



RESEÑA JURISPRUDENCIAL:

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (THE GAMBIA V. MYANMAR)

APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE (GAMBIE C. MYANMAR)

Laura Catalina Correa*
Laura Valentina Burbano García**

I. GENERAL INTRODUCTION

The International Court of Justice (ICJ) was created in 1945 alongside the United Nations. In this new international landscape, where peace and security came to the forefront of the international agenda, the ICJ rose as a judicial organ, charged with the purpose of the peaceful settlement of conflicts between Nations. Since then, the development of both the Court and International Law have created new avenues for States to relate to each other and manage their disputes.

For the specific instance of the case of *The Gambia v. Myanmar* regarding the application of the convention on the prevention and punishment of the crime of genocide, several new developments of both International Law and Interna-

* Estudiante de décimo semestre de la carrera de Derecho de la Facultad de Ciencias Jurídicas de la Pontificia Universidad Javeriana. Bogotá, Colombia. Contacto: laura_correa@javeriana.edu.co

** Estudiante de sexto semestre de Relaciones internacionales de la Facultad de Ciencias Políticas y Relaciones Internacionales y tercer semestre de Derecho de la Facultad de Ciencias Jurídicas de la Pontificia Universidad Javeriana. Bogotá, Colombia. Contacto: laurav-burbano@javeriana.edu.co

tional Relations come to the forefront. To understand why this specific case is novel in the history of the Court, some aspects of both disciplines coming into the XXI century need to be explained.

In the first place, we must understand the evolution of International Humanitarian Law (IHL) and where “genocide” as a crime fits in. “Genocide” was first recognised as a crime in 1946 by the United Nations General Assembly, through resolution A/RES/96-I (United Nations Office on Genocide Prevention and the Responsibility to Protect, n.d.) and later, in 1948 typified on its own in the Convention on the Prevention and Punishment of the Crime of Genocide. According to the Court, genocide prevention is both a *ius cogens* norm, as well as a principle embodied in said Convention, this means that no matter which States ratified the Convention, all States in the world are obligated to comply with it.

The previous makes clear two facts in relation to this new development in the decisions of the Court. First, that the prevention of genocide has historically evolved in International Law to be an *ius cogens* norm and thus of mandatory compliance for every State. Second, that even though The Gambia has no direct dispute with Myanmar, following the concept of responsibility to protect, it can demand the compliance of the prevention of genocide.

Finally, some precisions must be made regarding this particular judicial novelty: that the novelty itself is not the case nor the decision (that as of April 2020 has not been taken) but the indication of provisional measures that the Court mandated to Myanmar at the request of The Gambia, declaring that some provisional measures are to be taken by Myanmar in order to protect the rights of the Rohingya population in that country, said measures being binding as “The Court reaffirms that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” (LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 506, para. 109) and thus, create international legal obligations for any party to whom the provisional measures are addressed.” ((The Gambia v. Myanmar), Order, I.C.J Reports 2020, p. 24, para 84)

II. EXISTENCE OF A DISPUTE RELATING TO THE INTERPRETATION, APPLICATION OR FULFILMENT OF THE GENOCIDE CONVENTION

The Court considers several matters when establishing the existence of a dispute between the parties. For instance, that there are opposing views regarding one matter that can be proved positively. It has to be noted, that while initially the Court cites that said dispute must be “positively opposed” ((The Gambia v.

Myanmar), Order, I.C.J Reports 2020, p. 7, para 20) which would indicate the notion that the dispute has to be written explicitly in an official communication. However, the Court then clarifies that this opposition can be inferred from public statements and communications in one-to-one communications or in multi-lateral spaces, continuing to support this with previous jurisprudence in that “a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*” ((The Gambia v. Myanmar), Order, I.C.J Reports 2020, p. 9, para 27). This indicated that while not explicitly stated, the dispute can come from an abstraction in different statements made by the parties.

In this case, the Court took into consideration several statements from both parties at the UN General Assembly, during its plenary sessions as well as statements made by officials from Myanmar and the report from the International Independent Fact-Finding Mission by the Human Rights Council emitted in 2019. All of these documents proved to the Court that evidently Myanmar and The Gambia were at odds in their understanding of the specific obligations that the Convention created to State parties.

In sum, this single contradiction between both States is what sets the ground for the *prima facie* jurisdiction of the Court.

III. THE RESERVATION OF MYANMAR TO ARTICLE VIII OF THE CONVENTION

As a response to the submission for an order of measures from The Gambia, Myanmar alleges that due to this nation’s reservation to article VIII of the Convention, the Court holds no jurisdiction over the matter and thus the petition of The Gambia should be denied. However, the Court disputes this by stating that article VIII refers only in general terms to “organs of the United Nations” to take “actions”.

On the other hand, the Court notes that article IX addresses the matter of disputes directly and mentions specifically the role of the Court in such matters, as follows:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of

Justice at the request of any of the parties to the dispute.” (Convention on the Prevention and Punishment of the Crime of Genocide, 1948).

Hence, the Court concludes that it does have jurisdiction to rule over the matter, despite the reservation by Myanmar to article VIII of the Convention.

IV. CONCLUSION AS TO *PRIMA FACIE* JURISDICTION

However, it is of note that in this case, even though there is no armed conflict between or inside either Myanmar or The Gambia, the Convention has been applied. The reason behind this lies in article 1 “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” (Convention on the Prevention and Punishment of the Crime of Genocide, 1948).

V. QUESTION OF THE STANDING OF THE GAMBIA

The first matter of notoriety when approaching this case is the fact that Myanmar and The Gambia do not at present have a direct dispute. However, a dispute does exist in regard to the interpretation of the Genocide Convention. The Gambia was the country to come forth to the ICJ as a strategic political planning from countries that belong to the Organization of Islamic States, which seek to protect Muslims across the world.

Moreover, as the Convention has *erga omnes* effects, the Court has established that there is a common interest between the parties in the dispute and as such, the contractual obligations assumed under the Convention can be claimed by any State, because any State Party owes to the rest of them. Under this argumentation, the Court ratifies the standing of The Gambia in the dispute.

VI. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED

This particular case constitutes an active situation in which the rights of a community are vulnerable to violation. In this order of ideas, the Court ponders over the *plausibility* of these rights as opposed to their existence. This is because the Court is not at present ruling over the responsibility of Myanmar in allowing or having “genocidal intent”. Instead, they seek to assess if the rights of the

Rohingya Community (a protected community) and the Rakhine State can be protected by Myanmar and eventually, if they could exist under the Convention taking into account Myanmar's reservation to article VIII of the Convention.

Thus, the Court concludes that the rights, particularly the right to exist, are plausible and that at present it refrains to decide over the possibility of determining if there was genocidal intent from Myanmar. In order to rule over the measures to be adopted the Court refers to the petitions made by The Gambia, establishing that measures to prevent genocide, ordering military and paramilitary groups under the command of Myanmar to not commit genocide and preserving evidence that helps in the investigation, are in order. On the other hand, measures having Myanmar issue a report on the situation every 4 months is not a measure that links directly to the purposes the Court previously analyzed and thus deemed unnecessary.

VII. RISK OF IRREPARABLE PREJUDICE AND URGENCY.

The Court rules regarding the risk of irreparable prejudice and urgency under one basic principle; the right under attack is the right to exist. Legitimated under article 41 of the Statute of The Court, a real imminent risk is present, considering the report from the Office of the United Nations High Commissioner for Human Rights, which included satellite imagery proving a mass displacement of the Rohingya's from Myanmar.

VIII. CONCLUSION

This order of measures by the Court proves historical in that it directs a State to protect the rights of a community even when responsibility has not been determined yet.

As a historical pronouncement, it opens the possibility of The Gambia establishing its own investigation of the facts, subject to the authorization of the Court. Taking into account that proving genocide or even genocidal intent holds a higher threshold requirement of evidence than any other crime, this also opens up an opportunity for the Court to generate more jurisprudence on the matter that can, in the future, push Myanmar to change its laws regarding citizenship for this vulnerable community. Finally, it opens a range of possibilities for states that, because of racial, ethnic, or religious beliefs see their communities mistreated in another country to protect their own through international organisms such as the International Court of Justice.

IX. JURISPRUDENCIAL RECORD

Corporation, judges and date
<p>INTERNATIONAL COURT OF JUSTICE</p> <p>President YUSUF; Vice-President XUE; Judges TOMKA, ABRAHAM, BENNOUNA, CANÇADO TRINDADE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN, SALAM, IWASAWA; Judges ad hoc PILLAY, KRESS; Registrar GAUTIER.</p> <p>Date: 23 of January 2020</p>
Topic:
<p>On 11 November 2019, the Republic of The Gambia (hereinafter “The Gambia”) filed in the Registry of the Court an Application instituting proceedings against the Republic of the Union of Myanmar (hereinafter “Myanmar”) concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the “Genocide Convention” or the “Convention”).</p>
Subtopic:
<p>The Gambia seeks protection for “all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Genocide Convention”</p>
Demand:
<p><i>To adjudge and declare that Myanmar:</i></p> <ol style="list-style-type: none"> <i>1. Has breached and continues to breach its obligations under the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI;</i> <i>2. Must cease forthwith any such ongoing internationally wrongful act and fully respect its obligations under the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI;</i> <i>3. Must ensure that persons committing genocide are punished by a competent tribunal, including before an international penal tribunal, as required by Articles I and VI;</i> <i>4. Must perform the obligations of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group, including but not limited to allowing the safe and dignified return of forcibly displaced Rohingya.</i> <i>5. Respect for their full citizenship and human rights and protection against discrimination, persecution, and other related acts, consistent with the obligation to prevent genocide under Article I; and</i> <i>6. Must offer assurances and guarantees of non-repetition of violations of the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI.”</i>
Facts:
<p>A report published by UN investigators in August 2018 accused Myanmar’s military of carrying out mass killings and rapes with “genocidal intent”.</p> <p>The ICJ case, lodged by the small Muslim-majority nation of The Gambia, in West Africa, on behalf of dozens of other Muslim countries, called for emergency measures to be taken against the Myanmar military, known as Tatmadaw, until a fuller investigation could be launched.</p>

Vulnerated dispositions:

According to the actor Myanmar has breached and continues to breach its obligations under the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI;

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

At the end of its Request, The Gambia asked the Court to indicate the following provisional measures:

- a. Myanmar shall immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent all acts that amount to or contribute to the crime of genocide, including taking all measures within its power to prevent the following acts from being committed against [any] member of the Rohingya group: extrajudicial killings or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part;
- b. Myanmar shall, in particular, ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any act of genocide, of conspiracy to commit genocide, or direct and public incitement to commit genocide, or of complicity in genocide, against the Rohingya group, including: extrajudicial killing or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part;

- c. Myanmar shall not destroy or render inaccessible any evidence related to the events described in the Application, including without limitation by destroying or rendering inaccessible the remains of any member of the Rohingya group who is a victim of alleged genocidal acts, or altering the physical locations where such acts are alleged to have occurred in such a manner as to render the evidence of such acts, if any, inaccessible;
- d. Myanmar and The Gambia shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of this Application, or render it more difficult of resolution; and
- e. Myanmar and The Gambia shall each provide a report to the Court on all measures taken to give effect to this Order for provisional measures, no later than four months from its issuance.

Juridical inquiries:

In order to establish Myanmar responsibility the ICJ has to develop the following questions:

1. Which is the *prima facie* jurisdiction that can be offered by the applicant in order to establish provisional measures?
2. Is there an existence of a dispute relating to the interpretation, application or fulfilment of the Genocide Convention?
3. Which is the application of the reservation of Myanmar to Article VIII of the Convention in the present conflict?

Ratio Decidendi:

In view of the fundamental values sought to be protected by the Genocide Convention, the Court considers that the rights in question in these proceedings, in particular the right of the Rohingya group in Myanmar and of its members to be protected from killings and other acts threatening their existence as a group, are of such a nature that prejudice to them is capable of causing irreparable harm.

The Court notes that the reports of the Fact-Finding Mission have indicated that, since October 2016, the Rohingya in Myanmar have been subjected to acts which are capable of affecting their right of existence as a protected group under the Genocide Convention, such as mass killings, widespread rape and other forms of sexual violence, as well as beatings, the destruction of villages and homes, denial of access to food, shelter and other essentials of life.

X. REFERENCES.

- *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order, 23 January 2020, ICJ General List No 178 <<https://www.icj.cij.org>> accessed 11 April 2020.
- BBC News. 2020. *What You Need To Know About The Rohingya Crisis*. [online] Available at: <<https://www.bbc.com/news/world-asia-41566561>> [Accessed 11 April 2020].
- Human Rights Watch (2019) *Questions and Answers on Gambia's Genocide Case Against Myanmar before the International Court of Justice*. Retrieved April 27, 2020 from https://www.hrw.org/news/2019/12/05/questions-and-answers-gambias-genocide-case-against-myanmar-international-court#_
- Iccj-cij.org. 2020. [online] Available at: <<https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>> [Accessed 11 April 2020].

- Kirby, J (2020) *The top UN court ordered Myanmar to protect the Rohingya. An expert explains what it means.* retrieved April 27, 2020, from <https://www.vox.com/world/2020/1/24/21078774/icj-myanmar-roghingya-genocide-gambia>
- Melzer, N (2016) *International Humanitarian Law: A comprehensive introduction.* International Committee of the Red Cross.
- UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: <https://www.refworld.org/docid/3ae6b3ac0.html> [accessed 11 April 2020]
- United Nations Office on Genocide Prevention and the Responsibility to Protect. (n.d.). Genocide. Retrieved April 11, 2020, from <https://www.un.org/en/genocideprevention/genocide.shtml>
- United Nations Office on Genocide Prevention and the Responsibility to Protect. (n.d.). Responsibility to Protect - About. Retrieved April 11, 2020, from <https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml>
- Wes Rist, D (2020) *What Does the ICJ Decision on The Gambia v. Myanmar Mean?* Retrieved April 27, 2020 from <https://www.asil.org/insights/volume/24/issue/2/what-does-icj-decision-gambia-v-myanmar-mean>

