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Aung San Suu Kyi at the International Court of Justice

The Gambia's Genocide Case against Myanmar and Its Domestic Ramifications

Angshuman Choudhury and Felix Heiduk

The recent decision by The Gambia to file a genocide case against Myanmar at the International Court of Justice (ICJ) has directed international attention again towards Rakhine State in western Myanmar, where the Rohingya people have faced discrimination and persecution for decades. What took many observers by surprise was the announcement by State Counsellor Aung San Suu Kyi that she would be travelling to The Hague to personally “defend the national interest” and thus, by extension, the actions of her former nemesis. After all, she had enjoyed broad international support precisely for her role as leader of the National League for Democracy (NLD) and her democratic, non-violent opposition against the military dictatorship. These developments, we argue, must be understood against a wider rollback of the democratisation process. The rollback is at least partly being orchestrated by Aung San Suu Kyi and the NLD, and it could bode ill especially for the ethnic minorities in the country.

The Gambia, on behalf of the Organisation of Islamic Cooperation, has filed a case at the ICJ accusing Myanmar of committing genocide against the Rohingya minority. The case asks the ICJ to urgently order measures to stop Myanmar's genocidal conduct immediately. The Rohingya, a majority-Muslim ethnic group regarded by the government and the army as “Bengali”, or illegal immigrants from Bangladesh, have long faced discrimination and persecution. Recently, military-led campaigns against Rohingya communities in October 2016 and August 2017 had caused nearly 800,000 Rohingya to flee the country. The armed forces, as well as the civilian government of

Myanmar, have claimed that military operations took place only in direct response to terrorist attacks by an armed group, the Arakan Rohingya Salvation Army (ARSA), and that they were fully proportionate to the security threat posed. The United Nations (UN), however, has labelled the operations as ethnic cleansing campaigns involving mass rape, widespread killings of civilians, torture, and the frequent burning of Rohingya villages. Furthermore, a UN Fact-Finding Mission last year labelled the Tatmadaw's (armed forces) anti-Rohingya violence as “genocidal”. Under intense international scrutiny, the government has, in principle, agreed in 2018 to allow the



return of Rohingya refugees to improve its tainted international image. However, two attempts to repatriate at least some of the estimated more than one million Rohingya refugees have failed. The Rohingya refugees refused to participate in the repatriation efforts for fears over their physical safety. Additionally, a recent think-tank report has found that Myanmar has made only minimal preparations to facilitate the return of Rohingyas to their ancestral villages in Rakhine in terms of food, security, or shelter. More so, a UN Human Rights Council report released a few weeks ago indicates that the situation of the Rohingya who have remained in Myanmar is as dire as ever. The report details continuing abuses by the state security forces, prevailing impunity of those involved in human rights violations, and concludes that the remaining Rohingya in Myanmar are still at “serious risk of genocide” as the government “continues to harbor genocidal intent”. Thus, various governments and international organisations have approved of the decision by The Gambia to file a case at the ICJ.

Reactions Inside the Country

So far, the domestic political community and civil society in Myanmar have staunchly opposed international interventions on the Rohingya crisis. The dominant narrative emerging from the ruling party and the Tatmadaw, as also reflected in popular narratives, is that outside actors do not understand the “reality” on the ground. There is also a pushback against external investigative mechanisms based on the belief that the international community has ignored the terrorist violence unleashed by ARSA and focussed disproportionately on the Tatmadaw’s actions. However, the reaction to the ICJ case has been somewhat different.

The civilian government has acknowledged The Gambia’s case at the ICJ as valid, while flagging it as “an issue of high national interest affecting all nationals of Myanmar”. As a UN Member State and State Party to the Genocide Convention of 1948, Myan-

mar has no other option but to accept the Court’s jurisdiction. Furthermore, Myanmar had made two reservations while ratifying the Convention in 1956, but none in Article IX, which The Gambia has based its case on. However, the government has noted that the case (alongside the International Criminal Court and Argentine cases) has “severely damaged” Myanmar’s international image. It has also argued that Myanmar is as resolute about preventing genocide as it was when signing the 1948 Convention. The government has formed a “Special Unit on International Criminal Justice” and it is clear that Naypyitaw is taking the case seriously and hopes to put up a watertight defence before the Court. Furthermore, the State Counsellor has been appointed as “the agent” of Myanmar in her capacity as the Foreign Minister, effectively putting her as the lead defender. Suu Kyi’s appointment is being widely seen as a valiant attempt to defend the dignity of Myanmar before the international community, with members of the mainstream political community and civil society lauding her leadership.

The military’s response has been similar. Despite rejecting all accusations of genocidal violence made by the international community so far, it has acknowledged the ICJ case and announced that it would fully cooperate with the government on the issue. The military’s position of acceptance also comes from unavoidable boundaries of international law. It does not wish to be seen as being blatantly dismissive of the international legal system, but it has projected the case as a chance to tell the “reality” – or its own version – of the Rakhine story to the international community. It maintains that the Rohingya are “illegal immigrants” from Bangladesh and are responsible for the violence in northern Rakhine. Further, the Tatmadaw is letting the civilian government take the lead on the case.

The reactions of the Ethnic Armed Organisations (EAOs) towards The Gambia’s case have been mixed. The United Wa State Army (UWSA), the National Democratic Alliance Army (NDAA), and the Shan State Progressive Party have backed the govern-

ment. All three are non-signatories to the Nationwide Ceasefire Agreement (NCA). The 10 NCA signatories have not announced any uniform position yet. However, a Karen National Union central executive committee member told the media that he supports the government and appealed to other ethnic minorities to do so. Separately, a section of the Karen diaspora, under the banner of the Worldwide Karen Organisation, has declared its support for the ICJ case. Furthermore, the Arakan Army, the Ta'ang National Liberation Army, and the Myanmar National Democratic Alliance Army have supported the ICJ case. They are part of the Northern Alliance, a grouping of non-signatory EAOs that is currently at war with the Tatmadaw. The ICJ case could discredit the Tatmadaw, which is exactly what these warring EAOs seek. However, groups such as the UWSA and the NDAA have control over autonomous enclaves and are not at war with the Tatmadaw, which explains their support for the government.

Why Aung San Suu Kyi Is Going to The Hague

This is not the first time that Suu Kyi is defending the Tatmadaw's controversial actions against the Rohingya at an international forum. She has done so many times since the first wave of violence in northern Rakhine erupted in October 2016.

By personally going to The Hague to defend Myanmar, Suu Kyi will be able to accrue significant political gains at home in two distinct aspects.

First, national elections will be held next year, with Suu Kyi's party, the NLD, defending its ruling position. Although the NLD remains popular in majority Burman constituencies, it has lost traction in minority ethnic areas due to various factors, such as the emergence of new parties, renewed armed conflict, and clampdowns on ethnic activists. Even among its majority Burman constituencies in central Myanmar, the NLD faces headwinds. In this context, Suu Kyi's

decision to lead the defence at the ICJ can rejuvenate the NLD's political fortunes while boosting her own image before the domestic audience. By framing it as a "national interest" issue, she has already restricted the space for political opponents, including from smaller ethnic parties, to criticise her. Thus, she now stands to emerge as a unifying figure. Consequently, the NLD is not just retaining its existing voter base, but it will also end up expanding it before next year's elections.

Second, by defending charges of genocide that are essentially directed at the Tatmadaw, Suu Kyi stands to gain some political leverage over the military. This is particularly crucial in light of the ongoing process of constitutional amendment, which the NLD initiated last year and wants to push through before the 2020 elections. Amending the military-drafted 2008 constitution was one of the NLD's key election promises in 2015. However, for the military, which derives all of its political authority from the constitution, the process is an existential threat. This has sharpened tensions between both camps, casting a shadow over the stability of Myanmar's nascent democracy. By shielding the military at the ICJ, Suu Kyi might be able to convince the Tatmadaw to relax their parliamentary vetoes and allow some of the amendments to pass in the parliament. For the State Counsellor, the provision that bars her from becoming the union's President because of her British family is of particular importance. Most importantly, with the military publicly declaring its support for the government, the whole case could help stabilise civil-military relations in Myanmar, both in practice and popular perception.

Outlook: Domestic Ramifications

After the NLD landslide victory in 2015, which made Suu Kyi the de facto head of the new, democratically elected government, Western observers expected democracy would at last prevail. However, democratic reforms have come much more slowly

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than expected. This is in part due to the 2008 military-drafted constitution, which safeguards most of the armed forces' wide-ranging prerogatives. It enables the military to appoint the ministers of defence, home affairs, and border affairs. It also enables the military to assume power over all branches of the government in case of a state of emergency. It furthermore reserves 25 per cent of the seats in both houses of parliament for the security forces and stipulates that amending the Constitution requires the approval of more than 75 per cent of all lawmakers – thereby effectively granting the military veto powers over any constitutional changes. As it stands, the civilian government has almost no leverage over the armed forces. However, it is not just the armed forces that are to blame for the slow pace of democratic reforms. Despite holding a majority of seats in parliament, the NLD government has nonetheless struggled to reform the country over the last four years. Failure to prevent, or at least speak up against, the mass atrocities against the Rohingya has internationally been the most visible indicator of this. Yet, Suu Kyi's autocratic leadership style, her diffidence towards upcoming political talent, and the lack of intra-party democracy in the NLD, as well as the failure to decentralise Myanmar's politics and politics, have also been widely criticised. Military-era laws were used by the NLD government to stifle public expressions of dissent and to silence the media from reporting stories critical of the armed forces and the government. In addition, the peace process with ethnic armed groups has stalled and further conflict has broken out, business confidence remains low, and for many Burmese, living conditions have yet to improve. In recent by-elections, the NLD had a relatively poor showing, losing seats to the military-backed Union Solidarity and Development Party and to ethnic parties. Yet, as Suu Kyi remains hugely popular among the ethnic Burman majority of the population, very

few predict anything but an outright electoral victory of the NLD in 2020.

That being said, the ICJ case might turn out to be a double-edged sword. On the one hand, it has led to intensified scrutiny on the atrocities committed by the security forces in Rakhine, and by extension on those committed against other ethnic minorities. It will thereby help those who aim to further internationalise the issue. On the other hand, however, there is little reason to assume the case will alter the government's stance on the Rohingya issue or on other ethnic minorities. With the 2020 elections looming ever larger on the horizon, Suu Kyi will likely face off against the current army commander, Min Aung Hlaing, and military-backed parties. One can infer from her recent rhetoric that she will try to appear as tough and nationalist as possible on the campaign trail, while at the same time refraining from incensing the military. Her announcement to "defend the national interest" in The Hague has not only further boosted her image domestically, but also indicates a further hardening of her stance on minority rights. What it therefore highlights is not so much salience of the 2020 elections for her supporters, but also the alienation of the ethnic minorities, who make up more than 30 per cent of the total population. The increasing alienation of minority groups is most visible in Rakhine State, where both the ethnic Rohingya and ethnic Rakhine – the latter make up the majority of the population in the state – feel disillusioned about the current state of affairs. The same goes for the Karen in the south-east and the Kachin in the north. If Suu Kyi and her rivals go on a nationalist overdrive as the ICJ case drags on, national reconciliation and Myanmar's decentralisation might be at risk. However, if the Suu Kyi government decides to reach out to the minorities so as to fix Myanmar's international image, then the whole case might strengthen the country's emergent democracy.

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