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Suu Kyi has made herself the face of a murderous regime

Myanmar's leader, Aung San Suu Kyi, gave evidence this week before the International Court of Justice in the Hague as part of a three day hearing to consider genocide charges against Myanmar. These arise from military operations in 2017 that led to more than three quarters of a million Rohingya Muslims fleeing the country.

The Rohingya are wrongly portrayed as illegal Bengali immigrants, whose home is not Myanmar but Bangladesh. This is accompanied by a generally negative view of Islam and Muslims, which is partly rooted in the dominant Burmese Theravada Buddhism. This sees Myanmar's western border as a "Western Gate" to be protected from an encroaching Islam.

The expulsion of Rohingya from Rakhine state to Bangladesh, accompanied by the destruction of almost four hundred of their villages and the continued refusal of the Myanmar authorities to create conditions conducive to a safe, voluntary and dignified return of those expelled, remains at the heart of this humanitarian crisis and the case before the court.

The International Court of Justice does not have jurisdiction to try individuals for any of the alleged crimes, but it does play an important role in disputes between states and in establishing state responsibility for the actions of its agents, in this case the armed forces. The case, brought by Gambia, is supported by other Muslim states.

This week's hearing focused on whether the court should issue urgent provisional orders or measures to protect the half a million Rohingya that still remain in Myanmar. Most are interned in camps or confined to their villages, without access to basic services. The Gambia claims they continue to face grave danger of further genocidal acts. In addition to stopping genocidal acts, it was argued that the orders should include granting access to the UN and other investigative bodies, in addition to preservation of evidence.

In September 2018, the UN's Independent International Fact Finding Mission published its report on atrocities committed against the Rohingya people. The Gambia's application before the court relies heavily on this report. This is not surprising, given that the over four hundred page report is one of the most extensive accounts of human rights violations in Myanmar to date. The report corroborates reports by NGO's and others. In 2008, the Irish Centre for Human Rights at NUI Galway received funding from Irish Aid to launch a project on the human rights situation of the Rohingyas/Muslims of Rakhine state. The subsequent report found that there was reliable evidence of widespread or systematic attacks against the Rohingya civilian population. These appeared to

satisfy the requirements under international criminal law for the perpetration of crimes against humanity. It stated that failure to address these issues would undoubtedly lead to a bleak future for the ethnic minority.

The recent UN Fact Finding Mission undoubtedly did important work. The extensive collection of evidence will not only be crucial in bringing perpetrators of international crimes to justice in time, but it also helped highlight the crisis in Myanmar.

The Gambia is bringing the case to stop what it sees as genocide and to get a preliminary finding on the issue. The case is the first international attempt to make Myanmar accountable for the alleged atrocities against the Rohingya. During this week's hearing, Gambia's lawyers requested the court take action before the full case is heard. A full judgment on whether Myanmar violated the 1948 Genocide Convention will take years.

In this way, the case is largely symbolic as most commentators accept that atrocities occurred and that the military were excessive in their actions. The evidence of deliberate attacks on the civilian population and crimes against humanity and war crimes is overwhelming. The question is whether these atrocities also amounted to genocide under the 1948 Genocide Convention. This is a particularly serious crime involving an attempt to destroy a group, in whole or in part. The crime of genocide emerged after the Second World War to reflect the efforts by the NAZIs to exterminate the Jewish population of Europe.

The case being presented is heavily reliant on a 2018 UN Fact Finding report. This is an important source of information, however, some of the legal analysis in the report is flawed. Genocide is a very narrowly defined crime requiring proof of a specific intent to destroy a particular group based on either race, religion, ethnicity or nationality. As such it is challenging to prove and this makes the outcome of the case by no means a foregone conclusion.

Aung San Suu Kyi has already benefitted domestically from her decision to appear before the court to defend the country and its military in particular. Thousands have spilled out onto the streets to demonstrate their support and elections are planned for next year. However, the decision by the Nobel Peace Prize laureate to travel to the Hague inevitably tarnished her international reputation further. While she has paid a high price in the past for her outspoken views, she now seems unable and unwilling to incur the wrath of the still powerful military. Nevertheless, her past silence in the face of such atrocities against the Rohingya minority was unacceptable.

Aung San Suu Kyi has consistently declined to criticize the military leaders with whom she has shared power since winning elections in 2015. Navigating the space between political pragmatism and principle has been challenging in such circumstances. However, her appearance before the world court, the principal judicial organ of the UN, is unprecedented. In so doing she has decided to be the public face of a regime that has presided over widespread and systematic attacks

against civilians, including mass rape, ethnic cleansing and persecution. She could have chosen not to do so. Instead she presented a carefully crafted defence based on the advice of her lawyers. The technical legal nature of some of the testimony may be clever, but it does not change the facts or rewrite history.

While conceding that war crimes may have been committed and that it could 'not be ruled out' that the Myanmar military may have used 'disproportionate force', or failed to distinguish between rebels and civilians, she nevertheless presented an unapologetic defence of the generals and their tactics. Aung San Suu Kyi's testimony in the Hague means that she is now directly associated with some of the worst crimes of this century. Her former status as an icon of the human rights community is irreparably damaged.

Gambia should be applauded for its initiative at the court. Although invoking a judicial remedy of this nature to address such a crisis has limitations, it is preferable to calling for some kind of military intervention to stop the atrocities. Unfortunately history is replete with the adverse and unfortunate consequences of such interventions.

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