

Change Through Cooperation

WISMUN V

Chair Report

**International Court of
Justice**

**The Gambia v. Myanmar, Application of
the Convention on the Prevention and
Punishment of the Crime of Genocide**

Bernice Wu and Tang Hau-In

Message from the Chairs

Greetings Judges, Applicants and Respondents alike! We are Bernice Wu and Tang Hau In, G11/Y12 and G12/Y13 students respectively, and we are honoured to serve as your chairs in this iteration of the International Court of Justice.

Established on June 26, 1945, the International Court of Justice (ICJ) began its operations in 1946 as the primary judicial organ of the United Nations. The Court consists of 15 judges, each elected to nine-year terms through a joint process involving the UN General Assembly and the Security Council. Functioning in accordance with international law, the ICJ adjudicates legal disputes between states and provides advisory opinions on complex legal matters referred to it by authorized UN bodies.

Given the advanced nature of this council, we expect delegates to be adequately prepared, with a well-versed understanding of the key clashes and nuances at hand. The chair report should serve as a starting point, and is by no means conclusive. For further reading, we highly recommend reading the the series of pleadings and applications filed by the Gambia and Myanmar, in regards to alleged violations of the Genocide Convention -- this can be found in the bibliography section of the chair report.

As a specialised committee, we understand that navigating procedure may be challenging. Please refer to the procedural document as a guide, in order to facilitate council discussion. Should you have any other queries, please do not hesitate to reach out to us! Best of luck with your preparations, and we look forward to seeing you in court at WISMUN this June!

Warm Regards,

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Glossary

Key Terms	Definition
ARSA (Arakan Rohingya Salvation Army)	A Rohingya insurgent group, claiming responsibility for the 2016 attacks on military posts along the Bangladesh–Myanmar border, alongside the coordinated 2017 attacks on the Maungdaw district police station. Such perceived violence has triggered the Tatmadaw's crackdown.
Prima Facie	Latin for "at first sight", used in court to indicate that there is sufficient or adequate evidence to support a claim. In other words, a prima facie case indicates that at face value, the case presented to court has merit.
Tatmadaw	Also known as the Sit-Tat, refers to the armed forces of Myanmar. In early 2021, the Tatmadaw successfully deposed the elected Myanmar government in a coup, forming a State Administration Council that currently assumes power.
Erga Omnes Partes	Refers to obligations owed to the international community as a whole (ex. Genocide prevention)
Locus Standi	The legal right of a party to bring a case before court or any other legal body. In short, having a sufficient interest in the matter to be heard by the court.

Background Information

Introduction

On the 11th of November, 2019, the Republic of Gambia instituted proceedings against the Republic of the Union of Myanmar before the International Court of Justice, alleging that Myanmar failed to fulfill its obligations to prevent acts of genocide committed against the Rohingya in Rakhine state, by virtue of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). Despite history of states bringing cases before the ICJ under the Genocide Convention, the case of Gambia V. Myanmar marks the first time a state has invoked its jurisdiction to seek redress for alleged genocidal acts committed against the citizens of another state. This section will first discuss Myanmar's preliminary objections regarding the admissibility of application, examining their implications for what lies ahead in the litigation.

Jurisdiction and Admissibility

On July 2022, the ICJ ruled that by 15-1, it has jurisdiction under the Genocide Convention to hear the application filed by the Gambia against Myanmar in November of 2019. Prior, four preliminary objections were brought by Myanmar to the jurisdiction of the Court.

Myanmar's first objection was that The Gambia was not a 'real applicant', rather acting as a purveyor of the Organisation of Islamic Cooperation (OIC). Myanmar argued that the Gambia's application was driven by the OIC's absence of standing to invoke the ICJ's contentious jurisdiction, hence resorting to Gambia as a proxy and thus did not constitute a legitimate dispute under Article IX of the Genocide Convention ([The Genocide Convention](#)). In response, the Court referred to its judgement in Nicaragua v. Honduras, in which their nature as a legal character dismisses the motivation of the party to sue as immaterial. On such grounds, the Court held that any political motivation of the state party invoking the ICJ's jurisdiction is an irrelevant consideration for the Court, thus cannot be a premise to mount such jurisdictional challenges.

The second objection brought forth was that The Gambia's application constituted an abuse of process -- referring to the ostensible misuse of ICJ procedures to further political agendas rather than genuine legal claims. Myanmar contended that even if the Court were to confirm its jurisdiction, the case should be rendered inadmissible on these grounds. The Gambia, however, rejected this characterisation, underscoring instead the application's broad international endorsement -- namely support from the UN Secretary General and General Assembly, which had expressly welcomed the Court's provisional

measures order. To support this, the ICJ cited a decision in the *Certain Iranian Assets Case*, observing that Myanmar had failed to present convincing evidence of procedural abuse from The Gambia. Consequently, the Court dismissed this objection.

The third preliminary object brought forth was that Myanmar had made a reservation to Article VIII of the Genocide Convention, which grants “competent organs of the United Nations” to suppress acts of genocide. Myanmar contended that this reservation barred the ICJ, as a United Nations organ, from exercising jurisdiction over the case. In response, the Court rejected this argument, clarifying that Article VIII pertains solely to political measures by UN bodies (i.e. the Security Council), which is distinct from the ICJ’s judicial role to be exercised in accordance with law. Crucially, the court emphasized that Article IX -- the Convention’s jurisdictional clause, operates independently from Article VIII. Denoting the ‘legal pathway’ for adjudicating genocide disputes article IX provides the conditions for resource to the ICJ, while the latter grants state liberty to appeal to other UN organs, even when the court is not engaged, to suppress such acts of genocide.

Finally, Myanmar contended that even if the Gambia had the right to invoke state responsibility, it lacked standing to bring the case before the Court, as it was not an “injured party”. The court dismissed this objection, reaffirming that the Convention is not cemented in individual advantage / disadvantage of states, but rather to serve collective humanitarian purposes. Because genocide violates *erga omnes* obligations, owed to the international community as a whole, any state party, regardless of direct injury, may pursue legal action to uphold the convention.

Origins of Conflict

Since the Tamatdaw crackdown in response to ARSA attacks in 2017, the Rakhine state of Myanmar has been marred by indiscriminate killings, displacement and widespread human rights abuses, with the UNHRC branding the conflict “a textbook example of ethnic cleansing”. Rooted in sectarian divisions and exacerbated by the disproportionate concentration of power, the suppression of democratic processes ultimately constitutes the basis which the Gambia claimed the right to enforce the Convention on the Prevention and Punishment of the Crime of Genocide, under the *Erga Omnes Partes* principle.

The primary cause of the violence in Myanmar is the racial prejudice that impedes Rohingya assimilation into Burmese society. Historically, Burmese identity has been inextricably linked to Buddhism, tangibly shaping its culture and political landscape. As a result of this overt endorsement, governments have repeatedly used Buddhist ‘nationalism’ to justify discrimination, allowing anti-muslim sentiments to proliferate and enforcing discriminatory laws under the pretext of protecting national identity. Namely, the

1982 citizenship act saw the Rohingya, a predominantly Muslim ethnic minority, denied citizenship rights. The absence of legal recognition has restricted their freedom of movement, access to basic human rights and subjected them to state-sponsored marginalization, placing the Rohingya under a systemically discriminatory regime

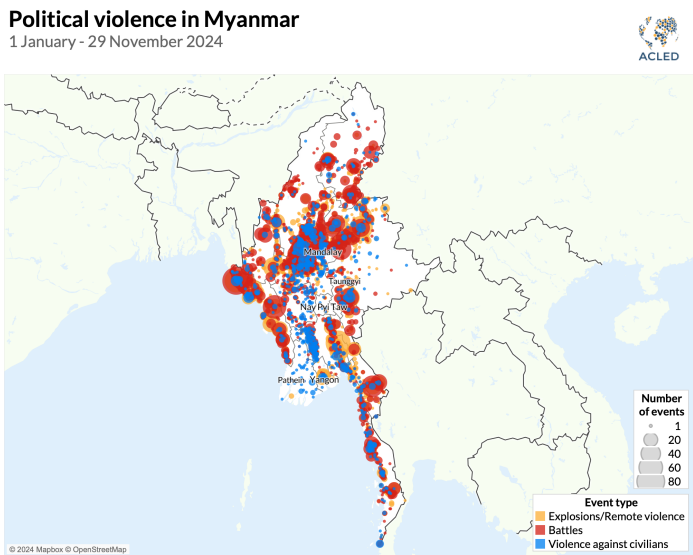


Figure 1: Political Violence in Myanmar, 2024

Following the genocidal acts committed by the Tatmadaw under the premise of ‘national security’ in 2017, thousands of Rohingya have been persecuted out of Myanmar’s Rakhine state, seeking refuge in the neighboring Bangladesh. Due to almost one million refugees residing in Cox’s Bazar, not only has Bangladesh’s economy been strained by expenditures towards providing for refugees, but has also resulted in congested living circumstances, disease outbreaks and food shortages. In conjunction with statelessness, these refugees have been placed at high risk of exploitation and made dependent on humanitarian assistance, thus rendering displacement a major consequence.

Position of Key Member Nations and Other Bodies

Stakeholder	Summary of Stance
Islamic Republic of The Gambia (Applicant)	Since its democratic transition in 2017, The Gambia has made sustained efforts to move beyond a legacy of humanitarian violations under former president Yahya Jammeh, whose regime was marked by repression and abuse. Today, the Gambia

	has assumed a leading role within the Organization of Islamic Cooperation (OIC) and positions itself as a strong advocate of human rights.
Republic of the Union of Myanmar (Respondent)	Myanmar denies the allegations of genocide by The Gambia, with the claim that its military actions in Rakhine State were aimed not at civilians but at insurgents, and argues that the mens rea to genocide does not exist. Myanmar has a long history of military dominance and human rights abuses, especially against ethnic minorities.
ICJ Judges	For the case of The Gambia v. Myanmar, the International Court of Justice is composed of Judges Donoghue (USA), Gevorgian (Russia), Tomka (Slovakia), Abraham (France), Bennouna (Morocco), Sebutinde (Uganda), Bhandari (India), Robinson (Jamaica), Salam (Lenabon), Iwasawa (Japan), Nolte (Germany), Charlesworth (Australia), Xue (China); and Ad-Hoc Judges Pillay and Kress. Judges are expected to remain impartial and make decisions based on legal reasoning rather than personal interests or bias, if any.

Key Clashes

Application of the Convention on the Prevention and Punishment of the Crime of Genocide

This section presents the disputed points in the case based on The Gambia's application, which alleges that Myanmar has violated the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. This includes, in particular, the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V, and VI, which will be explored in the sections below. Clashes are ordered and sectioned in chronological order of the claims of Gambia according to its application to the ICJ.

Applicants and Respondents are encouraged to compile a factsheet of alleged acts committed by Myanmar through its State organs, agents, and other persons and entities acting on the instructions and under the control of Myanmar, before returning to this section and other sources and reconsider whether the compiled acts amount to violations of the Convention. Judges are encouraged to interpret the provisions of the Convention from their own lens, supported by legal arguments and reasoning based on facts presented by Applicants and Respondents, with further analysis.

Article III (a), (b), (c), (d)

Whether Myanmar has the direct and indirect intention and action of committing genocide

The definition of genocide consists of two elements: **actus reus** (the act of committing genocide) and **mens rea** (the intent to commit genocide). Both factors must be present to constitute an act of genocide.

According to the Convention, genocide is defined as a crime committed with the intent to destroy a national, ethnic, racial, or religious group, in whole or in part, including but not limited to:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

Judges need to determine whether the evidence presented in court is sufficient to establish an element of genocide. Various metrics can be used to assess whether an act is severe enough to be attributed to a genocidal cause. For example, in the case of

"causing serious bodily or mental harm," factors such as duration of pain, victim demographics, and physical or mental effects may be considered. While forced witnessing of torture does not lead to serious bodily harm, such an act may cause significant mental distress to the witness and therefore be considered as causing serious mental harm.

A **dolus specialis** (special intent) must also be established to constitute genocide. In addition to the proven will of the perpetrators to destroy the community, it must be shown that the victims are deliberately targeted due to their real or perceived membership in one or more of the four groups listed in the Convention. **Destruction must be aimed specifically at the group's status, with the end goal of elimination, and not coincidentally against a mass that happens to contain some members of that group.**

Article I, Article III (d), (e), Article IV, Article V, Article VI

Whether Myanmar has upheld its substantive obligation to prevent and punish genocide

The Convention establishes a duty for states to take measures to prevent and punish genocide.

A **positive obligation** requires a party to take specific actions to achieve a certain outcome, such as enacting effective policies to prevent genocide. It is essential to examine whether Myanmar has implemented sufficient and effective measures to prevent genocide and actively intervene in potential genocidal acts by any party.

Myanmar has a government structure that includes law enforcement and military agencies capable of implementing preventive measures. However, the effectiveness of these institutions is often compromised by systemic issues, including corruption and resource limitations. **It must be considered whether Myanmar has acted within its capacity to prevent genocide, given these constraints. Moreover, a lack of genuine willingness to engage in preventive efforts may further undermine its capacity to fulfill this obligation.**

Conversely, a **negative obligation** requires a party to refrain from actions that would cause harm, such as infringing on freedoms or targeting individuals or groups. Under international law, states are responsible for actions taken by their institutions, officials, and related parties, such as security forces. This raises the question of whether the acts committed against the Rohingya were carried out by state actors with the government's consent or if the state's failure to prohibit such actions amounts to complicity.

Judges must analyze whether the actions of military and security forces can be attributed to the state. If these parties acted independently, **it is crucial to consider whether their actions reflect a broader pattern of negligence or failure by the state to uphold its obligations under the Convention.**

Guiding Questions

Locus Standi

- How does the Erga Omnes Partes principle justify The Gambia's standing, given that it is not a direct aggrieved party to Myanmar's violence?
- What precedents support or weaken Myanmar's claim that The Gambia's application is in pursuit of political interests?
- Does Myanmar's reservation to Article VIII effectively limit the ICJ's jurisdiction under Article IX?

Application of Genocide

- In regards to genocidal intent, what evidence supports / refutes the claim that Myanmar's actions were intended to destroy the Rohingya "in whole or in part"?
 - How might judges assess the role of public statements (ie. military rhetoric, discriminatory laws) in proving intent?
- Under article III, does the Tatmadaw's operations against ARSA insurgents justify civilian casualties, or do they constitute genocide?
- Can Myanmar be held responsible for acts committed by non-state actors (ie. Buddhist militias) under the Genocide Convention?
 - How does your representative evaluate Myanmar's compliance with its obligation to prevent genocide?

Roots of Conflict

- How has Buddhist nationalism influenced state policy towards the Rohingya?
 - How have power structures in Myanmar, particularly the military's influence, authorised discriminatory state policy against the Rohingya?
- How does the 1982 Citizenship Act contribute to the legal framework for genocide, if at all?

Bibliography

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