

U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM
TOM LANTOS HUMAN RIGHTS COMMISSION, UNITED STATES CONGRESS

HEARING -- *Ending Genocide: Accountability for Perpetrators*

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Congressman McGovern (Co-Chair, TLHRC, D-MA), Congressman Smith (Co-Chair TLHRC, R-NJ), Commissioner Maenza (Chair, USCIRF), Commissioner Turkel (Vice Chair, USCIRF), Members of Congress, Commissioners, esteemed guests – thank you for inviting me to testify at this important hearing. And thank you for your commitment to ensuring justice and accountability for international crimes such as genocide.

My testimony will focus on the ongoing efforts to hold perpetrators accountable for genocide and other grave international crimes committed against the Rohingya. I will also discuss what additional steps the United States and other partners could take to ensure accountability for the Rohingya genocide, and how current efforts can help to inform potential future efforts to ensure accountability in other situations.

At the outset, I want to express my deepest respect for and solidarity with all victims of genocide and other international crimes. As legal counsel to The Gambia in its case against Myanmar at the International Court of Justice (“ICJ”), I have had the honor to meet many Rohingya survivors, to hear their stories, and to include their testimony in The Gambia’s case. We had the honor of including Rohingya genocide survivors in The Gambia’s delegation to the ICJ during our first hearing before the Court in December of 2019.² It is only because of their courage and perseverance – as well as that of journalists and human rights defenders who have reported on the situation – that we have been able to learn the truth about the Rohingya genocide in Myanmar. And in so bearing witness, it is incumbent upon us all to work and act for justice and accountability to protect their rights and ensure that such atrocities never occur again.

My remarks will focus on three prominent international accountability efforts:

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This testimony is in my personal capacity and does not necessarily reflect the views of any institutions with which I am or have been affiliated.

² Owen Bowcott, “Rohingya fury at Aung San Suu Kyi’s genocide denial to world court”, THE GUARDIAN (14 December 2019), *available at* <https://www.theguardian.com/world/2019/dec/14/myanmar-genocide-hearings-victims-fury>.

- 1) The Gambia's enforcement of Myanmar's State responsibility under the Genocide Convention at the ICJ;
- 2) The International Criminal Court's investigation of crimes against the Rohingya; and
- 3) A Universal Jurisdiction proceeding pending in Argentina.

The Gambia v. Myanmar – Enforcing the Genocide Convention

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”)³ confirms that genocide is a crime under international law, and it obligates States Parties to the Convention to prevent and to punish genocide. The prohibition of genocide has the character of a peremptory norm under international law, and the obligations under the Convention are owed *erga omnes* and *erga omnes partes*.⁴ In other words, the obligations under the Convention are owed by each of the Convention's 152 States Parties to the international community generally and to each of the other States Parties specifically.

Article IX of the Genocide Convention provides a mechanism for States Parties to enforce those obligations. It states:

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.⁵

Thus, Myanmar, as a party to the Genocide Convention, is obligated under the Convention to prevent, to punish, and to not commit genocide.⁶ Any State Party to the Convention that does not have a reservation to Article IX and that has a dispute with Myanmar over its fulfillment of the obligations in the Convention can submit that dispute to the ICJ for adjudication.

³ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277 [hereinafter Genocide Convention].

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *I.C.J. Reports 2015*, pp. 45-47, paras. 85-88 (citing *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 (I)*, pp. 110-111, para. 161).

⁵ Genocide Convention, art. IX.

⁶ The ICJ has interpreted Article I of the Convention as effectively also prohibiting States from committing genocide. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, *I.C.J. Reports 2007*, p. 113, para. 166.

To its great and everlasting credit, The Gambia brought its dispute with Myanmar to the ICJ in order to protect the Rohingya from genocide and to hold Myanmar to account for its responsibility under the Genocide Convention. When The Gambia filed its case in November 2019, it asked the ICJ to impose “provisional measures” to protect the rights of The Gambia and the Rohingya during the pendency of the case.⁷ Such measures operate as a sort of temporary restraining order until the Court can decide the merits of a dispute. After a public hearing in December 2019, the ICJ issued an historic, unanimous Order in January 2020 approving the measures requested by The Gambia to prevent further acts of genocide from occurring against the Rohingya group in Myanmar.⁸ The 17 judges who issued that Order include judges from China, Russia, and Myanmar’s appointed judge ad hoc.

The Court agreed with The Gambia that the Rohingya who remain in Myanmar are at risk of ongoing genocidal acts, that they are a protected group under the Convention, and that they needed the urgent protection of the Court. The Court unanimously ordered Myanmar:

- 1) to take all measures within its power to prevent the commission of all acts of genocide against the Rohingya, including killings, causing serious bodily or mental harm, inflicting conditions of life calculated to bringing about their physical destruction, and imposing measures to restrict births;
- 2) to not commit genocide, conspiracy to commit genocide, incitement to genocide, attempt to commit genocide, or complicity in genocide;
- 3) to preserve all evidence relating to allegations of the crime of genocide; and
- 4) to report back to the Court in four months and then every six months thereafter on its compliance with the Order.⁹

This provisional measures Order was a momentous victory for The Gambia and the Rohingya, marking the first time ever that Myanmar was being held to account for its violations of the Genocide Convention. All of the Court’s orders are binding upon Myanmar under international law, and Myanmar has been submitting its compliance reports to the Court as required.

The case is active and ongoing. In October 2020, The Gambia filed its Memorial, or full case on the merits, with the ICJ. In January 2021, Myanmar filed preliminary objections to the Court’s jurisdiction. The Gambia filed its response to those objections in April 2021. Once the Court rules on the preliminary jurisdictional objections, then Myanmar will have approximately six

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Application instituting proceedings and Request for the indication of provisional measures* (11 November 2019), available at <https://www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf>.

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020*.

⁹ *Ibid.*

months to file its Counter-Memorial. After that, the ICJ could order further pleadings or move to a hearing on the merits of the dispute.

The ICJ is the only forum in which Myanmar's State responsibility under the Genocide Convention for the acts of genocide perpetrated by its armed forces during the 2016-2018 "clearance operations" can be adjudicated, so it is a particularly important venue for accountability. The Gambia has asked the Court to declare Myanmar responsible for violations of the Genocide Convention, to order the cessation of such violations, and to order reparations and restitution for the Rohingya victims of the genocide.

The ICC Investigation

The next two accountability mechanisms that I will discuss deal with individual criminal responsibility, not State responsibility. Normally, a State's own courts and judicial systems would be expected to prosecute culpable individuals for crimes committed. However, there is no prospect for justice for the Rohingya genocide in Myanmar's legal system. The armed forces retain control over judicial processes for alleged crimes committed by their personnel, and they have a long history of impunity. In fact, the same armed forces who perpetrated acts of genocide against the Rohingya have taken full control of the State of Myanmar itself, with disastrous consequences for the people of Myanmar. Moreover, the State's position is to deny the genocide altogether, and Myanmar does not even have the crime of genocide in its penal code.

It is natural, then, that many have turned to international options for individual criminal accountability. But here too the options are limited. Myanmar is not a State Party to the Statute of the International Criminal Court ("ICC"). Absent a referral to the ICC by the UN Security Council, which does not appear to be a realistic prospect at the moment, there is no basis for ICC jurisdiction over crimes committed entirely within the territory of Myanmar, including the crime of genocide.

However, the Office of the Prosecutor of the ICC has an open investigation regarding the crime of deportation and any other crime against humanity consummated on the territory of Bangladesh, which is a State Party to the ICC Statute.¹⁰ Hundreds of Rohingya victims have submitted testimony to assist the Prosecutor in this investigation.¹¹ Mechanisms like the

¹⁰ See ICC, Pre-Trial Chamber III, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, No. ICC-01/19-27 (14 November 2019); ICC, Office of the Prosecutor, *Situation in the People's Republic of Bangladesh / Republic of the Union of Myanmar*, Request for authorisation of an investigation pursuant to article 15, No. ICC-01/19 (4 July 2019); ICC, Pre-Trial Chamber I, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"*, No. ICC-RoC46(3)-01/18 (6 September 2018).

¹¹ See ICC, Pre-Trial Chamber III, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of*

Independent Investigative Mechanism for Myanmar (“IIMM”), which was established by the UN Human Rights Council, may also be able to provide support for such prosecution efforts.

Though limited in scope and by the challenge of obtaining suspects in the Court’s actual custody, the ICC investigation does open the possibility for some individual criminal prosecutions, and that is an important element of accountability.

The Argentina Universal Jurisdiction proceeding

The principle of universal jurisdiction is that some crimes – such as genocide, piracy, and torture – are of such exceptional gravity that they affect the fundamental interests of the international community as a whole, and thus national authorities of any State are able to investigate and prosecute perpetrators of such crimes even if they were committed in another country.

In November 2019, the Burmese Rohingya Organisation UK (BROUK) – a Rohingya NGO based in London – initiated in Argentina the first universal jurisdiction case on the Rohingya genocide. BROUK asked the Argentinian authorities to investigate and prosecute senior military and civilian leadership for international crimes committed against the Rohingya, including genocide. The Argentinian judiciary is considering the request – it was initially rejected by the Court of First Instance in December 2019 as duplicative with the ICC investigation, but that decision was overturned on appeal in May 2020, with the appellate court ruling that it was necessary to seek clarification from the ICC on the scope of its investigation. Information about the ICC investigation was requested and received by Argentina to better inform its judiciary. Earlier this month the lower court again decided to reject the request on the same ground, and that decision is again on appeal.

A universal jurisdiction investigation such as the one requested in Argentina would not be limited in scope in the same way that the ICC’s current investigation is, but it would suffer from the same challenge of obtaining physical custody over the alleged perpetrators. Nevertheless, it would allow survivors to come forward and share their stories and apply further public pressure on Myanmar. Other interested parties in States that have universal jurisdiction statutes might consider similar legal strategies.

Additional Steps / Lessons Learned

These three accountability efforts are part of the broader toolkit that States have for promoting justice and accountability for international crimes. Additional tools include sanctions (including under the Magnitsky Act), suspension of aid and other forms of assistance, trade consequences, diplomatic censure, and other political expressions of condemnation. We can draw some lessons from these efforts.

Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19-27 (14 November 2019), para. 20.

1. The Importance of Truth-Telling

Genocide, crimes against humanity, and other international crimes are not just historic wrongs. Their impact reverberate through time, scarring generations of its victims and their descendants, and reshaping the makeup, culture, and fundamental nature of our societies. Telling the truth about such atrocities is an essential part of the process of ensuring accountability and honoring the victims.

Perpetrators of genocide and other international crimes deny the truth of their actions to avoid responsibility and erase their victims from history. The struggle for justice and accountability for these crimes is first and foremost a struggle for truth.

Recent actions by the Biden Administration to recognize the Armenian Genocide, and by Germany to recognize its genocide of the Herero and Nama people in present-day Namibia, demonstrate the importance of truth telling as a first step towards justice and accountability.

The same was true for the Rohingya – it was critical that human rights NGOs and other credible experts began to call what happened to the Rohingya by its proper term, genocide. And when the UN Independent International Fact-Finding Mission on Myanmar found credible evidence to support a finding of genocidal intent, that tipped the scale to help The Gambia and others initiate legal proceedings.

Governments must speak the truth about such situations, and the United States and others should make a genocide determination regarding the Rohingya.

2. International Mechanisms Work when Used Effectively

That brings me to my next point, which is that international mechanisms work when they are used effectively. The UN Fact-Finding Mission on Myanmar was created through UN Human Rights Council Resolution 34/22, adopted in March 2017. Through its credible work and reporting, the Mission successfully conveyed the extent of the atrocities committed against the Rohingya and informed the international community about the facts that support a finding of genocidal intent. When the Mission's mandate expired, it transferred its evidence to another entity created by the UN Human Rights Council, the IIMM (created by UN Human Rights Council Resolution 39/2, adopted in September 2018), which collects evidence of international crimes and prepares files for criminal prosecution.

These actions by the UN Human Rights Council have been integral to the struggle for justice and accountability for the Rohingya. They are a shining example of how multilateral institutions can be used effectively to protect human rights.

The United States has had an erratic relationship with the UN Human Rights Council.¹² The George W. Bush Administration did not seek a seat on the Council when it was first created in 2006. Beginning in 2009, under the Obama administration, the United States joined the Council and served two consecutive three-year terms. The United States was ineligible for reelection in 2016, so it spent a year off the Council before rejoining in 2017. But the United States under the Trump administration did not serve its full term, withdrawing from the Council in June 2018.

When the United States engages and leads in multilateral forums like the UN Human Rights Council, we are able to make these institutions more effective, and we are able to protect and advance our national interests through them. It is disgraceful that the United States – which should be the international leader on promoting human rights – would abandon the premier multilateral human rights body in the world. We need a consistent commitment to multilateral diplomacy, particularly in the realm of human rights, in order to advance human rights protections globally.

I look forward to the United States rejoining the UN Human Rights Council under the Biden Administration and once again making effective use of multilateral bodies to advance U.S. foreign policy priorities.

3. Leadership is Critical

One question everyone asks me about the ICJ case is: Why The Gambia? Why would a small country in West Africa, thousands of miles away from Myanmar, file this case? Well, the simple answer is leadership and commitment to human rights. The Gambia's Justice Minister at the time, H.E. Abubakar Tambadou, personally met Rohingya genocide survivors in the refugee camps and was moved to act. The Gambia's President, H.E. Adama Barrow, decided to file the case on the advice of his Justice Minister. They decided to do the right thing and stand for justice and accountability.

The Gambia's example is one that other States can and should follow. International justice mechanisms are critical tools in ensuring accountability and deterring future atrocities. There are mechanisms that can be used to respond to other genocides, like the Uyghur genocide, if States only take the bold steps needed to invoke them.

That includes the United States. The United States can and should lead efforts to promote international accountability through international justice mechanisms. But instead of doing that, the Trump Administration actually imposed sanctions and travel restrictions on the ICC

¹² See M. Arsalan Suleman, *Empty Seat Diplomacy: How America Surrendered Its Diplomatic Advantage, and How It Can Bounce Back*, 40 SAIS REVIEW OF INTERNATIONAL AFFAIRS 1 (2020).

Prosecutor and her staff and anyone in the United States supporting their work,¹³ a step that would clearly violate the First Amendment rights of U.S. nationals.¹⁴ The Biden Administration’s decision to revoke the Trump executive order and withdraw the travel restrictions is welcome,¹⁵ and will hopefully mark the start of greater U.S. support for international accountability measures.

4. Justice and Accountability should be National Security Priorities

Finally, justice and accountability must be national security priorities. It should surprise no one that the same military that carried out genocidal attacks on the Rohingya would go on to overthrow the elected government in Myanmar in February of this year. The Myanmar military’s brutal crackdown on civilian protesters has led to over 900 deaths and hundreds more tortured. Decades of impunity for human rights violations and atrocities ensures that such violent and destabilizing actions will occur again in the future. This lesson is true for many other States and regions across the world.

The United States, acting together with like-minded States, must prioritize justice and accountability efforts as urgent national security concerns. Failure to do so will ensure that cycles of violence and atrocities will continue to occur with devastating consequences.

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In conclusion, I thank the Representatives, the Chair, the Vice Chair and other Commissioners for holding this hearing and drawing attention to these important issues, and would be pleased to answer any questions that you might have.

¹³ See Human Rights Watch, “US Sanctions on the International Criminal Court” (14 December 2020), *available at* <https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court#>.

¹⁴ See “Foley Hoag Obtains Preliminary Injunction for Open Society Justice Initiative and Law Professors Against Trump Administration in Lawsuit Over International Criminal Court Executive Order” (4 January 2021), *available at* <https://foleyhoag.com/news-and-events/news/2021/january/foley-hoag-obtains-preliminary-injunction-for-open-society-justice-initiative-and-law-professors-against-trump-administration-in-lawsuit-over-international-criminal-court-executive-order>.

¹⁵ Pranshu Verma and Marlise Simons, “Reversing Trump, Biden Repeals Sanctions on Human Rights Prosecutor”, N.Y. Times (2 April 2020), *available at* <https://www.nytimes.com/2021/04/02/us/politics/biden-international-criminal-court-sanctions.html>.