



Who gets to be ‘Myanmar’ at the ICJ?

written by Judith Beyer
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The Myanmar military will appear at the International Court of Justice (ICJ) in The Hague on 21 February 2022. Their main interest does not lie in defending the country against genocide allegations.

In the case of The Gambia vs Myanmar currently pending at the International Court of Justice (ICJ), Myanmar has been accused of having violated the UN Genocide Convention of 1948 by committing serious crimes against the Rohingya, a predominantly Muslim ethnic group. In 2017, 800.000 Rohingya fled Myanmar to neighbouring Bangladesh in an effort to escape the military's atrocities. In a



clearance operation that can be compared to similar events occurring in the mid-1970s and in the 1990s, the army killed men, women and children indiscriminately and committed acts of sexual violence, torture, beatings, and arbitrary detention. The UN created an [Independent Investigative Mechanism for Myanmar](#) in September 2018 that has since then amassed evidence of the army's atrocities. In March 2019, The Gambia, through its membership in the Organization of Islamic Cooperation (OIC) [called upon Myanmar](#) "[t]o honor its obligations under International Law and Human Rights covenants, and to take all measures to immediately halt all vestiges and manifestations of the practice of . . . genocide . . . against Rohingya Muslims" . In June 2019, the country filed a case at the United Nation's top court. When the case was opened in November 2019, State Counsellor Aung San Suu Kyi had decided to face the lawsuit herself, thereby continuing a long-standing tradition in the country that aligns [her personal aura as "Mother Suu"](#) with the well-being of the entire nation.

The army's attempted military coup of February 2021

The case did not proceed after the Myanmar military attempted a coup on 1 February 2021. That night, Aung San Suu Kyi and President Win Myint were arrested and have since been accused of corruption, violations of the telecoms law, a state secrets act as well as covid-19 regulations. They are currently facing several years of imprisonment. The generals declared the November 2020 parliamentary elections as fraudulent and put a state of emergency in place. Senior General Min Aung Hlaing is now heading the country. But not only the State Counsellor and the President, but the entire population of Myanmar has been held hostage: since February 2021, over 1.500 people have been murdered, thousands have been [arrested](#) and 450.000 people have become [internally displaced](#), adding to the already high numbers of IDPs. Many activists, especially of the younger generation, have been forced into exile, others have joined the People's Defense Forces (PDF), a newly-formed civil army that is now fighting alongside the already existing ethnic armed groups in this multi-ethnic and multi-religious nation-state. The junta has at no point achieved full control of the country. The nation-wide [Civil Disobedience Movement \(CDM\)](#) that formed



immediately after the power grab is forced to operate largely underground as is the actual legitimate government of the country.

The National Unity Government

Members of the parliament elected in November 2020 formed the National Unity Government (NUG) while in hiding, now operating from undisclosed locations. They have established working relations with many states and international organizations, including the UN, where Ambassador U Kyaw Moe Tun supports the NUG and has been able to continue representing his country even though the military fired and charged him with high treason. While the military regime has received backing from China and Russia, most other countries have cut diplomatic and also economic ties with Myanmar under the current leadership. The question of who is representing Myanmar in the international community is a contested one which needs to be kept in mind when the case in The Hague continues on 21 February 2022.

Trying to benefit from a genocide accusation

Historically, the army has shown no interest in complying with international legal norms. The “rule of law”-paradigm has been a particular red rag for the Generals. Still, the Myanmar military will likely send delegates to attend the upcoming proceedings in The Hague. At the same time, the National Unity Government (NUG) has declared that United Nations Ambassador U Kyaw Moe Tun is the only person authorised to represent the country in The Hague. On 15 February 2022, they even announced that the preliminary objections by the Myanmar state party in 2019 to the lawsuit should be withdrawn, thus encouraging the efforts to proceed with the case. They also introduced a new legal team of international legal experts that would work with the NUG and Myanmar’s Ambassador to the UN in representing Myanmar. But still now, it is unclear which side will represent Myanmar in front of the ICJ—the NUG or the junta. It seems more likely that the generals will eventually be able to do so. Fittingly, one might say, as they are also the ones directly implicated in the crime. However, for the generals, defending



the country against the genocide accusation is largely a means to an end. In contrast to Aung San Suu Kyi's appearance in December 2019, it will not be about personal aura: they will use this opportunity to conduct themselves as the legitimate representatives of the Republic of the Union of Myanmar on a global stage. One should not fall for this trick, or not again: Already in April 2021 the military managed the feat that a general participated in an online-event of the UN Commission on Narcotic Drugs (CND), thereby bypassing the UN Secretary General's own advice not to cooperate with the junta. Lt.-Gen Than Hlaing was understandably content and expressed his ["pleasure in having this opportunity"](#).

As things stand now, the generals are likely to appear at one of the key institutions upholding the rule of law internationally. The ICJ is one of the principal legal organs for investigating violations of the 1948 UN Genocide Convention, to which Myanmar is a signatory. To invite the junta to represent the country means to offer them the chance to use the court as a platform for strategic litigation where no longer the crime, but the performance of legitimacy will be key: When the ICJ reopens the case against Myanmar, the Rohingya genocide is not a primary concern of the generals. Rather, it is to be 'Myanmar'. The ICJ has a historical opportunity to avoid such an ethical, political and legal failure.