

INTERNATIONAL COURT OF JUSTICE

THE GAMBIA'S PRELIMINARY OBSERVATIONS ON
MYANMAR'S REPORT OF 22 MAY 2020

REPUBLIC OF THE GAMBIA

v.

REPUBLIC OF THE UNION OF MYANMAR

5 June 2020

1. In the view of the Republic of The Gambia (“The Gambia”), the filing of the Report of the Republic of the Union of Myanmar (the “Report”), as ordered by the Court on 23 January 2020, underscores the necessity of the Court’s Order. Notwithstanding the Report’s shortcomings, the mere fact that it was filed shows that Myanmar does not take the Order lightly. Likewise, Myanmar’s alleged adoption of certain directives in the month before the submission of the Report which require, for the first time, that those acting on Myanmar’s behalf not commit acts of genocide, prevent hate speech, and preserve evidence testify to Myanmar’s desire not to be found in breach of the Order.¹

2. Moreover, the Order appears to have achieved, at least for the time being, The Gambia’s principal objective in seeking it: the prevention of further “clearance operations” by the Tatmadaw, Myanmar’s armed forces, to destroy the Rohingya people who remain in Myanmar. There appears to have been no resumption of widespread “clearance operations” (such as occurred in 2016-2018) since 23 January 2020, or, indeed, since The Gambia’s *Application* was filed on 11 November 2019. The Court will recall that, in its September 2019 report, the United Nations Fact-Finding Mission found that evidence of Myanmar’s genocidal intent had “strengthened” in the past year, and that the Rohingya were then at “serious risk that genocidal actions may occur or recur.”²

3. The Gambia will address in its Memorial the specific directives adopted by Myanmar in purported compliance with the Court’s Order. It notes here, however, that the rapid adoption of decrees of this nature, in the limited period since 23 January 2020, confirms that Myanmar could easily have promulgated formal legal protections against genocide of the Rohingya people at any time, if it had wished to do so. The fact that it did not, until so ordered

¹ *Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020*, (22 May 2020) [hereinafter the “Report”], paras. 89-94 & Annexes 3, 4, and 5.

² UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 September 2019), ¶ 58.

by the Court, is significant. The practical consequences of these newly adopted decrees, if any, remain to be seen.

4. The Gambia further observes that paragraph 86(4) of the Court’s Order requires Myanmar to “submit a report to the Court on all measures taken to give effect to” the indicated provisional measures, which include specific measures to: prevent acts of genocide against the Rohingya group (paragraph 84(1)); ensure that its armed forces do not commit, attempt to commit, or incite genocide against the group (paragraph 84(2)); and preserve evidence of alleged acts of genocide committed against them (paragraph 84(3)).

5. However, much of the Report is not concerned at all with actions taken to give effect to such measures, but constitutes material that is not pertinent to the Order. The lengthy treatment of non-international armed conflicts in which Myanmar has engaged since “the time it gained independence from British rule in 1948”³ is of no relevance to the Court’s Order. It provides bulk to the Report, but nothing of substance. As the Court observed in paragraph 74 of its Order: “irrespective of the situation that the Myanmar Government is facing in Rakhine State, including the fact that there may be an ongoing internal conflict between armed groups and the Myanmar military and that security measures are in place, Myanmar remains under the obligations incumbent upon it as a State party to the Genocide Convention.”⁴ The Report fails to demonstrate that Myanmar has satisfactorily discharged those obligations since it was ordered by the Court to do so.

6. Another significant portion of the Report is devoted to making self-serving claims about promotion of ethnic reconciliation and repatriation of the Rohingya from Bangladesh. This material is not responsive to the Court’s Order, either.

³ Report, para. 6. Most of these conflicts did not occur in Rakhine State – where the Rohingya group resides – but elsewhere in Myanmar, including Kayin, Kachin and Shan States. Even insofar as the Report describes events in Rakhine State, it largely refers to Myanmar’s conflict with the so-called “Arakan Army,” an ethnic Rakhine armed group that is not associated with the Rohingya.

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar)*, Order of 23 January 2020 [hereinafter “Order”], para. 74.

7. Myanmar made the same assertions during the December 2019 oral hearing.⁵ The Court addressed them in paragraph 73 of its Order, taking note of “the statement of Myanmar during the oral proceedings that it is currently engaged in repatriation initiatives to facilitate the return of Rohingya refugees present in Bangladesh and that it intends to promote ethnic reconciliation, peace and stability in Rakhine State, and to make its military accountable for violations of international humanitarian and human rights law.” The Court observed, however, that the “steps” Myanmar claimed to be taking are insufficient because they do not appear to eliminate the “possibility that acts causing irreparable prejudice to the rights invoked by The Gambia for the protection of the Rohingya in Myanmar could occur.”⁶ The Court emphasized that Myanmar had “not presented to the Court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention.”⁷

8. The same failing characterizes Myanmar’s Report. While Myanmar makes now-familiar assertions of its efforts to facilitate return of the nearly one million Rohingya who fled to Bangladesh – assertions that the Government of Bangladesh emphatically refutes – and speaks of its commitment to ethnic reconciliation, it still has not presented to the Court any “concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention.”⁸ The Report was an opportunity for Myanmar to present information as to such measures, but none is presented. The reasonable inference is that none exists.

9. Indeed, Myanmar persists in refusing even to refer to the Rohingya by their proper name; instead, the Report describes them as “the community referred to in the Court’s

⁵ CR 2019/19, pp. 65-70, paras. 9-13 (Okawa); CR 2019/21, pp. 35-36, paras. 3-6 (Suu Kyi).

⁶ Order, para. 73.

⁷ *Ibid.*

⁸ *Ibid.*

Order as the ‘Rohingya.’”⁹ The Court will recall that Myanmar’s Agent took pains at the oral hearing to avoid any reference to the “Rohingya” people. This is consistent with Myanmar’s longstanding refusal to recognize them as an ethnic group, or accord them full rights of citizenship or nationality, as Myanmar does for the 135 “national races” that it legally recognizes. It is elementary that protection of a group requires, at the very least, recognition of their existence. Despite the Court’s Order, Myanmar continues to refuse to recognize that the Rohingya exist as a group.

10. The Report nevertheless asserts that Myanmar provides sufficient protections to them. This is not supported by the views of independent observers and organizations. On 26 May 2020, for example, the International Crisis Group reported:

“Those Rohingya who remain in Rakhine State have seen no meaningful improvement in living conditions: many remain corralled in squalid displacement camps; the rest are confined to isolated villages. All face apartheid-like bans on access to most hospitals, schools are mostly segregated and freedom of movement remains curtailed. Restrictions on humanitarian access further compound their plight.”¹⁰

11. In a similar vein, in a report dated 22 May 2020, Amnesty International concluded that “[d]espite the International Court’s order nothing has changed for the estimated 600,000 Rohingya who live in Rakhine State in dire conditions, including around 126,000 whom the authorities are holding indefinitely in camps.”¹¹ Amnesty International further observed that the “Rohingya in Rakhine State are still denied their rights to nationality, freedom of movement and access to services, including healthcare.”¹²

⁹ Report, para. 35.

¹⁰ “Myanmar: Rakhine State Faces a Third Crisis”, *International Crisis Group* (26 May 2020), available at <https://www.crisisgroup.org/global/watch-list-2020-spring-edition#myanmar>.

¹¹ “Myanmar: Government fails to protect Rohingya after world court order”, *Amnesty International* (22 May 2020), available at <https://www.amnesty.org/en/latest/news/2020/05/myanmar-government-fails-to-protect-rohingya-after-world-court-order/>.

¹² *Ibid.*

12. Human Rights Watch has arrived at the same conclusion, based on interviews with Rohingya who remain in Rakhine State. On 29 May 2020, it reported: “The reality on the ground for the Rohingyas is dire: ‘oppressive and systemic restrictions’ imposed on those remaining in Rakhine state, which may be indicative of ongoing genocide.”¹³

13. In contrast to the Report’s assertions concerning Myanmar’s alleged efforts to prevent the spread of Covid-19 among the Rohingya, Human Rights Watch observed:

“the camps neither have Covid-19 testing nor the capacity to address complex medical cases. This failure to provide an adequate health response is underlined by Myanmar’s nationwide ‘Action Plan for the Control of Covid-19 Outbreak at IDP Camps,’ which does not include testing or plans for the country’s internally displaced people.”¹⁴

14. Where the Report purports to point to concrete steps taken, The Gambia notes that the information presented appears to be inaccurate or incomplete. By way of example, in regard to hate speech, the Report asserts that the “Government of Myanmar is opposed to any speech or act which could damage the social harmony of its multi-ethnic society or create conflicts between different communities,” and claims that Myanmar has persuaded Facebook to block accounts that engage in hate speech.¹⁵ The evidence does not support those assertions. It is correct that in April 2020 Facebook announced it had taken action against those who used the platform to propagate “anti-Rohingya content.”¹⁶ However, Facebook’s own account tells a very different story from that in the Report. According to Facebook:

“Although the people behind this activity attempted to conceal their identities and coordination, our investigation found links to members of the *Myanmar Police Force*. We found this activity as

¹³ Human Rights Watch, *Pandemic Adds New Threat for Rohingyas in Myanmar* (29 May 2020), available at <https://www.hrw.org/news/2020/05/29/pandemic-adds-new-threat-rohingyas-myanmar#>.

¹⁴ *Ibid.*

¹⁵ Report, paras. 106-107.

¹⁶ “April 2020 Coordinated Inauthentic Behavior Report”, *Facebook* (April 2020), p. 21, available at <https://about.fb.com/wp-content/uploads/2020/05/April-2020-CIB-Report.pdf>.

part of our internal investigation into suspected coordinated inauthentic behavior in the region.”¹⁷

15. Similarly, the Report seeks to shift the blame for anti-Rohingya hate speech onto Facebook, citing a *New York Times* investigation.¹⁸ However, the Report fails to mention that the investigation concluded that “Myanmar military officials were behind a systematic campaign on Facebook to target a mostly Muslim Rohingya minority” and that “[h]uman rights groups say this campaign has led to murder, rape and forced migration.”¹⁹ This caused Facebook, on its own initiative and not at Myanmar’s urging, to take down hundreds of accounts and pages linked to the Tatmadaw, including those of the Commander-in-Chief, Senior General Min Aung Hlaing. Facebook explained it was compelled to take these actions because “many of these individuals and organizations committed or enabled serious human rights abuses in the country. And we want to prevent them from using our service to further inflame ethnic and religious tensions.”²⁰

16. Of particular concern, the Report makes clear that Myanmar has not engaged – and is continuing not to engage – in any meaningful effort to investigate or punish members of the Tatmadaw for their involvement in genocidal acts committed against the Rohingya before, during, or after the “clearance operations” of 2016-2018. The Court will recall that the UN Fact-Finding Mission considered that Myanmar’s failure to investigate or punish those responsible for crimes against the Rohingya was a significant indicator of its continuing genocidal intent.²¹ That situation continues. Of the 139 “cases of crimes” that the Report says were identified by Myanmar’s “Independent Commission of Enquiry” – which issued its Final Report to the

¹⁷ *Ibid.* (emphasis added).

¹⁸ Report, para. 107.

¹⁹ Alexandra Stevenson, “Facebook Admits It Was Used to Incite Violence in Myanmar”, *The New York Times* (6 November 2018), available at <https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html>.

²⁰ “Removing Myanmar Military Officials From Facebook”, *Facebook* (28 August 2018), available at <https://about.fb.com/news/2018/08/removing-myanmar-officials/>.

²¹ UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/42/50 (8 August 2019).

Myanmar Government on 20 January 2020 – *not even one* was found by that Commission to have been committed by a member of the Tatmadaw.²²

17. Further, while the Report references the establishment on 24 January 2020 of a “Criminal Investigation and Prosecution Body,” the jurisdiction of that Body does *not* extend to the military, who, according to the Report, are instead “generally dealt with by the military justice system.”²³ Yet, the Report offers no information to allow the Court to conclude that the military justice system has addressed any alleged act that amounts to – or could contribute to – genocide. This confirms the remarks of Myanmar’s Agent at the oral hearing on provisional measures: that under Myanmar’s Constitution, the civilian justice system lacks jurisdiction over armed forces personnel, who can only be investigated and prosecuted under the *military* justice system; that is, the system that is overseen by the same generals and other senior officers whom the UN Fact-Finding Mission identified as bearing direct responsibility for acts of genocide against the Rohingya and recommended for prosecution.²⁴ The Report confirms that Myanmar has done nothing to investigate, let alone prosecute, them for their alleged crimes.

18. Tellingly, the Report addresses “Proceedings within the military justice system” in just a single paragraph.²⁵ It describes how the only military personnel who have been punished for any acts are certain low ranking soldiers who were prosecuted after Reuters reported – and published photographs of – their participation in the mass killing of men and boys at Inn Din village. The military pardoned these soldiers in November 2018, only seven months after they were sentenced.²⁶ The Report does not refer to a single member of the Myanmar military who

²² Report, paras. 98-101.

²³ Report, para. 96, note 37.

²⁴ UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/CRP.2 (17 September 2018), ¶ 1555.

²⁵ Report, para. 103.

²⁶ Report, para. 87, note 31.

has been punished since the Court's Order of 23 January 2020 or since the military pardoned those who committed the killings at Inn Din.

19. This failure is the subject of a statement made on 29 April 2020 by the UN Special Rapporteur on the situation of human rights in Myanmar, Ms. Yanghee Lee. She declared, in relation to Myanmar's unwillingness or inability to hold its armed forces accountable for genocide against the Rohingya, or other crimes:

“Having faced no accountability, the Tatmadaw continues to operate with impunity. For decades, its tactics have intentionally maximised civilian suffering; we all know what they did to the Rohingya in 2017. They are now targeting all civilians in the conflict area, with people from Rakhine, Rohingya, Mro, Daignet and Chin communities being killed in recent months. Their alleged crimes must be investigated in accordance with international standards, with perpetrators being held accountable.”²⁷

20. Perhaps the most striking omission from Myanmar's Report is its failure to address the wide-ranging and systematic sexual violence that was orchestrated by the Tatmadaw against Rohingya women and girls as part of the “clearance operations.” The Report offers no indication that Myanmar is making any efforts to identify or hold accountable those who were responsible, as a means of assuring that such acts are not repeated.

21. In this regard, the Report references a Joint Communiqué on Sexual Violence in Conflict signed on 7 December 2018 by the Special Representative of the UN Secretary-General and the Permanent Representative of Myanmar to the United Nations.²⁸ The Report mentions that Myanmar has formed a National Committee which, Myanmar claims, is working to implement six specific priority areas identified in the Joint Communiqué.²⁹ However, the Report – which does not annex the Joint Communiqué – conspicuously neglects to mention that the

²⁷ UN OHCHR, *Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar* (29 April 2020), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25838&LangID=E>.

²⁸ Report, para. 147.

²⁹ Report, para. 149.

Joint Communiqué records the Special Representative’s “concern regarding allegations of widespread and systematic patterns of sexual violence allegedly committed by elements of Myanmar Security Forces, Border Guard Police and Rakhine Buddhist militias.”³⁰

22. Nor does the Report disclose that, under the terms of the Joint Communiqué, Myanmar committed to “implementation” of the “measures” set out in paragraph 10 of UN Security Council Resolution 2106, the importance of which the Special Representative “stressed.”³¹ Those measures include the requirement to:

“make and implement specific time-bound commitments to combat sexual violence, which should include, *inter alia*, issuance of clear orders through chains of command prohibiting sexual violence and accountability for breaching these orders, the prohibition of sexual violence in Codes of Conduct, military and police field manuals or equivalent and to make and implement specific commitments on timely investigation of alleged abuses....”³²

23. Nowhere does the Report acknowledge these commitments, much less indicate that Myanmar is fulfilling them, or cooperating with the appropriate UN mission personnel who, under the terms of the Joint Communiqué, are charged with monitoring their implementation.³³

24. For these reasons and others to be elaborated in the Memorial, it is The Gambia’s view that the Report provides no reason to conclude that Myanmar is discharging its obligations under paragraphs 86(1), 86(2) or 86(3) of the Court’s Order of 23 January 2020.

³⁰ Joint Communiqué of the Republic of the Union of Myanmar and the United Nations on Prevention and Response to Conflict-Related Sexual Violence, 7 December 2018, p. 1, *available at* https://www.un.org/sexualviolenceinconflict/wp-content/uploads/joint-communication-of-myanmar-un-on-prevention-response-to-crsv/Joint_Communique_of_Myanmar_UN_Prevention_Response_to_CRSV_2018.pdf.

³¹ *Ibid.*

³² *Ibid.*; UN Security Council Resolution 2106 (2013).

³³ Report, paras. 147-150.



H.E. Mr. Abubacarr Marie Tambaou

Agent of the Republic of The Gambia

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