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The Gambia's gamble, and how jurisdictional limits may keep the ICJ from ruling on Myanmar's alleged genocide against Rohingya

Published on November 21, 2019 Author: Thomas Van Poecke, Marta Hermez and Jonas Vernimmen

On 11 November, The Gambia filed an Application (https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf) instituting proceedings and requesting provisional measures at the International Court of Justice (ICJ) in relation to the genocide allegedly committed by Myanmar against the Rohingya (for a first analysis of the Application, see this post (https://opiniojuris.org/2019/11/13/the-gambia-v-myanmar-at-the-international-court-of-justice-points-of-interest-in-the-application/) by Priya Pillai). As notably reported by The New York Times (https://www.nytimes.com/2019/11/11/world/asia/myanmar-rohingya-genocide.html?searchResultPosition=1) and The Washington Post (https://www.washingtonpost.com/world/africa/why-a-tiny-african-country-is-taking-the-rohingyas-case-to-the-world-court/2019/11/12/f491d5a4-04cd-11ea-9118-25d6bd37dfb1_story.html), the application is at least in part a personal quest for justice by The Gambia's Minister of Justice and Attorney General, Abubacarr Marie Tambadou, who acts as The Gambia's Agent and previously worked for the prosecutor of the International Criminal Tribunal for Rwanda. The Gambia's application is backed by the Organisation of Islamic Cooperation (of which The Gambia is a member) and its legal team is led by the US law firm Foley Hoag (see here (https://foleyhoag.com/news-and-events/news/2019/november/foley-hoag-leads-the-gambias-legal-team-in-case-to-stop-myanmar-genocide)). As we will

About the Author(s)

Thomas Van Poecke

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Marta Hermez

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argue below, the peculiar origins of this quest for justice may well be determinative for the establishment of the ICJ's jurisdiction.

Regarding the atrocities committed against the Rohingya, the UN Human Rights Council's Independent International Fact-Finding Mission on Myanmar has found 'that the factors allowing the inference of genocidal intent are present' (see here (https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf), para 1441). While there appears little reason to disagree with the Fact-Finding Mission's conclusion, in this post we will not examine substantively whether the atrocities complained of constitute genocide. Instead, we will briefly sketch why it makes sense for The Gambia to seize the ICJ while proceedings relating to the Rohingya are already going on at the International Criminal Court (ICC), after which we will address the request for provisional measures.

Different nature of the ICJ and ICC Proceedings

Just three days after The Gambia submitted its application to the ICJ, Pre-Trial Chamber III of the ICC authorized the Prosecutor to investigate the situation in Myanmar/Bangladesh (see here (https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF)). As Myanmar is not a party to the Rome Statute, and as the position of China and Russia make a UN Security Council referral highly unlikely (see eg here (https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-security-council-mulls-myanmar-action-russia-china-boycott-talks-idUSKBN1OG2CJ)), the Prosecutor has opened an investigation on her own initiative. The investigation 'geographically' focuses on Bangladesh, Myanmar's neighbouring country to which over 742.000 Rohingya refugees have fled (see here (https://www.unhcr.org/rohingya-emergency.html)). Bangladesh is a party to the Rome Statute, and accordingly provides a jurisdictional link to the Court.

This geographical focus on Bangladesh implies certain limitations: as already ruled by Pre-Trial Chamber I in the Jurisdiction Decision (https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF) of 6 September 2018, the Court may only assert jurisdiction 'if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party to the Statute' (para 72). This explains why the Prosecutor has limited her investigation to crimes against humanity, and more specifically those of deportation, persecution on grounds of ethnicity and/or religion,

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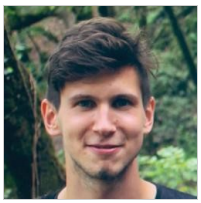

Jonas Vernimmen is a PhD researcher at KU Leuven's Human Rights Law department, where he studies the rights of ethnic minorities under the ECHR. He is an alumnus of Columbia Law School (2019) and KU Leuven (2016), did migration work with different NGO's and interned at the United Nations HQ in New York. *Read Full*
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and other inhumane acts (respectively Article 7(1)(d), (k) and (h) of the Rome Statute). The Prosecutor argues that these crimes as allegedly committed against the Rohingya involve cross-border conduct that has taken place on the territory of Bangladesh (see here (https://www.icc-cpi.int/CourtRecords/CR2019_03510.PDF), paras 76-78); an argument that has, at least for the crime against humanity of deportation, first been accepted by Pre-Trial Chamber III (at para 73) and now also by Pre-Trial Chamber I (at para 62). Accordingly, the Prosecutor does not investigate any crimes of genocide.

Thus, and apart from seeking the immediate imposition of provisional measures, there are two main reasons to seize the ICJ in addition to the ICC. First, the ICJ can establish Myanmar's state responsibility, whereas the ICC can only establish the individual criminal responsibility of those who committed the atrocities. Second, given the points made above about the limited nature of ICC jurisdiction over the crimes committed against the Rohingya, the ICJ is the Rohingya's and, by extension, the international community's only hope for an international judicial qualification of the situation as a genocide.

Provisional Measures

While on the merits The Gambia requests the Court to declare that Myanmar 'has breached and continues to breach its obligations under the Genocide Convention' (see Application, para 112), it first seeks a provisional measures order under Article 41 of the ICJ Statute. The Gambia essentially asks the Court to order Myanmar to prevent new acts of genocide and to refrain from destroying evidence (para 132).

The Court may indicate provisional measures if three conditions are met: (1) the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which the ICJ's jurisdiction could be founded; (2) the Court must satisfy itself that the rights whose protection is sought are at least plausible, meaning that there is some chance that the Court will eventually find a violation on the merits (whilst the threshold employed by the Court is unclear), and that there is a link between the rights that are the subject of the proceedings on the merits and the measures requested; and (3) there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision (see Costa Rica v Nicaragua, Order of 8 March 2011 (https://www.icj-cij.org/files/case-related/150/150-20110308-ORD-01-00-EN.pdf), paras 49-64).

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Prima Facie Jurisdiction: The Existence of a Dispute

The Gambia submits that the Court has jurisdiction based on Article 36(1) of the ICJ Statute, referring to all matters specially provided for in conventions in force, linked with Article IX of the Genocide Convention, which provides that disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Genocide Convention shall be submitted to the ICJ at the request of any of the parties to the dispute.

To establish its *prima facie* jurisdiction, the ICJ first has to establish whether there is a dispute between The Gambia and Myanmar. In its Application (paras 20-21), The Gambia lists a number of events and documents through which it has supposedly 'repeatedly expressed its concerns in respect of the conduct by Myanmar'. They include reports of the UN Fact Finding Mission (see here (https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Index.aspx)), statements by the Organisation of Islamic Cooperation (OIC), as well as statements by The Gambia itself in the context of the UN General Assembly, in one way or another condemning Myanmar for genocide. They also include a statement of a Myanmarese representative contesting the Fact-Finding Mission's conclusions in the UN General Assembly. However, there is only one indication of direct contact between The Gambia and Myanmar on the matter: a Note Verbale of 11 October 2019 from The Gambia's Permanent Mission to the UN transmitted to Myanmar's Permanent Mission, in which The Gambia expresses its concerns over the findings of the UN Fact-Finding Mission and Myanmar's rejection thereof. Myanmar has not responded to this Note Verbale.

Hence, the question is whether the ICJ will accept these concerns expressed by or in the context of multilateral fora, and supported by The Gambia, and/or the relatively recent and as of yet unanswered Note Verbale, as sufficient to find a dispute between The Gambia and Myanmar. Admittedly, it is not that clear that there is a claim of one party that is 'positively opposed' by the other (*South West Africa*, Judgment of 21 December 1962 (https://www.icj-cij.org/files/case-related/46/046-19621221-JUD-01-00-EN.pdf), p 328). Nevertheless, the existence of a dispute must be determined by an examination of the facts as a matter 'of substance, not of form', and 'may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for' (Georgia v Russian Federation, Judgment of 1 April 2011 (https://www.icj-cij.org/files/case-related/140/140-20110401-JUD-01-00-EN.pdf), para 30). That consideration

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may in particular apply to the (relatively recent) Note Verbale, to which Myanmar has not (yet) replied.

Even then, it would suffice that Myanmar 'was aware or could not have been unaware, that its views were "positively opposed" by the applicant' (Marshall Islands v India, Judgment of 5 October 2016 (https://www.icj-cij.org/files/case-related/158/158-20161005-JUD-01-00-EN.pdf), para 38). In this respect, it is – apart from the Note Verbale – relevant that The Gambia's Vice-President has stated in a plenary meeting of the UN General Assembly that 'The Gambia is ready to lead the concerted efforts for taking the Rohingya issue to the International Court of Justice' (see here (https://undocs.org/en/A/74/PV.8), at 31). However, the threshold for the Court to accept statements made in the context of international fora is rather high. Special consideration is given to 'the author of the statement or document, their intended or actual addressee, and their content' (Marshall Islands, para 36). More specifically, 'a statement can give rise to a dispute only if it refers to the subject-matter of a claim "with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject matter"' (ibid, para 46). While the statement may have made The Gambia's intentions relatively clear, it did not mention allegations of genocide, nor explicitly address Myanmar.

It remains to be seen whether the Court will accept the combination of events and documents on which The Gambia relies as sufficient to establish a dispute. In any case, it appears that the issue of the existence of a dispute is intrinsically linked to that of plausible rights.

Plausible Rights and Link with Measures Requested

For the second condition, the rights which according to The Gambia are the subject of the proceedings are (i) the rights of the Rohingya residing in Myanmar, as a protected group under the Genocide Convention; and (ii) the '*erga omnes* rights' of The Gambia under the Genocide Convention (see Application, paras 121-127). As the ICJ rules on disputes between *states* over *their* mutual rights and obligations, (i) can arguably dismissed, and (ii) should be the focus of our attention.

As The Gambia itself appears to be aware, the 'plausible rights' requirement is, in this case, intrinsically linked with the issue of standing. To quote Mariko Kawano (2012) (https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/jpyintl55&id=223&men_tab=srchresults) (at 210):

the issue of the standing of the Applicant has not been taken up in every case before the PCIJ and the ICJ. The reason might be that when a State decides to refer a dispute in order to invoke the international responsibility of other States, the acts of the latter have normally infringed the concrete and specific rights and interests of the former, giving the dispute an essentially bilateral nature.

Indeed, what characterizes *The Gambia v Myanmar* is that the dispute is not of an essentially bilateral nature. Accordingly, and rightfully so, The Gambia appeals to the *erga omnes* nature of the provisions of the Genocide Convention it invokes. As ruled by the ICJ in *Belgium v Senegal* (https://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-EN.pdf) (2012) in relation to the relevant provisions of the Convention against Torture, which are in this respect similar to those of the Genocide Convention (para 68), 'each State party has an interest in compliance with them in any given case', which 'implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party'. This gives any State Party to the Convention 'standing' to invoke the responsibility of another State Party without the requirement of any 'special interest' (paras 68-70).

In this case, the acts alleged by The Gambia appear to fall within the scope of the Genocide Convention and the rights asserted by The Gambia are plausible, considering the *erga omnes* nature of the obligations enshrined in the Convention. There is also a link between the rights to be protected through these provisional measures, and the rights subject to the main claim. That is so especially as 'the possibility of particularly devastating consequences – particularly those involving risk to human life, health or liberty – will result in the link requirement being stretched to its limits' (Cameron A Miles (2017) (https://www.cambridge.org/core/books/provisional-measures-before-international-courts-and-tribunals/AA4D6B5C3D5E7259861E3E472C943F39), 184). Nonetheless, and especially should Myanmar, by way of preliminary objection for example, contest the ICJ's jurisdiction, the plausible rights test (and the urgency-test, for that matter) will be delicate, as the ICJ will have to touch upon the merits of the case, be it in a *prima facie* way (see a discussion of this issue in this recent post) (http://www.ejiltalk.org/provisional-measures-in-ukraine-v-russia-from-illusions-to-reality-or-a-prejudgment-in-disguise/).

Urgency and Imminent Risk of Irreparable Injury

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Finally, there must be urgency. In this respect, The Gambia stresses that while significant alleged acts of genocide against the Rohingya have already taken place, especially in two waves of escalation during 'clearance operations' by the Myanmarese government (October-February 2017 and August 2017-November 2018), the atrocities are still ongoing. As quoted by The Gambia (para 99), the Fact-Finding Mission concluded in September 2019 that 'the Rohingya remain the target of a Government attack aimed at erasing the identity and removing them from Myanmar' (here (https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf), para 2).

Quite likely, therefore, the urgency criterion is met. First, 'it is not relevant whether the situation complained of had already existed for a considerable time when the request was filed, for what is important is only the imminence of action prejudicial to the rights at stake' (Karin Oellers-Frahm (2012) (https://opil.ouplaw.com/view/10.1093/law/9780199692996.001.0001/law-9780199692996-chapterFrontMatter-55), 1048). Second, 'the condition of urgency was found to exist in all cases concerning genocide or ethnic cleansing, thus all cases where irreparable damage resulted from the risk to human life on a large scale' (ibid, 1047). Precisely how soon the ICJ will decide on the request for provisional measures depends on its consultations with the parties, in which Myanmar may refuse to participate. With some exceptions, such decisions usually take between four and fifteen weeks (ibid, 1048). However, as human life is at risk on a large scale, the ICJ may want to decide rather quickly. For example, in *Bosnia and Herzegovina v Yugoslavia* (Order of 8 April 1993 (https://www.icj-cij.org/files/case-related/91/091-19930408-ORD-01-00-EN.pdf)), it took the Court 19 days to indicate the provisional measure that 'The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately […] take all measures within its power to prevent commission of the crime of genocide' (at 24).

Conclusion

The main issue regarding The Gambia's request for provisional measures is that of jurisdiction, because the existence of a dispute between The Gambia and Myanmar is not obvious. This is a fortiori the case for a decision on the merits, which requires the Court to establish its jurisdiction in a definite rather than *prima facie* way. Nevertheless, we believe that this jurisdictional obstacle can be overcome. That is so especially as the ICJ considers the existence of a

dispute to be a matter of substance and not of form. In any case, the ICJ is the only hope for an international judicial condemnation of the atrocities committed by Myanmar against the Rohingya under the label they appear to deserve, namely genocide. This consideration may well influence the ICJ's decision about its (*prima facie*) jurisdiction.

Filed under: EJIL Analysis, Genocide, International Court of Justice, International Criminal Court, International Criminal Law, International Tribunals, Jurisdiction

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2 Responses

Aditya Roy
November 21, 2019 at 11:37

Dear Authors,
Very Comprehensive Analysis of the situation at hand.
My question is What is the role of Article 48 (1) (b) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts?
Article 48 (1) (b) deas with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole.
Therefore, Article 48 (1) (b) is also relevant when the proceedings commences before the ICJ.

Thomas Van Poecke
November 21, 2019 at 14:13

Dear Aditya Roy,

Thanks for your question. You're entirely right in pointing to

Art 48(1)(b) of the Draft Articles on State Responsibility, which reflects the ICJ's case law as regards obligations erga omnes (Barcelona Traction onwards) and the corollary interest all states have in invoking the responsibility of a state breaching such obligation. In other words, the article is most relevant and is in a way implied in our analysis.

Kind regards,

Thomas Van Poecke

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