myanmar signed the Convention before it went into force on 30 December 1949, and acceded to the Convention on 14 March 1956. Accordingly, both States have previously agreed that the current dispute should be settled before the ICJ. Myanmar nonetheless alleges that Article IX of the Convention is insufficient for the Court to exercise its jurisdiction over the matter. However, the Court has already held this position is without merit. In 1996, in *Bosnia and Herzegovina v. Serbia and Montenegro*, Serbia and Montenegro unsuccessfully sought to evade the Court's jurisdiction over a dispute involving the Genocide Convention via the same argument.<sup>12</sup>

### c. The Gambia's Specific Claims:

Once jurisdiction has been established, the Court must consider whether the alleged atrocities occurred in the manner alleged, and, if so, whether they may be legally defined as genocide. The Gambia's claims centre around events between October 2016 and September 2019, when the UN Fact-Finding Mission made its report to the UN Human Rights Council. On 9 October 2016, a handful of Rohingya attacked three border guard police posts in response to historical persecution. Myanmar military and police forces responded with overwhelming force, systematically shooting, killing, sexually assaulting, beating, and torturing members of the Rohingya population.<sup>13</sup> The troops also razed homes, mosques, madrassas (Islamic religious schools), and Rohingya-owned shops. These activities continued for approximately four months, temporarily ending on 16 February 2017.<sup>14</sup> These so-called “clearance operations” resumed on 25 August 2017, when Myanmar redeployed military forces into the region, accompanied by tanks, heavy artillery, and helicopters.<sup>15</sup> Coordinated mass exterminations of Rohingya men, women, and children followed. More than 400 Rohingya villages were partially or fully destroyed.<sup>16</sup> This was followed by the implementation of a forced starvation policy by the government, confiscating agricultural lands from the surviving Rohingya. Hundreds of thousands were forcibly displaced.<sup>17</sup> Based upon the foregoing, The Gambia claims that Myanmar, via its State organs and agents, violated the Genocide Convention as it,

11. Ibid art 9.

12. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) 11 July 1996 [41], [47].

13. 2018 Report (n 3) [1069] - [1095].

14. Ibid [1069] - [1070].

15. Ibid [1151] - [1156].

16. Amnesty International, “‘We Are at Breaking Point’: Rohingya - Persecuted in Myanmar, Neglected in Bangladesh” (Amnesty International, 19 December 2016) <<https://www.amnesty.org/download/Documents/ASA1653622016ENGLISH.PDF>> accessed 29 August 2022; Human Rights Watch, ‘Burma: Military Burned Villages in Rakhine State’ (Human Rights Watch, 13 December 2016) <<https://www.hrw.org/news/2016/12/13/burma-military-burned-villagesrakhine-state>> accessed 29 August 2022.

17. UNHRC Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar (16 September 2019) UN Doc A/HRC/42/CRP.5 [158] - [159].

among other things, committed, incited, conspired to commit, and failed to prevent or punish genocidal acts. The relief sought by The Gambia includes the cessation of the aforementioned wrongful acts, and that those responsible face justice via a competent legal tribunal.

#### **d. Brief Legal Analysis:**

As previously provided, the United Nations' Fact-Finding Mission to Myanmar has documented incidents that, on their face, constitute acts that would fall within the provisions of those excluded by the Convention. However, even if these events are sufficiently proven before the Court, two additional elements must be established. First, the Rohingya people constitute an ethnic, racial, or religious group. Rohingya have self-identified as a unique ethnic group, with their own language, culture, and religious identity since the 18th Century.<sup>18</sup> Evidence of these circumstances, on their own, may be sufficient to establish the Rohingya's status. As previously indicated, the Myanmar government refuses to officially attribute these terms to the Rohingya people. However, in 2009, a Myanmar diplomat issued a letter to the media in which he asserted, “[i]n reality, Rohingya are neither Myanmar people nor Myanmar's ethnic group.”<sup>19</sup> This is tantamount to an admission by the Myanmar government that the Rohingya are of a unique and distinguishable ethnic group.

Historically, the greatest challenge in establishing the commission of genocide has been establishing the motivation of the actor, commonly referred to as the suspect's mental state or *mens rea*. Under the Convention, it must be shown that the individual engaged in the precluded conduct “with an intent to destroy, in whole or in part, an ethnic racial or religious group.”<sup>20</sup> Given the usual lack of overt statements by regimes admitting to their motivation for such conduct, the trier of fact must look to what can be inferred from the facts and circumstances of the events. In the present matter, the UN Fact-Finding Mission, and The Gambia, via its Court submissions, have identified specific laws and practices that appear to single out Rohingya. One of the most compelling pieces of evidence comes from a statement given by Senior General Min Aung Hlaing regarding the resumption of “clearance operations” in August 2017. Hlaing stated, “[t]he Bengali problem was a long-standing one that targeted Rohingya communities which have become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem.”<sup>21</sup> This statement reflects the true intention of the Myanmar government – to destroy the Rohingya population in whole or in part – satisfying the *mens rea* element of the crime of genocide.

18. Francis Buchanan, 'A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire' (1799) 5 Asiatic Researches 219-240.

19. Kate Akkaya 'The Rohingya: Genocide in the Modern Era?' (Reliefweb, 3 December 2015) <<https://reliefweb.int/report/myanmar/rohingya-genocide-modern-era>> accessed 29 August 2022.

20. Genocide Convention art 2.

21. 2018 Report (n 3) [753].

**e. Case Developments:**

Since the initial filing of the case by The Gambia on 11 November 2019, additional submissions have been made by the parties, resulting in a handful of important Court orders. As part of its application, The Gambia sought provisional measures to protect against further harm to the Rohingya people. On 23 January 2020, the Court issued an order directing Myanmar to take steps to ensure that its troops refrain from conduct covered under the Convention and to preclude the destruction of evidence. Various human rights and advocacy groups have asserted that Myanmar has failed to comply with the Court's order.<sup>22</sup> Myanmar has filed periodic reports on its alleged progress to the Court, but these are confidential. On 20 January 2021, Myanmar filed objections, challenging the Court's jurisdiction and The Gambia's standing as the applicant in the matter. On 22 July 2022, the ICJ issued its judgement, rejecting Myanmar's objections. Myanmar's Memorial addressing the merits of the case is scheduled to be due in April of 2023.

22. Prachiti Venkatraman and Ashley Jordana, 'Myanmar's Compliance with ICJ Provisional Measures Order & the Road Ahead' (UK Human Rights Blog, 3 September 2020) <<https://ukhumanrightsblog.com/2020/09/03/myanmars-compliance-with-the-icj-provisional-measures-order-the-road-ahead/>> accessed 29 August 2022.

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Prachiti Venkatraman and Ashley Jordana, 'Myanmar's Compliance with ICJ Provisional Measures Order & the Road Ahead' (UK Human Rights Blog, 3 September 2020).



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