

The Legal Significance of the US Recognition of the Atrocities on the Rohingya as Genocide

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On March 21, 2022, US Secretary of State, Antony J. Blinken stated [that the US concluded](#) that the crimes perpetrated on the Rohingyas in the Rakhine Province of Myanmar amount to crimes against humanity and genocide. [The US has also committed to resettle some \(though no number was specified\)](#) Rohingya to its own territories. Arguably, this is a significant development from its past restrained stance. For instance, on August 24, 2021, the US Department of State, in a press release, stated that [“Burma’s military launched a horrific ethnic cleansing against Rohingya in northern Rakhine State.”](#)

Of course, in and of itself, ethnic cleansing can also amount to genocide. Because it is well-established by the [judgment of the International Court of Justice](#) (ICJ) and [International Criminal Court](#) (ICC) that ethnic cleansing, that is forcibly displacing people from a region, may signify the intention to destroy a group of people, in whole or in part which could, in turn, prove the genocidal intent. At the same time, [the ICJ observed that](#) “[n]either the intent, as a matter of policy, to render an area ‘ethnically homogeneous’, nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is ‘to destroy, in whole or in part’ a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.” And while ethnic cleansing would fall under the genre of crimes against humanity, the ICJ, as the law stands now, does not have jurisdiction over crimes against humanity. This may change if the [Draft Convention](#) on the Prohibition and Punishment of Crimes Against Humanity comes into force, as Article 15(2) of the Convention envisages the ICJ to have jurisdiction in cases of crimes against humanity. Thus, if the Court arrives at the conclusion that the atrocities in Rakhine only amounted to ethnic cleansing, then it is *cadit quaestio* for The Gambian Case. Irrespective of the outcome of the proceedings in the ICC, this could well shut the door of judicially determining the state responsibility of Myanmar and may also mean the end of legal determination on Myanmar’s legal obligation to repatriate the Rohingya.

Blinken’s statement suggests that the experts appointed by the US Department of State found evidence of a systemic attack on the Rohingyas in Rakhine and an unequivocal intent to destroy the Rohingya by perpetrating

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torture on them. They also cited, inter alia, the statements of the Myanmar army officials, including Min Aung Hliang, the Commander-in-Chief, which showed disdain for the Rohingya and intention to destroy them. Hliang is quoted saying “[t]he Bengali problem was a longstanding one that has become an unfinished job. . . . The government in office is taking great care in solving it.” It is important to note that [Blinken’s statement is based on a joint report published in November 2017](#), by the US Holocaust Museum’s Simon-Skjoldt Center for the Prevention of Genocide and the Fortify Rights, a human rights NGO. And that report had been prepared based on, inter alia, [a survey](#) of more than 1,000 Rohingya refugees living in Bangladesh, all of whom have been direct victims of the wave of atrocities on the Rohingya in 2016 and 2017. What the witnesses have said is horrific. Around 75 percent of them have described witnessing someone [being killed](#) by the military and more than 50 percent of them have witnessed sexual violence. The scale and gravity of the atrocity on the Rohingya become apparent from the testimony of the witnesses among whom around 20 percent have witnessed [a mass-casualty event](#), i.e., a single incident accounting for the killing or injury of more than 100 people. Thus, they cannot be brushed aside as isolated events.

This US determination could be an important step for The Gambia, who is fighting the case against Myanmar. During the provisional order phase at the ICJ, the then Vice-President of the ICJ, Judge Xue, had clearly given importance to the view of Bangladesh about the events in Rakhine. During the Provisional Order, though she voted in favor of it, she also issued a [separate opinion](#). She observed that [while appalling things that happened in Rakhine, such events could not perhaps amount to genocide](#). And in making this point, she referred to the official statements of the Government of Bangladesh, whose interest was significantly affected by the atrocities in Rakhine. In particular, she noted that [“Bangladesh’s position to seek ‘a durable solution’ to this protracted problem in close co-operation with the Myanmar Government indicates that the particular circumstances from which the present case has arisen could not possibly suggest a case of genocide.”](#)

Legally speaking, her position seems to be unconvincing. Indeed, Bangladesh’s official assertion reflects more like an effort to seek a peaceful resolution of a challenge that has encumbered it for years. Bangladesh did not comment on the gravity of the atrocities, let alone their legal nature. Assuming *arguendo*, Bangladesh’s subjective view (unaccompanied by any clear investigation of facts) on the events of Rakhine were to decide the nature of the events in Rakhine, then the position of Bangladesh [transforms from](#) an affected party to a judging party. As states are the primary actors of international law, the state practice of which official press releases are one of the clearest examples, would clearly carry significant weight in areas of customary international law. But a subjective view (not to imply that Bangladesh took the position) regarding the non-genocidal act cannot have any impact on the facts of a contentious case. [There is at least no public record that the Bangladeshi statement was based on an assessment by experts.](#)

Having said this, the view of the USA, unlike the press release of the Government of Bangladesh, is of a different genre. More importantly, while Bangladesh, being constrained by the [sudden entry of nearly a million](#)

[Rohingya](#), was taking a stance designed to respond to the grave problem, it had to look through the prism of practical challenges it was facing. On the other hand, the USA is not a state whose material interest is affected by the Rohingya situation, aside, of course, the fact that as a party to Genocide Convention, [it has an interest in its compliance and an erga omnes obligation to prevent and punish genocide](#). And while Bangladesh confronting the challenges posed by the entry of nearly a million Rohingya and then refuge in Bangladesh would have constrained its choices, the relatively unaffected position of the US should make the position of its experts more fact-based.

[The finding of the experts appointed by the US State Department clearly corroborates, inter alia, the finding of the Independent International Fact-Finding Mission on Myanmar](#) (“IIFMM”), established in March 2017 by the United Nations Human Rights Council, which concluded in [September 2018](#) that there was [a prima facie case of genocidal intent in Rakhine](#). And there is a possibility of the use of [satellite images](#) to further provide evidence of atrocities on the Rohingya. In any case, the involvement of the US should also further dent the claim of Myanmar that The Gambia is nothing but [a proxy](#) for the Organization of Islamic States.

On one point, it is difficult to disagree with Judge Xue’s opinion that the Court’s judgment would, inter alia, have a significant impact on the interpretation of [Article 48 of the International Law Commission’s Draft Articles on State Responsibility](#) (dealing with the invocation of responsibility by a State other than an injured State) as she has rightly observed [“its repercussions on general international law and State practice would likely extend far beyond this particular case.”](#) If the Court upholds The Gambia’s claim, there could be many more states whose legal responsibility would be put to the test at the ICJ in the coming days. And that may cause some headaches to many other brutal regimes perpetrating systemic atrocities on ethnic minorities.