

The International Court of Justice (ICJ) & Myanmar

Mandate

The ICJ is mandated to:

- Handle contentious cases: The ICJ makes a decision on a legal dispute between two countries, for example, a dispute about the application of an international treaty or convention.
- Give advice: The ICJ gives advisory opinions on legal questions referred by the UN.

What is the case at the ICJ regarding Myanmar?

- Myanmar is a party to the Genocide Convention. Other State Parties to the Convention may submit to the ICJ a dispute with Myanmar relating to its interpretation, application, or fulfilment of the Convention, including a dispute about Myanmar's responsibility for genocide.
- This means that another country may ask the ICJ judges to make a decision about Myanmar's responsibility for genocide against the Rohingya or against other ethnic minorities.
- On 11 November 2019, an African country, The Gambia, filed an application at the ICJ against the Myanmar State for violating obligations under the Genocide Convention (including committing genocide, incitement, attempt to commit, failure to prevent, failure to punish, etc).

What is the difference between the ICJ and the ICC?

- The ICJ (International Court of Justice) resolves legal disputes between countries. It looks at the responsibility of governments, and not at the responsibility of individual perpetrators.
- The ICC (International Criminal Court) puts individual people on trial. It looks at individual criminal responsibility.

Myanmar representation

- In 2019, Daw Aung San Suu Kyi was appointed as “Myanmar agent” to represent the State of Myanmar. This does not mean that the case at the ICJ was against her; it only means that she was authorized to speak on behalf of Myanmar.
- In February 2022, a new agent appointed by the military's State Administration Council (SAC), Ko Ko Hlaing, represented the Myanmar State during public hearings.
- The National Unity Government (NUG) had previously asked the ICJ to recognize its own agent and to drop the preliminary objections (see below), but this was not accepted by the ICJ.

What are the “provisional measures”?

- A first hearing took place at the ICJ in The Hague (in The Netherlands) on 10-12 December 2019, to discuss issues of jurisdiction and “provisional measures”.
- Provisional measures are actions that the ICJ can order the parties to take while the case is working its way through the ICJ process.
- On 23 January 2020, the ICJ judges issued an order to Myanmar to implement certain provisional measures.
- The judges said that there was a serious risk of genocide. The decision was unanimous. All the judges on the panel agreed, including the judge appointed by Myanmar.

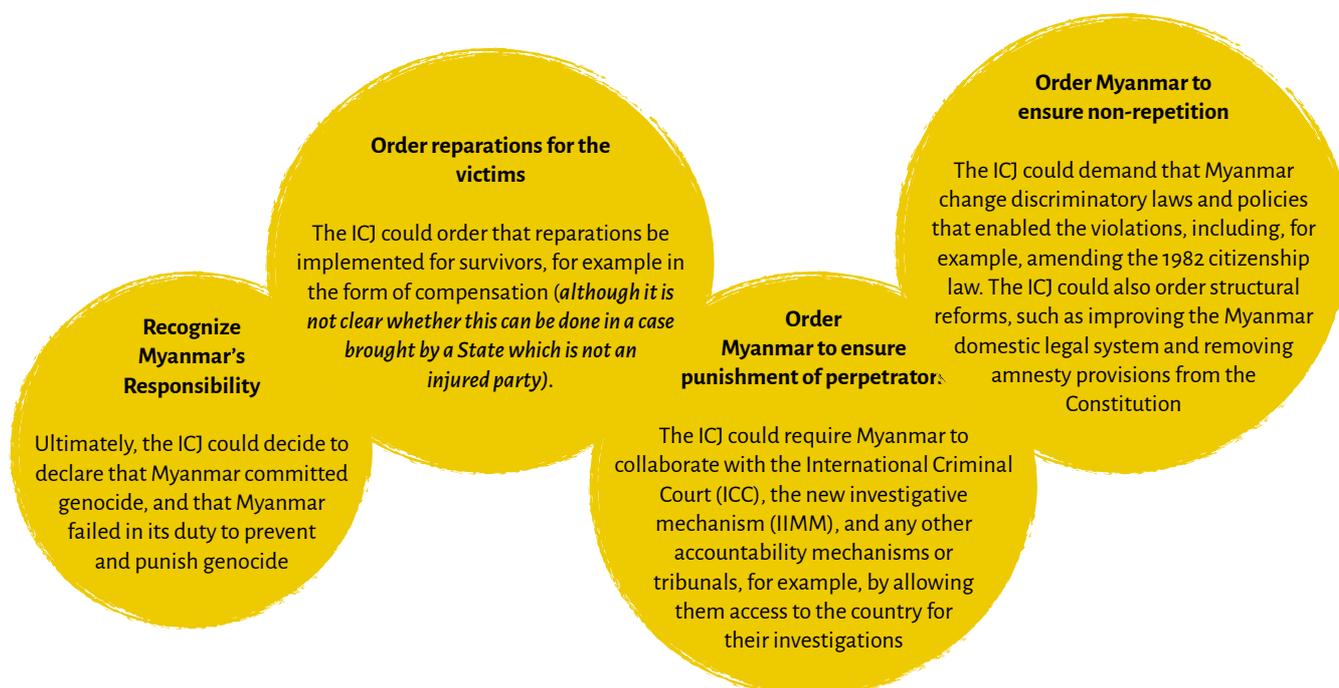
- The ICJ ordered that:
 1. Myanmar must take all measures to prevent acts of genocide against the Rohingya, such as killing and causing serious harm.
 2. Myanmar must ensure that the military and other armed forces under its control and influence do not commit acts of genocide.
 3. Myanmar must preserve the evidence of genocide.
 4. Myanmar must report to the ICJ within 4 months, and then every 6 months until there is a final decision in the case.

What are the “preliminary objections”?

- In January 2021, before the coup, the NLD government filed what is called “preliminary objections” on the question of jurisdiction. They requested the judges to dismiss the case.
- In February 2022, the ICJ held a hearing to discuss the preliminary objections.
- Myanmar requested the Court to declare that the Court lacks jurisdiction to hear the case (*it has no right to consider the case*) and/or that The Gambia’s application is inadmissible. They presented various arguments.
- The Gambia asked the Court to reject the arguments presented by Myanmar and to proceed with the main case.
- It may take several months for the judges to decide on the preliminary objections. The proceedings on the main case (*the “merits”*) are suspended until then.

What are the next steps?

- The decision of 23 January 2020 was only on the question of provisional measures, and the hearing in February 2022 was only on questions of jurisdiction.
- The ICJ has not yet decided on the main issues raised by The Gambia when it filed the case (*the “merits” of the case*). This means that the ICJ has not decided yet that genocide took place. It only decided that there is a serious risk of genocide and that provisional measures are necessary.
- If they reject the preliminary objections and continue with the case, the judges will then receive arguments about the main case in writing (*the “pleadings”*).
- It may take years for the ICJ to reach a decision on the main case (*the “merits”*). There will be a long procedure before that.
- When there is a decision on the main case in the future, the ICJ could:



Advantages

- The ICJ order on provisional measures might increase pressure on the Myanmar military by increasing the scrutiny of the international community. It keeps the case in the public eye, including with regular reporting to the court by Myanmar.
- It might also increase pressure on the UN Security Council to take significant action on human rights violations in Myanmar.
- The case forces Myanmar to respond to genocide allegations publicly in a formal judicial setting, and exposes their policies and practices in relation to the Rohingya.
- In the future, if the ICJ decides that Myanmar is responsible for genocide, Myanmar would face political pressure at the international level to implement the changes ordered by the ICJ.
- All ICJ judgments are final, with no option of appeal. If a State does not respect the ruling, the matter can be referred to the UN Security Council.

Limitations

- It may be difficult to implement the order on provisional measures, as well as any other future decision against Myanmar, because the ICJ has no direct way to enforce its decisions.
- The ICJ case process is very long. It takes many years for the full case to finish, and there is no guarantee of success.
- The ICJ will focus only on the issue of genocide. It will only look at violations against the Rohingya and not at violations in other areas of Myanmar, such as war crimes and crimes against humanity in Kachin and Shan States.
- It is very difficult to prove genocide in the legal sense; it is especially difficult to prove the element of “genocidal intent.” If the ICJ concludes that there was no genocide in the legal sense, the decision might be counter-productive and be a propaganda victory for the Myanmar government and the Tatmadaw.
