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### **GAMBIA'S GENOCIDE CASE AGAINST MYANMAR: A LEGAL REVIEW**

By

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Being buoyed by the absence of any domestic pressure and the tacit support of some economically powerful actors such as China, India, and Russia – all of whom have something to gain from the jockeying for the abundant natural resources of Myanmar – the authorities in Myanmar have been emboldened to persecute Rohingyas with apparent impunity since October 2016. Their denial, propaganda, and meaningless diplomatic negotiations seemed to be never-ending and yielded virtually no change on the ground. However, on November 11, 2019, the Gambians sought to test that impunity by filing a case at the International Court of Justice (ICJ).

While the Gambia is not in any way directly affected by the atrocities the Myanmar security forces have committed on the Rohingyas, its standing to bring a case against Myanmar would be a non-issue. Genocide, under contemporary international law, is a firmly established area of universal jurisdiction. Some Western democracies have enacted laws providing for the exercise of universal jurisdiction over genocide (i.e., the right to try genocide without the concerned state having any territorial connection to the offense) and those laws have not been protested by the international community of states, which would connote that it is now established as a rule of customary international law. Gambia being a party to the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (Genocide Convention), its standing to bring a case against Myanmar (also a party to the Genocide Convention) should be a straightforward issue. The damning observations of independent bodies such as the report of the Independent International Fact-Finding Mission on Myanmar set up by the United Nations Human Rights Council in September 2019, which found that Myanmar has failed to perform its obligations to prevent, investigate, and punish genocide, should help the Gambians to prove the factual aspects of the case.

If Myanmar does appear before the ICJ to defend the case, it is likely that it would challenge the jurisdiction of the Court. However, the challenge seems likely to be unpersuasive. Some state parties to the Genocide Convention have made specific reservations to Article IX of the Genocide Convention, which gives jurisdiction to the ICJ to try genocide, but Myanmar has not done this. Myanmar has only made reservations to Articles VI and VIII of the Genocide Convention, neither of which should aid in it successfully challenging the jurisdiction of the ICJ.

Article VI merely requires that persons (i.e. individuals) charged with genocide be tried by a competent tribunal of the state where an offense occurs or by an international penal tribunal. In its reservation, Myanmar only asserts the exclusive jurisdiction of national tribunals over the trial of individuals for offenses under the Genocide Convention and nothing more. In the current case, the Gambians are not seeking to try any individual of Myanmar for genocide but are rather accusing the state of Myanmar, and thus Article VI is inapplicable here.

Article VIII provides that the contracting parties to the Genocide Convention "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide." Thus, it would appear that it may only apply to situations where a state party may seek intervention of the UN Security Council (UNSC) and even in that situation it seems unsure how Myanmar's reservation could override the provisions of the Charter of the United Nations, which authorizes the UNSC to act.

As Article IX of the Genocide Convention unequivocally deals with the jurisdiction of the ICJ and Myanmar has refrained from making any reservations to that Article, it seems an uphill task for Myanmar to challenge the jurisdiction of the ICJ on the basis of its reservations to Articles VI and VIII.

The previous judgment of the ICJ in Bosnia's case against Serbia, rendered in 2007, should help the Gambians to establish their case. Although on factual grounds, the majority of the Judges of the ICJ did not hold Serbia and Bosnia liable for the crime of genocide (except for the massacre of more than 7,000 men and boys at Srebrenica in July 1995), it nonetheless recognized that a state could commit the crime of genocide. And the ICJ held that an unequivocal "obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide ...the obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome." (para 461) In the current case, it is difficult to see Myanmar to have fulfilled this obligation.

A somewhat disenchanting prospect for many would be that the directly tangible practical value of any ICJ judgement may be somewhat circumscribed. For a start, it would fail to impose any direct sanction on the civil and military establishments of Myanmar, which have orchestrated and executed the genocide. Whether or not the ICJ will order Myanmar to pay any compensation or arrange the safe repatriation of Rohingyas to Myanmar is uncertain. It is true that in deciding the Factory at Chorzow Case, the Permanent Court of International Justice, the predecessor to the ICJ, held that “reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” But the fact that the death of more than 7,000 Bosnians notwithstanding, the ICJ ordered no form of compensation for the benefit of the successors of the slaughtered victims in the 2007 case may not bid well in the current case.

Assuming the ICJ orders Myanmar to pay compensation, to what extent Myanmar’s rouge regime would be pressured enough to comply with the order is an even more uncertain proposition. A judgement on provisional measures in the form of an injunction against Myanmar should deter it from persecuting the Rohingyas who are still within Myanmar. However, even a mere provisional order to stop persecuting Rohingyas (without more) could be a partial gain for the government of Myanmar in that they would never have to repatriate the hundreds of thousands of Rohingyas who have already been forced out of the country.

That being said, a ruling by the ICJ would clearly have moral value and should deter Myanmar from continuing with the shameless denials and propaganda that it has been running since the beginning of the latest wave of persecutions in 2016. An adverse judgment should also be a disincentive for some (though not all) of the foreign investors who care about their reputation among their global consumers and would not be too keen on hobnobbing with a regime under whose tenure the state is found to be committing genocide. And beyond this specific case, a judgment may also send a message to future perpetrators of genocide that there is no complete impunity for such egregious violations of international law. The case should also encourage many other states in the future to punch above their weight and fight for justice by invoking the principles of international law.

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