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**THREE DIFFERENT ACTIONS AGAINST MYANMAR  
FOR GENOCIDAL ACTS AND CRIMES AGAINST HU-  
MANITY INCLUDING DEPORTATION**

TRZY RÓŻNE DZIAŁANIA PRZECIWKO MYANMAR ZA LUDOBÓJSTWA I ZBRODNI PRZECIWKO LUDZKOŚCI, W TYM DEPORTACJE

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Artykuł dotyczy trzech różnych rodzajów czynności prawnych przed trzema różnymi sądami, czyli przed Międzynarodowym Trybunałem Sprawiedliwości w Hadze, przed krajowym sądem w Buenos Aires (Argentyna) i przed Międzynarodowym Trybunałem Karnym w Hadze. W sprawie toczącej się przed MTS, Gambia wystąpiła przeciwko Myanmar (Birma) o zarządzenie tymczasowych środków zabezpieczających, aby zapobiec dalszemu popełnianiu zbrodni ludobójstwa; w drugiej sprawie, pozew został złożony przez Birmańską Organizację Rohingya UK (BROUK) w argentyńskim sądzie federalnym w Buenos Aires przeciwko przywódcy Myanmaru Aung San Suu Kyi (laureatce pokojowej nagroda Nobla), byłemu prezydentowi Thein Sein, byłemu prezydentowi Htin Kyaw, obecnemu prezydentowi Birmy Win Myint, a także generałowi Min Aung Hlaing, nacelnemu dowódcy sił zbrojnych Birmy. W trzeciej sprawie, prokurator ograniczyła swoje dochodzenie do przestępstw o charakterze transgranicznym, ponieważ Bangladesz jest państwem-stroną Statutu Rzymskiego. Dotyczą one głównie zbrodni przeciwko ludzkości, w tym deportacji. W dniu 14 listopada 2019 r. Sędziowie III Izby Przygotowawczej Międzynarodowego Trybunału Karnego przychylnie przyjęli wniosek prokuratora o przeprow-

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adzenie dochodzenia w sprawie w Bangladeszu/Myanmar, w sprawie domniemanych przestępstw podlegających jurysdykcji MTK. W pierwszej i drugiej sprawie, zarówno MTS w Hadze jak i sąd federalny Argentyny w Buenos Aires, nie wydały do końca grudnia 2019 r. zarządzeń i wyroków.

Pojęcia kluczowe: jurysdykcja uniwersalna, tymczasowe środki zabezpieczające, Międzynarodowy Trybunał Karny, Międzynarodowy Trybunał Sprawiedliwości

**O**n 11 November 2019 The Gambia filed an application against Myanmar at the International Court of Justice (ICJ) alleging violations of the Genocide Convention against Myanmar.

On 13 November 2019 a case was filed in Argentine domestic courts on the basis of “universal jurisdiction” against members of the Myanmar government, including Aung Sang Suu Kyi.

And finally, on 14 November 2019, the pre-trial chamber of the International Criminal Court (ICC) issued its decision, giving the Prosecutor the green light to commence with her formal investigation.<sup>1</sup>

These are three distinct types of legal actions, and in different fora.

### **First, the International Court of Justice – (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Request for the indication of provisional measures)**

The Republic of The Gambia (“The Gambia”) on 11 November 2019 instituted proceedings against the Republic of the Union of Myanmar (“Myanmar”) before the International Court of Justice, alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide (“the Genocide Convention”) through “acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group”.<sup>2</sup> The Gambia has filed its application based on the fact that both Myanmar and The Gambia are parties to the Genocide Convention of 1948. The Gambia argued, that “from around October 2016 the Myanmar military (the “Tatmadaw”) and other Myanmar security forces began widespread and systematic “clearance operations” – the term that Myanmar itself

<sup>1</sup> See Priya Pillai, Three Complementary Legal Strategies for Accountability: A Momentous week for the Rohingya, *Opinio Juris*, 19.11.2019, Comments, p.1. <http://opiniojuris.org/2019/11/19/three-complementary-legal-strategies-for-accountability-a-momentous-week-for-the-rohingya/> [last accessed: 19 December 2019].

<sup>2</sup> <https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf> 1 [last accessed: 9 December 2019].

uses – against the Rohingya group. The genocidal acts committed during these operations were intended to destroy the Rohingya as a group, in whole or in part, by the use of mass murder, rape and other forms of sexual violence, as well as the systematic destruction by fire of their villages, often with inhabitants locked inside burning houses. From August 2017 onwards, such genocidal acts continued with Myanmar's resumption of "clearance operations" on a more massive and wider geographical scale." The Gambia said that these acts constitute violations of the Genocide Convention.

It stated that it had made this claim known to Myanmar since September 2018 but Myanmar had still denied any wrongdoing. The Applicant based the Court's jurisdiction on Article 36 (1) of the Statute of the Court and on Article IX of the Genocide Convention to which both States are parties.

In its application, The Gambia "respectfully requests the Court to adjudge and declare that 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; – 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; – 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;— 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 and 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 — 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." The Gambia also asked the ICJ to indicate the provisional measures, seeking to protect the rights of the Rohingya group under the Genocide Convention, and to prevent the aggravation or extension of the dispute pending the final judgment of the Court. 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 member[s] 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.”

The ICJ hears disputes between states and only states can introduce the proceedings – art. 34 (1) of the ICJ Statute. The Gambia is a member of the Organisation of Islamic Cooperation and argued that it has responsibility as part of the international community of states as well as a state party to the convention to ask the Court to stop these ongoing atrocities. The Gambia has asked for “provisional measures” which are the first step to stop genocidal actions of Myanmar. Previously, the ICJ has heard cases of genocide, most relevant of which is *Bosnia and Herzegovina v Serbia and Montenegro* in relation to the genocide at Srebrenica. The Court held that while Serbia had not directly committed genocide, it was responsible for not preventing and punishing the crime. It is also worth remembering that at the time the ICJ decided the case, the International Criminal Tribunal for the Former Yugoslavia had already found individuals criminally liable for genocide in Srebrenica.<sup>3</sup>

The ICJ hold public hearings in the case from Tuesday 10 to Thursday 12 December 2019 at the Peace Palace in The Hague, the seat of the Court. The hearings were devoted to the request for the indication of provisional measures submitted by the Republic of The Gambia.

<sup>3</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43.

On 10 December 2019 (International Human Rights Day) the United States Government imposed sanctions on six of the Tatmadaw top generals – including the Commander-in-Chief, Senior General Min Aung Hlaing, the same who have all been accused of genocide by the UN Fact-Finding Mission.<sup>4</sup>

The Gambia filed its application based on the fact that both Myanmar and The Gambia are parties to the Genocide Convention, and both agree that the ICJ is the appropriate court to resolve a dispute between them. The Gambia has appointed Navanethem Pillay as an *ad hoc* judge. (para. 135) With her experience as President of the ICTR (International Criminal Tribunal for Rwanda), a judge at the ICC, and head of the OHCHR (Office of the High Commissioner for Human Rights), it is very important for the case to be successful.

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), at first seeks a provisional measures order under Article 41 of the ICJ Statute (para 113). 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) there is a documents (for example treaty, agreement *ad hoc*) on which the ICJ may base its *prima facie* jurisdiction; (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, 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 of the case connected with imminent risk of irreparable prejudice (see *Costa Rica v Nicaragua*, Order of 8 March 2011, paras 49-64).<sup>5</sup>

### **The second set of legal proceedings has been initiated by the Burmese Rohingya Organisation UK (BROUK), and filed in the courts of Argentina**

This is based on the principle of “universal jurisdiction” – a legal concept that allows national courts to prosecute individuals for serious crimes against international law such as crimes against humanity, war crimes, genocide, and torture, regardless of nationality or location of the crimes. Tun Khin, President of the Burmese Rohingya Organisation UK, and Argentine human rights lawyer Tomas Ojea Quintana, filed at Argentine federal court in Buenos

<sup>4</sup> US Department of the Treasury, Treasury Sanctions Individuals for Roles in Atrocities and Other Abuses (10 Dec. 2019), available at <https://home.treasury.gov/news/press-releases/sm852>.

<sup>5</sup> I.C.J. Report 2011, order of 8 March 2011, p. 6.

Aires a lawsuit against Myanmar leader Aung San Suu Kyi (Nobel peace prize!) and others for serious crimes, including genocide against the minority group of the Rohingya. He said that this action has been taken in Argentina because Rohingya plaintiffs have no other possibility of filing the criminal complaint anywhere else. BROUK president Tun Khin said that others named in the lawsuit are: former President Thein Sein, former President Htin Kyaw, current President of Myanmar Win Myint, and top military including Senior General Min Aung Hlaing, commander-in-chief of Myanmar's armed forces. Mrs. Aung San Suu Kyi has been named in the lawsuit because she failed to speak out against the military's actions against the Rohingya, she is considered to be covering up for the military and act as an accomplice. According to the Myanmar Constitution she has no power over military but she should have given them a warning not to commit these crimes.

### **The last part of the legal action at the International Criminal Court in The Hague**

It is the permanent international court that can try individuals (much like domestic courts) for international crimes. This court plays a complementarity role which means, that only once domestic remedies are exhausted, the international case can start. In the case of the Rohingya, while Myanmar is not a party to the Rome Statute, Bangladesh is. In order to be able to examine the case in the first place, the Prosecutor limited her inquiry to those crimes that have a cross-border component as Bangladesh is a State Party to the Rome Statute. These essentially relate to crimes against humanity including deportation. The Prosecutor completed her initial inquiries, and in July 2019, on the basis that there was sufficient evidence to ensure a detailed investigation – a new phase in the proceedings – she submitted a request to the Pre-Trial Chamber to authorize this full-fledged investigation. On 14 November 2019, the judges of Pre-Trial Chamber III of the International Criminal Court granted the Prosecutor's request to proceed with an investigation in the Situation in Bangladesh/Myanmar for the alleged crimes within the ICC jurisdiction.<sup>6</sup> The Chamber accepted that there exists a reasonable basis that crimes against humanity and deportation may have been committed, across the Myanmar Bangladesh border, and the persecution, on grounds of ethnicity and/or religion, against the Rohingya population. As a result of these alleged crimes, it is estimated that 600,000 to one million Rohingya were forcibly displaced from Myanmar to neighbouring Bangladesh. The ICC has jurisdiction

<sup>6</sup> Bangladesh/Myanmar Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19.

over crimes where at least part of the criminal conduct takes place on the territory of a State Party.

When sufficient evidence is collected, the Prosecutor will request Judges to either issue summons to appear requesting suspects to appear voluntarily before the Court, or to issue arrest warrants. States Parties to the Rome Statute have a legal obligation to cooperate fully with the ICC. Other non-party States, such as Myanmar, may be invited to cooperate with the ICC and may decide to do so on a voluntary basis. The ICC prosecutes individuals, not groups or States. There is no immunity for suspected of crimes within ICC jurisdiction. However, the primary responsibility to investigate such crimes remains with the States. The ICC works in complementarity with the national tribunals. It could lead to obtain a separate referral from the UN Security Council to the ICC, and as Prof. Gabriel M. Lentner rightly pointed out, “In case of a SC referral, the state concerned has not directly conferred its criminal jurisdiction to the ICC. Here, the ICC gains jurisdiction by virtue of a referral by the SC acting under Chapter VII of the UN Charter”<sup>7</sup>.

Here the Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorisation to commence an investigation into the Situation in Bangladesh/Myanmar of 11 December 2019.

“As announced last week, the Judges of Pre-Trial Chamber III have authorised my Office to commence an investigation into the Situation in the Bangladesh/Republic of the Union of Myanmar (situation in Bangladesh/Myanmar). In my 4 July 2019 Request, I sought authorisation to investigate the situation in Bangladesh/Myanmar in the period since 9 October 2016. Specifically, I requested authorisation to investigate crimes within the jurisdiction of the International Criminal Court (“ICC” or the “Court”), in which at least one element occurred on the territory of the People’s Republic of Bangladesh (“Bangladesh”), and which occurred within the context of two waves of violence, in 2016 and 2017, in Rakhine State on the territory of the Republic of the Union of Myanmar (“Myanmar”), as well as any other crimes which are sufficiently linked to these events.

On 14 November 2019, the Judges authorised an investigation with broad parameters. This is a significant development, sending a positive signal to the victims of atrocity crimes in Myanmar and elsewhere.

Specifically, the Chamber has authorised an investigation in relation to *any crimes* within the jurisdiction of the ICC This includes any future crimes, committed at least in part on the territory of Bangladesh, or on the territory of any other State Party or State

<sup>7</sup> EJILTalk.org, „Why the ICC won’t get it right-the legal nature of the United Nations Security Council referrals and Al-Bashir immunities”, 24 July 2017.

which would accept the jurisdiction of this Court in accordance with article 12(3) of the Rome Statute (“the Statute”), insofar as such crimes are sufficiently linked to the situation, and irrespective of the nationality of the perpetrators.

As for the time period, the Judges authorised the investigation of crimes allegedly committed on or after 1 June 2010, the date of entry into force of the Statute for Bangladesh, and, in relation to crimes allegedly committed, at least in part, on the territory of *other* State parties – after the date of entry in force of the Statute for those States Parties.

The Judges accepted that there is a reasonable basis to believe that:

1. since at least 9 October 2016, widespread and/or systematic acts of violence may have been committed against the Rohingya population, including murder, imprisonment, torture, rape, sexual violence, as well as other coercive acts, resulting in their large-scale deportation;
2. these coercive acts could qualify as the crimes against humanity of deportation and persecution on grounds of ethnicity and/or religion against the Rohingya population; and
3. there may have been a state policy to attack the Rohingya population, given that there are many sources indicating the heavy involvement of several Myanmar government forces and other state agents, and that members of the Myanmar armed forces (“*Tatmadaw*”), jointly with other Myanmar security forces and with some participation of local civilians, may have committed these crimes against humanity.

On the important issue of territorial jurisdiction, I note that the Chamber agreed with the 6 September 2018 ruling by the Judges of Pre-Trial Chamber I that the Court may exercise jurisdiction over crimes when part of the criminal conduct takes place on the territory of a State Party.

While Myanmar is not a State Party of the ICC, Bangladesh is, and I welcome the Chamber’s conclusion that “[t]he alleged deportation of civilians across the Myanmar-Bangladesh border, which involved victims crossing that border, clearly establishes a territorial link on the basis of the *actus reus* of this crime” – that is, “the crossing into Bangladesh by the victims.”

I wish to highlight that my Office is not restricted to investigating only the events, persons or groups identified in my Request, or their provisional legal characterisation. The Chamber has emphasised that my Office may, on the basis of the evidence gathered during the investigation, extend its investigation to other crimes against humanity or other crimes under article 5 of the Statute, as long as these crimes remain within the parameters of the authorised investigation.

I am aware that a number of acts of violence have also allegedly been committed in Myanmar by the Arakan Rohingya Salvation Army armed group. I will keep these allegations under review, as I have informed the Chamber I would do, as well as the question of whether these acts amount to a crime or crimes under the Statute and were committed in part on the territory of a State Party.

I also note that the Chamber saw no reason to disagree with my assessment that there are no substantial reasons to believe that an investigation into the situation would not be in the interests of justice.

My investigation will seek to uncover the truth and will now focus its efforts on ensuring the pursuit and success of its independent and impartial investigation. In doing so, we aim to bring justice to victims and affected communities, and count on the full support and cooperation of States Parties, civil society, and other partners.”<sup>8</sup>

### Conclusions

We are still awaiting the order from the ICJ indicating or not the interim measures of protection. It should be announced sooner rather than later, taking into account the urgency of the case, according to Article 41 of the ICJ Statute. I believe there is a *prima facie* jurisdiction of the Court. The three elements required before the indication of interim measures by the Court, that is the irreparable prejudice<sup>9</sup>, plausible rights and urgency, are also present<sup>10</sup>. There is a political implication of the case as well. The leader of Myanmar, Aung San Suu Kyi, winner of the Nobel Peace Prize, who is defending her country accused of committing a genocide in front of the world supreme court, the ICJ, shows that such an „icon” can be ridiculed. It has to be seen if the international justice also will be criticized... It depends on the decision to be taken by the ICJ.

To be continued in a very detailed article after the order of the ICJ.

<sup>8</sup> <https://www.icc-cpi.int/Pages/item.aspx>

<sup>9</sup> See Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Provisional Measures, Order of 8 December 2000, I. C. J. Reports 2000, p. 182; dissenting opinion of judge ad hoc Bula-Bula, p. 222 quoting my statement in post-graduate diploma (Ewa Sałkiewicz, Geneva, IHEI, 1984) about the irreparable prejudice.

<sup>10</sup> The Statute of the International Court of Justice, A Commentary, second ed. A. Zimmerman, K.Oellers-Frahm, p. 1028 (Article 41 of the ICJ Statute).