

THE GAMBIA Vs MYANMAR AT THE ICJ

A pathway to justice through jurisdiction?



BINA D'COSTA

as I make this statement to you today. Yet we do nothing to stop it. This is a stain on our collective conscience.”

— The Gambia’s Justice Minister Abubacar Tambadou at the opening of the argument for provisional measures, December 10, 2019.

Public hearings are currently taking place on the request for the indication of provisional measures—an interim order on Myanmar to cease and desist from any actions that harms or may cause harm to the Rohingyas, while the International Court of Justice considers the full merits of the case. In simple terms, a provisional measure in such cases takes the function of an injunction to maintain the status quo pending determination of the dispute.

The case before the ICJ, the principal judicial organ of the United Nations (UN), is for limited purposes only, and is not a criminal case but a legal determination of state responsibility for genocide. The legal determinants for the ICJ have gradually developed through cases before the court.

The Gambia initiated the process, citing provisional measures and the Bosnia case, which occurred two years before the Srebrenica genocide. Consequently, the Gambia asked the 17-member panel of UN judges to compel Myanmar to do everything within its power to, among other things, prevent the extrajudicial killings, sexual violence and rape, deportation, and deprivation of food to the Rohingya. The Gambia also sought to ensure that evidence related to the genocide case is not destroyed.

Drawing heavily upon the UN Fact-Finding Mission’s (UNFFMM) reports, the Gambia’s legal counsel argued that there was genocidal intent as evidenced by indiscriminate killings of civilians, sexual and gender-based violence, violence committed against children, and forcible erasure of Rohingya identities through the imposition of documentations and ID cards. All of this was made possible through the storyline of the Rohingya as “illegal Bengalis”. More than 740,000 Rohingya fled into neighbouring Bangladesh in 2016 and 2017.

Requesting an order for a provisional measure, Ms Tafadzwa Pasipanodya, one of the Gambia’s lawyers, also invoked state’s responsibility to protect. She noted, “Certainly Myanmar cannot be counted on to protect them from itself...In the past few years, it has appointed numerous commissions to investigate the genocidal acts that have been reported by the United Nations Fact-Finding Mission and other international observers. None of Myanmar’s commissions has found any violations of internationally protected rights.”

Aung San Suu Kyi, Myanmar’s State Counsellor and de facto head of state, is leading the delegation at the ICJ. Suu Kyi is known in Burma/Myanmar’s human rights circles as a leader who does not want to hear details of atrocities. She sat impassively and perhaps for the first time since 2017, was required to actually listen to the detailed accounts of the horrific ordeal the Rohingya people experienced.

Aung San Suu Kyi labelled the case a rushed, externalising accountability, emphasising her faith in Myanmar’s military justice system. Suu Kyi downplayed the serious and grave violations of human rights, including the killings, as “factually misleading”. She noted, “the situation in Rakhine is complex,” and insisted that “genocidal intent cannot be the only hypothesis.” Stressing the role of the Arakan Army and Arakan Rohingya Salvation Army (ARSA) as national security threats, Suu Kyi observed that Myanmar has the right and responsibility to protect itself in a situation of internal armed conflict. She stated that “it cannot be ruled out that disproportionate force was used” that may have resulted into

the displacement of “several thousand” across the border in Bangladesh but, in no way, was it genocide. In her view, if war crimes were committed, Myanmar’s accountability mechanism would handle it. Professor William Schabas spoke after Suu Kyi as part of Myanmar’s legal team. Schabas, who is known for his narrow and pedantic conceptualisation of genocidal intent, argued that the Gambia used an incorrect standard of genocidal intent and that there was no evidence of such intent. Schabas made some precarious legal and technical claims by disassociating deportation and food deprivation from physical harm that, if taken into account, could have far-reaching implications in other humanitarian contexts.

As many others have commented after the second day, Suu Kyi did not acknowledge the Rohingya by name—only using Rohingya once when referring to ARSA. Such deliberate erasure of a group’s identity and blatant disregard for a community’s right to be called by their preferred name is yet another signpost of the discursive state practices of “othering” within Myanmar, resulting in violence in the Rakhine State.

On the final day of the hearings, Paul Reichler, from the Gambia’s legal team, repeated its demand for provisional measures to restrain Myanmar’s military until the case is heard in full. Also, Professor Phillippe Sands QC observed, “Not a word about the women and girls of Myanmar who have been subjected to these awful serial violations. Madam Agent [Aung San Suu Kyi], your silence says far more than your words.”

In Myanmar, thousands joined multiple demonstrations to rally behind their beloved Daw Suu. Ahead of the hearings, huge billboards appeared in Myanmar’s largest city, Yangon, depicting Suu Kyi alongside smiling generals. Going against the mainstream in Burma/Myanmar, especially at a time when hate speech is so prevalent, takes a lot of courage. In Yangon, young activists with placards supporting justice initiatives and defying genocide denials were quickly dispersed by police. A handful of Burma/ Myanmar’s outspoken and prominent human rights advocates have also received threats following the announcement of the international legal proceedings. The Karen and Kachin human rights and women’s rights groups have also publicly condemned the violence in Rakhine State and expressed their solidarity with the Rohingya.

Why the Gambia?

On December 10, 2019—the first day of the hearing—the Rohingya community living in 34 camps offered *doa* (prayers) in mosques and community spaces. Some of them gathered and chanted “Gambia, Gambia” to show their appreciation. Both the Gambia and Myanmar are parties to the 1948 Genocide Convention. Under Article 9, any state party to the treaty may bring a claim against another state party if it feels it failed to uphold its obligations in preventing and punishing the crime of genocide.

The Gambia’s filing was the first from a country without any direct connection to the alleged crimes that used the country’s membership in the Genocide Convention to bring a case before the ICJ. The Gambia, a Muslim-majority West African country, has only recently emerged from the repressive 22-year rule of Yahyah Jammeh and its history of human rights violations.

Diplomatic efforts and advocacy in the Muslim world through one of its most important organisations have played a crucial role to pave the path for accountability and justice. In May 2018, as a last-minute replacement of the foreign minister, Aoubacarr Marie Tambadou, the Attorney-General and Justice Minister of the Gambia came to Bangladesh for the 45th Session of the Organisation of Islamic Cooperation (formerly known as the Organisation for Islamic Conference, hereafter, OIC). Tambadou, a former prosecutor at the International Criminal Tribunal for Rwanda (ICTR) and other participants were able to visit the Rohingya camps. The Gambia serves as the Chair of the OIC’s Ad Hoc Ministerial Committee on “Accountability for Human Rights Violations Against the Rohingya, for violations by Myanmar of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.” The

57 members of OIC adopted a resolution (no 4/45 MM, page 14-24) to demand accountability for the crimes committed against the Rohingya and prevent future occurrence.

During an interview this week, I heard from a leading Rohingya leader of how he and others recounted their ordeals to the OIC delegates, requested them to advocate for the justice of Rohingya Muslims at the highest levels in the international community, and also praised the host community in Bangladesh. Following this on May 9, 2018, the OIC pointed to targeted and systematic ethnic cleansing of the Rohingya.

With the backing of the OIC, on November 11 this year, the Gambia submitted a “dispute” with Myanmar concerning Myanmar’s compliance with the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter, the Convention). Myanmar, in recognition of the binding nature of the ICJ Statute, announced on November 24 that Aung San Suu Kyi would lead the delegation to “defend the national interest of Myanmar”. On December 9, the governments of Canada and the Netherlands, also parties to the Convention, announced they considered it “their obligation to support the Gambia before the ICJ, as it should concern all of humanity.”

Myanmar’s counsel on December 11 argued that while the Gambia brought forward the

of grievances primarily linked to the rapidly changing political economy of Cox’s Bazar district. While the locals resent Rohingyas, particularly those who are here following the most recent exodus and worry about the devastating impact on the environment, most support the demand for justice.

The Rohingya leaders are extremely careful now, even in how they express their demands for justice. On August 25, 2019 for the second Genocide Day, there was a public gathering held in Kutupalong.

Local media, particularly the Bengali media, questioned the validity of such a large gathering of refugees. The growingly xenophobic Bengali language reporting of the Rohingya also dubbed the gathering a security threat to Bangladesh. The government took a series of measures including transferring some senior officials (who were known to be sympathetic to the plight of the refugees), restricting activities of Rohingya rights groups operating in the camp, and imposing visa bans on foreigners. The Bangladeshi army has also started to erect barbed-wire fencing around Rohingya camps in Ukhia, a sub-district of Cox’s Bazar, to prevent the refugees from leaving the camps. This measure follows a parliamentary defence committee recommendation in September this year that the government install fencing around the refugee camps to contain the Rohingya because “it deemed

relationship between the two countries. Bangladesh and Myanmar share 271 km of land and maritime boundaries, including the Naaf river, and vital geopolitical and economic interests. For years, their bilateral relationship has been one of reluctance between two neighbours forced to tolerate each other. In interviews conducted in Myanmar and Bangladesh, this author has repeatedly been told by diplomats and security analysts about the limited understanding (and in pre-2017, also, of limited interests) of socio-cultural practices, politics and security between these countries. From Myanmar’s perspective, the deeply held prejudice and xenophobia against dark-skinned people, particularly against Muslims, has manifested in superficial foreign policy engagement. A conscious construction of the Rohingya has further compounded the discourse of this group as “illegal Bengali”.

Bangladesh settled a longstanding maritime dispute with Myanmar through the International Tribunal for the Law of the Sea (ITLOS) in March 2012. In addition to trade agreements, the neighbours have also signed several repatriation agreements and MoUs. Both countries are involved in border control exercise to combat drugs and illicit arms trade, terrorism, and human trafficking. Bangladesh’s two-pronged foreign policy approach meant that while a 12-member Bangladeshi delegation team led by the Foreign Secretary Shahidul Haque participated as observers at the Hague, the army chief visited Myanmar. This is surely not a coincidence. Irawaddy reported that Bangladesh Army Chief of Staff General Aziz Ahmed and Myanmar’s Vice-Senior General Soe Win, deputy commander-in-chief of Myanmar’s defence services, discussed the repatriation of Rohingya refugees, border security issues, and friendship between the armed forces of the two countries.

What about justice and individual responsibility?

Although the Security Council previously failed to pass a resolution because of China and Russia, the Pre-trial Chamber of the ICC, on September 6, 2018 agreed with the prosecution request that it can exercise jurisdiction to the crime against humanity of deportation under the Rome Statute. In November, the ICC judges gave prosecutor Fatou Bensouda authorisation to open an investigation into crimes against humanity, notably the forced deportation in 2017. Myanmar, which is not a party to the Rome Statute advised that it would not allow ICC prosecution to enter its territory for investigation. Bangladesh, however, is a party to the Rome Statute and the crime of deportation might have been committed in Bangladesh.

The ICJ proceedings offer a unique opportunity to create global and local awareness and support for justice processes. While not relevant at this stage, the proceedings focussing on jurisdiction could also pave the way for new discussions on restorative justice and reparation for the victims. As a senior Rohingya politician told me, “This is no small matter. Burma has never acknowledged us by our name—Rohingya. But now at the ICJ, there is a case on the Rohingya. The international community calls us by our name.”

There is also a possibility that it would offer some guidance to both Bangladesh and Myanmar to refine the repatriation agreement. The provisional measures at the ICJ are legally binding in nature. Any decision by the ICJ will be communicated to the UN Secretary-General for transmission to the UN Security Council. The court may also request information from the parties on any matter concerning the implementation of the provisional measures.

On a final note, three of the survivors of the 2017 exodus have also travelled to the Hague. It is imperative to provide adequate support, including psycho-social care, even if they don’t directly testify before the court. The same goes for all the victims and survivors in the camps in Bangladesh and those who remain in Myanmar.

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PHOTO: REUTERS

A general view of the courtroom during a hearing at the International Court of Justice in The Hague.

case, it was not exactly known who was behind the case and how these efforts were being funded. The legal counsel observed that since there was no dispute between the Gambia and Myanmar, the matter of jurisdiction could not be proven in these proceedings.

On the last day, in response to Myanmar, Tambadou, dismissed Myanmar’s claim and stated, “It’s a bit insulting for Myanmar to try to argue that we are being used. It’s below the belt. It’s insulting to our country and to our sovereignty. It’s a false narrative.”

Is Bangladesh involved?

There are mixed views about this, even in Bangladesh, which has not only opened its borders but led the humanitarian operation on the ground to support the Rohingya. The country’s key domestic policy priority is to repatriate the Rohingya who are classified as Undocumented Foreign Myanmar Nationals (UFMN). Its security and economic policies have resulted in the creating of numerous firewalls and restrictive access (or in some cases none) to education, employment, health, social protection (e.g. unconditional cash transfer options) and the overall protection responses in the camps. A senior politician with ARNO and a commander of its armed wing RNA told me that the local population of Cox’s Bazar were the first responders on the frontline in 2017. They shared all they had in their households with the distressed refugees. The relationship between the locals and the refugees has changed by the end of 2019. In my interviews with both the refugees and host communities, many spoke about the culture of growing fear in the region and a whole range

them to be security threats”.

Against this backdrop, the international demand for justice is interesting. At the 74th session of the UN General Assembly, Prime Minister Sheikh Hasina stated that the “Rohingya crisis... is now becoming a regional threat”. Then again, in a recent speech, she also emphasised that Bangladesh supports “their right to return, self-identification and their right to seek justice”.

Major diplomatic efforts in Europe and elsewhere was spearheaded by HE Sheikh Mohammad Belal, Bangladesh’s Ambassador to the Netherlands. Furthermore, the embassy provided vital support to the delegation and worked with the leading human rights activists from Bangladesh and Burma. As one of the senior officials mentioned to me, “So, it was not so ‘from behind’. Rather, along with the Gambia, but I don’t know how much it will remain so.” Interestingly, despite the crucial roles played by women’s rights and human rights advocates and some government representatives at the highest level, Bangladesh is keeping a low profile at this stage. The Foreign Minister AK Abdul Momen said, “If Gambia seeks any technical support, we will provide them [with it].” This is consistent with the country’s support to the UNFFM, International Criminal Court (ICC) and OIC teams when they visited the camps.

The dual nature of portraying refugees as security threats while advocating justice is indeed perplexing.

To understand this seemingly contradictory position, we have to look at the bilateral

QUOTABLE
Quote



SITTING BULL
(1831-1890)
Teton Dakota Indian chief under whom the Sioux peoples united in their struggle for survival on the North American Great Plains

Inside of me there are two dogs. One is mean and evil and the other is good and they fight each other all the time. When asked which one wins I answer, the one I feed the most.

CROSSWORD BY THOMAS JOSEPH

ACROSS

1 Shade

6 Casual eateries

11 Take for – (trick)

12 Before, in Brest

13 Defy authority

14 Place for pesos

15 Wisdom bringer

16 “Exodus” hero

18 Scot’s cap

19 Gift tag word

20 Golfer Hogan

21 Guitar blaster

22 Menu choice

24 Pharaoh symbols

25 Like old news-papers

27 Litmus reddener

29 Sign up

32 – Alamos

33 Fourth-yr. students

34 Hotel amenity

35 Feel queasy

36 Pipe waste

37 Bagel topper

38 Mongrel’s warning

40 Muscat native

42 Nairobi’s nation

43 Scope

44 Said further

45 Cut off

DOWN

1 Wine bottle

2 Salem’s state

3 Site of a famed statue

4 Exalted work

5 Put a new tag on

6 Plane part

7 Director DuVernay

8 Tattoo’s show

9 Make a settle-ment

10 Jazz dances

17 Some square dancers

23 Stop signal

24 Piercing tool

26 Like driftwood

27 Denali setting

28 Made up

30 Moocher

31 Headed for the hangar


33 Crouton’s place

39 Reuben base

41 Fellow

WRITE FOR US. SEND US YOUR OPINION PIECES TO dsopinion@gmail.com.

BEETLE BAILEY
by Mort Walker



BABY BLUES
by Kirkman & Scott

