

## Q&A: Preliminary Objections in *The Gambia v. Myanmar* at the International Court of Justice

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On November 11, 2019 the Republic of The Gambia filed suit against the Republic of the Union of Myanmar in the International Court of Justice (“ICJ”) for violations of the Genocide Convention. This historic lawsuit brings a critical focus to Myanmar’s responsibility as a state for the Rohingya genocide.

The Gambia’s case focuses on Myanmar’s security forces’ so-called “clearance operations” in 2016 and 2017 against the Rohingya, a distinct Muslim ethnic minority, in Myanmar’s Rakhine State. These attacks against Rohingya were massive in scale, ghastly in brutality, and meticulous in coordination. Approximately 800,000 Rohingya fled to Bangladesh in a matter of weeks, with survivors reporting indiscriminate killings, gender-based violence, arbitrary detention, torture, beatings, and forced displacement. Rape and sexual violence were widespread, pervasive, and often conducted in public, to the extent that the United Nations Fact-Finding Mission (“FFM”) found that sexual violence was a hallmark of the Security Forces’ operations.

On January 20, 2021 Myanmar filed preliminary objections in *The Gambia v. Myanmar* at the International Court of Justice (“ICJ”). The objections challenge The Gambia’s ability to bring its genocide suit against the state of Myanmar.

**This fact sheet answers fundamental questions about the Preliminary Objections stage of the ICJ case. (Answers to questions about the early stages of the lawsuit, Myanmar’s responsibility for genocide, and its impact on the Rohingya population are [here](#) and [here](#).)**

### 1. What is the current status of *The Gambia’s case* against Myanmar?

In November 2020, when The Gambia filed its case against Myanmar, it also requested emergency measures, known as provisional measures, “to protect against further, irreparable harm to the rights of the Rohingya group under the Genocide Convention” as the merits of the case proceed at the Court.

In January 2020, the ICJ [issued such provisional measures](#), requiring Myanmar to take certain actions to protect the Rohingya including: to prevent genocidal acts; to ensure that military, police and other forces within its control do not commit genocidal acts; and to preserve all evidence of genocidal acts. As a part of these measures, the Court also asked Myanmar to report every six months to the Court on the steps it has taken to comply with the measures. Reports were filed in May 2020 and November 2020, with the next compliance report due on May 23, 2021. These reports are not currently public, but The Gambia is able to review them and provide commentary to the Court.

In October 2020, The Gambia filed its Memorial, which details its case against Myanmar. Most recently, on January 20, 2021 Myanmar filed Preliminary Objections, challenging the ICJ’s ability to decide the case.

It should be noted that Myanmar was due to file its Counter-Memorial by July 23, 2021; however, the filing of Preliminary Objections will now suspend merits proceedings in the case until the issues now raised by Myanmar are adjudicated by the ICJ.

### 2. What is a Preliminary Objection?

Preliminary Objections are used at the ICJ to raise issues, largely procedural, that a respondent (here Myanmar) believes should be resolved prior to the merits of a case. Such objections are often raised because it’s possible that the resolution of such objections may result in the Court declining to rule on the substantive issues of a case. Preliminary Objections are generally challenges to either the ICJ’s jurisdiction to hear a case or the admissibility of an application, but can also include other preliminary matters. [Under the ICJ’s own rules](#), a decision on such objections will generally be made before, and apart from, the merits of the case.

### 3. What objections has Myanmar raised?

At present, Myanmar's Preliminary Objections filing is not yet public, so it is not known what objections it has raised. In the ICJ's Order fixing time-limits for The Gambia to present its written response to Myanmar's objections, the Court only notes that Myanmar raised preliminary objections to the "jurisdiction of the Court and to the admissibility of the Application."

However, the issues Myanmar raised during the December 2019 Provisional Measures hearings may provide some insights into objections it might have filed as related to jurisdiction and admissibility. While these issues were only resolved by the ICJ *prima facie* (on first impression) for the purposes of its Provisional Measures order, the Court's rationale may be instructive in how these issues may be resolved in its Preliminary Objections judgment. They are reviewed briefly here.

#### *The Gambia as a proxy for the Organization of Islamic Cooperation*

During the provisional measures hearings, Myanmar challenged The Gambia's ability to bring the suit because, it alleged, The Gambia did not file the suit on its own behalf as a party to the Genocide Convention, but rather as a "proxy" for the Organization of Islamic Cooperation ("OIC"). This is of relevance because only states, not international organizations, have standing at the ICJ under the Genocide Convention. In examining this assertion, the ICJ found The Gambia had filed the case in its own name over its own dispute with Myanmar over the Convention, and that its seeking support from other states or international organizations does not preclude The Gambia's individual standing to pursue a case.

#### *Existence of a dispute*

During the provisional measures hearings, Myanmar argued that there is no genuine dispute between Myanmar and The Gambia regarding the provisions of the Genocide Convention, which is required under the jurisdictional terms of Article IX of the Genocide Convention. Myanmar highlighted the fact that The Gambia brought the case on behalf of the OIC, and that the contents and context of interactions between Myanmar and The Gambia in months leading up to The Gambia's application to institute proceedings, including statements at the UN and a note verbale to which Myanmar did not respond, were not sufficient to establish a cognizable dispute between the two nations. The Court disagreed and found that in fact statements and documents in multilateral fora, including language welcoming The Gambia's efforts by the FFM, support the finding of the existence of a dispute. In addition, the Court found that Myanmar's failure to respond to the note verbale "in light of the gravity of the allegations" also supported the finding of the existence of a dispute.

#### *Myanmar's reservation to Article VIII*

During the provisional measures hearings, Myanmar argued that its reservation to Article VIII of the Genocide Convention (meaning that Article VIII does not apply to Myanmar), precludes The Gambia's ability to invoke the Court's jurisdiction under Article IX of the Convention. Article VIII enables States parties to the Convention to call on the competent organs of the UN to take action to prevent and suppress genocide. Myanmar argued that since the ICJ is a competent organ of the UN, and since Article VIII does not apply to Myanmar, that The Gambia could therefore not call on the ICJ. This argument did not have traction during the provisional measures stage, because the Court found that the ambits of Article VIII and Article IX are distinct, and as it relates to the ICJ's jurisdiction, only Article IX (to which Myanmar does not have a reservation) matters.

#### *Standing erga omnes partes*

During the provisional measures hearings, Myanmar argued that The Gambia does not have standing to bring a case against Myanmar at the ICJ because The Gambia is not specifically affected by Myanmar's alleged breach of the Convention. Myanmar also argued that the appropriate State to bring such an action would be Bangladesh, because it is specifically affected; however, Bangladesh has a reservation to Article IX and cannot bring a suit at the ICJ. In making this argument, Myanmar aimed to create a distinction between the present case and the Court's precedent in

[Belgium v. Senegal](#) where it found that compliance with certain obligations, such as those prohibiting genocide and torture, is in the interest of any State party to a treaty (*erga omnes partes*). The Court found in that case that where such obligations are invoked, any State party, not only a specifically affected State, can invoke the responsibility of another State for its failure to comply. In its provisional measures order in *The Gambia v. Myanmar*, the Court upheld this precedent to find that The Gambia did not need to be affected by the Rohingya genocide in order to bring a suit to the ICJ. It should be noted here that while the provisional measures order was unanimous, Judge Xue did file a [separate opinion](#) in which she raised concerns over the Court’s reliance on the *Belgium v. Senegal* precedent.

#### 4. What does this mean for The Gambia’s case?

The Preliminary Objection stage of an ICJ case is an early stage defined by technical and procedural legal issues relating to admissibility and jurisdiction. This stage is distinct from the merits stage where the substantive issues of a case are resolved. This means that for the next 12-24 months the ICJ will be focusing on technical issues relating to whether The Gambia’s case can move forward as originally filed, whether it can proceed in a more limited manner, or whether the Court should dismiss the case altogether.

Accordingly, if the Court rejects Myanmar’s objections and decides that The Gambia’s case can move forward, the case will then move into the merits stage where the Court will decide whether Myanmar committed, failed to prevent, and failed to punish the genocide against the Rohingya. On the other hand, if the Court agrees with Myanmar that there are valid objections, it will dismiss either those parts of the case, or the entire case. The Court may reject some of Myanmar’s arguments and accept others, and may also differ judgment on objections including to the merits phase if they cannot be separated from substantive issues or touch on matters that are not exclusively of a preliminary nature.

#### 5. Do the Preliminary Objections affect Myanmar’s compliance with the provisional measures order?

As part of its application alleging violations by Myanmar of the Genocide Convention, The Gambia requested provisional measures to “protect against further, irreparable harm to the rights of the Rohingya group under the Genocide Convention.” On January 23, 2020 the ICJ concluded that the conditions required for it to indicate provisional measures were met and issued four provisional measures with which Myanmar must comply – prevent genocidal acts, ensure military and police and other forces within its control do not commit genocidal acts, preserve all evidence of genocidal acts, and report on compliance with these measures. Provisional measures orders are binding and compliance with these measures will be monitored by the Court.

Whereas the purpose of provisional measures is to protect the status quo and prevent further harm between the parties while the Court hears the case and decides if there has been a violation of international law, the purpose of preliminary objections is to determine whether the technical criteria for the Court to hear a case are met. In other words, provisional measures are about preventing additional harms while a case is heard, while Preliminary Objections are about whether the case belongs in the Court at all.

Thus, Myanmar’s filing of Preliminary Objections will not affect the Court’s previous provisional measures order, which will remain in effect and binding on Myanmar as both the Preliminary Objections and, subsequently, merits proceedings continue. Myanmar will still have to report on its compliance every six months.

#### 6. What does this mean for the Rohingya?

Because Preliminary Objections relate to whether the ICJ can properly hear a case and/or the scope of a case on the merits, Myanmar’s objections must be heard and resolved by the Court before the case can move forward. This means that the Court’s final ruling on whether Myanmar violated the Genocide Convention, and what reparations are therefore necessary, will be delayed by the time it takes for the Court to hear arguments and decide on the Preliminary Objections, a delay of likely at least a year.

It should be noted that the ICJ has shown an interest in resolving this case expeditiously—[initially shortening](#) the amount of time available to each party to file their written pleadings from the time requested of nine months to six months—due to the “exceptional circumstances of the case and its gravity.” It is possible that the Court may try to

move expeditiously here.

Importantly, if the ICJ were to dismiss the case at this stage, it does not mean that Myanmar did not commit genocide against the Rohingya, but rather that there were technical or procedural aspects of the case which were not properly met in order to allow the case to move forward.

## 7. What opportunity do representatives of the Rohingya have to participate in the Court's hearings at this stage?

The Preliminary Objections stage is no different than any other stage of a contentious case in the ICJ, in that it is reserved only and specifically for states. The ICJ is the UN's principal judicial organ and does not hear contentious cases brought by individuals or groups against a state — only states can bring cases against other states. This means that like other stages of The Gambia's case, the Rohingya are not entitled to participate in the Preliminary Objections proceedings.

Nevertheless, in its application The Gambia made clear that in its presentations to the ICJ it seeks to assert the rights of "all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Genocide Convention," including the "rights of the Rohingya group to exist as a group."

## 8. What happens next?

The ICJ has asked The Gambia to file its own observations and submissions on Myanmar's Preliminary Objections, including relevant evidence, by May 20, 2021. Following this submission, the Court will set the dates for public oral hearings on the objections, and following the hearings the Court will deliberate and render its judgment. While the Court has not yet specified a time frame for the latter parts of this process, the judgment on Preliminary Objections is likely at least one year away.

Depending on the Court's decision on the issues raised related to jurisdiction and admissibility, the case will either pick up where the case left off to proceed to the merits stage (with Myanmar due to file its Counter-Memorial), or will be dismissed.

## 9. What is the impact of the military's coup d'état on the ICJ case?

In principle the coup has no direct impact on the ICJ case. For the ICJ's own purposes, it is the state of Myanmar, however constructed, that is the subject of this case and changes in political leadership have no bearing. The coup does however, raise other questions, including whether a military-led government will continue to engage with and defend the case, as well as how the Court will view compliance with the provisional measures orders.

## 10. What does this mean for other court proceedings, such as in the International Criminal Court?

Other efforts at justice and accountability for the Rohingya genocide including at the [International Criminal Court](#), a case in the [domestic courts of Argentina](#) under the theory of universal jurisdiction, and any other cases that may be supported through the [Independent Investigative Mechanism for Myanmar](#), are not impacted by Myanmar's objections, which pertain specifically to the ICJ's ability to hear the case brought by The Gambia.

In addition, while the ICJ case is concerned with Myanmar's responsibility as a state for obligations under the Genocide Convention, the other cases are concerned with the individual criminal responsibility of those who planned, participated in, or sanctioned crimes. As a result, The Gambia's ICJ case is limited to state responsibility under the Genocide Convention, and any decisions or procedural hurdles in this case will impact this case alone, and will not affect the various criminal investigations and proceedings occurring in other courts and other jurisdictions.

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