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The Gambia v Myanmar: Paving The Yellow Brick Road to International Accountability for The Crime of Genocide

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I. Introduction

The International Court of Justice (ICJ) handed down its much-awaited decision on the Request for the indication of provisional measures in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)[1] earlier this year. In a refreshingly rare ruling that witnessed the ICJ taking a unanimous decision on every count, the Court adopted a humanist perspective and bypassed the pitfalls of an outdated State voluntarist outlook to grant four of the six provisional measures requested by the Republic of The Gambia (hereinafter, "The Gambia").[2] The ICJ's decision on the narrow issue of indication of provisional measures sets a powerful precedent for global genocide prevention and breaks new ground for enforcing States' obligations to prevent and punish genocide under international law. The critical provisional measures ordered by the ICJ contribute directly to the reduction in violence against 600,000 Rohingya that remain in the State of

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1 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Order of 23 January 2020) General List No 178 [132] <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf> accessed 1 August 2020.

2 ibid [86].

Rakhine[3] and are a binding guarantee on their safety. The decision reaffirms with all legal and moral force flowing from the highest international judicial authority that the Rohingya are a protected group under the Genocide Convention[4] and enjoy a distinct identity.

The ICJ's decision is unique on two particularly significant counts. Firstly, the ICJ heard a genocide case filed by a non-contiguous and non-warring nation against an accused State for the first time in history and as a consequence enlarged the scope of erga omnes partes in international law. Secondly, this case is the only instance in ICJ's history when the Court investigated genocide claims on its own, relying solely on the reports of independent UN investigators. This case note explores the substance and ramifications of ICJ's novel approach in humanising its jurisprudence on the legal prerequisites for granting provisional measures before concluding in favour of the appropriateness of provisional measures as a true jurisdictional guarantee of preventive character capable of protecting the rights of the most vulnerable populations.

II. The Case

A. Background

The Rohingya are an ethnic Muslim minority, often described as the "most persecuted minority in the world",[5] predominantly residing in Rakhine State in the Republic of the Union of Myanmar (hereinafter, "Myanmar").[6] The Rohingya practice a Sufi-inflected variation of Sunni Islam and possess a distinct cultural identity which differs from Myanmar's dominant Buddhist majority religiously, linguistically and ethnically. In 2017 a Rohingya population of around 1 million resided in Rakhine State, however, this population has since been reduced to 600,000 owing to a violent history of persecution and strife.[7] International academics have often compared the legal conditions faced by the Rohingya in

3 UNHRC, 'Detailed findings of the Independent International Fact-Finding Mission on Myanmar' UN Doc A/HRC/42/CRP.5 (16 September 2019).

4 Convention on the Prevention and Punishment of the Crime of Genocide 1951 (hereinafter, "Genocide Convention").

5 UN OHCHR, 'Human Rights Council opens special session on the situation of human rights of the Rohingya and other minorities in Rakhine State in Myanmar' (5 December 2017) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22491&LangID=E> accessed 5 August 2020.

6 Elizabeth Albert and Lindsay Maizland, 'The Rohingya Crisis' (*Council on Foreign Relations*, 23 January 2020) <https://www.cfr.org/backgrounder/rohingya-crisis> accessed 10 August 2020.

7 UNHRC (2019) (n 3).

Myanmar to apartheid.[8] State policies reflective of institutionalised discrimination have largely stripped the Rohingya of citizenship, access to basic healthcare, education and employment.[9]

In August 2017, the Arakan Rohingya Salvation Army (ARSA) was held responsible for attacks on police (Ion htein) and military (hereinafter, "Tatmadaw") posts in Rakhine State.[10] Myanmar retaliated by declaring ARSA as a terrorist organisation and commenced indiscriminate military campaigns in Rakhine State.[11] Myanmar termed these military campaigns as "clearance operations"[12] and employed social media to spread propaganda designed to incite hatred and violence against the wider Rohingya population.[13] According to reports, several hundred thousand Rohingya were forced to flee to the neighbouring country of Bangladesh and around 10,000 were killed as a result of Tatmadaw's brutal "clearance operations".[14] Myanmar claimed that its operations represented "a legitimate response to attacks by Rohingya insurgents".[15] However, in 2018, UN investigators warned of an ongoing genocide in Myanmar and detailed gang rapes and mass slaughter[16] as part of systemic "clearance operations" carried out by the Tatmadaw, intended to destroy Rohingya as a group.[17] According to the 2019

8 Amnesty International, 'Myanmar: Rohingya trapped in dehumanising apartheid regime', (21 November 2017) <https://www.amnesty.org/en/latest/news/2017/11/myanmar-rohingya-trapped-in-dehumanising-apartheid-regime/> accessed 7 August 2020.

9 UN OHCHR, 'Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council' (12 March 2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22806&LangID=E> accessed 5 August 2020.

10 Albert and Maizland (n 6).

11 ibid.

12 ibid.

13 Paul Mozur, 'A Genocide on Facebook, With Posts from Myanmar's Military' (New York Times, 15 October 2018) <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> accessed 6 August 2020.

14 UNHRC, 'Report of the Independent International Fact-Finding Mission on Myanmar' UN Doc A/HRC/39/64 (27 August 2018) [36]; See Medecins Sans Frontieres, '"No one was left": Death and Violence Against the Rohingya in Rakhine State, Myanmar' (March 2018) <https://www.msf.org/sites/msf.org/files/msf_death_and_violence_report-2018.pdf> accessed 14 August 2020.

15 Wa Lone et al., 'Massacre in Myanmar' *Reuters* (*Reuters*, 8 February 2018) <https://www.reuters.com/investigates/special-report/myanmar-rakhine-events/> accessed 14 August 2020.

16 UNHRC, 'Report of the Special Rapporteur on the situation of human rights in Myanmar', UN Doc A/HRC/34/67 (14 March 2017).

17 Poppy Elena McPherson and Ruma Paul, 'Myanmar army chief must be prosecuted for Rohingya genocide: UN rights envoy' (*R*euters, 25 January 2019) <https://www.reuters.com/article/us-myanmar-rohingya-un/myanmar-army-chief-must-be-prosecuted-for-rohingya-genocide-u-n-rights-envoy-idUSKCN1PJ1AK> accessed 2 August 2020.

Report of the UN Fact Finding Mission (FFM), a history of oppression and denial of rights had forced 740,000 Rohingya to flee the country and the 600,000 that remained, faced a serious risk of recurrence of genocidal actions.[18] An undeniable two-fold threat confronted the Rohingya population, one to their physical safety and the other to their cultural existence.

B. The request for provisional measures

The Gambia, a self-described "small country with a big voice on human rights"[19] filed a case[20] against Myanmar on the alleged breaches of the Genocide Convention, pursuant to Articles 36(1) and 40 of the Statute of the Court[21] and Article 38 of the Rules of the Court.[22] At the heart of the proceedings was The Gambia's Request for indication of provisional measures – a litmus test for international law – aimed at the cessation of atrocities targeted towards the Rohingya and the preservation of evidence for future accountability.[23]

The Gambia filed its Request for the indication of provisional measures[24] pursuant to Article 41 of the Statute of the Court[25] and Articles 73, 74 and 75 of the Rules of the Court.[26] In its Application, The Gambia described a brutal campaign involving "[d]ecades of gradual marginalisation and eroding of rights, resulting in a State-sanctioned and institutionalised system of oppression affecting the lives of Rohingya from birth to death".[27] In light of the ongoing severe and irreparable harm suffered by members of the Rohingya group, The Gambia was categorical in stating that the continuing situation in Myanmar not only requires, but compels the indication of provisional measures under Article 41(1) of the Statute of the Court as a matter of extreme urgency.[28] The Gambia reminded the Court that

18 UNHRC (2019) (n 3).

19 Owen Bowcott, 'Gambia files Rohingya genocide case against Myanmar at UN court' (*The Guardian*, 11 November 2019) <https://www.theguardian.com/world/2019/nov/11/gambia-rohingya-genocide-myanmar-un-court> accessed 15 August 2020.

20 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Application Instituting Proceedings and Request for Provisional Measures) General List No 178. <https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf> accessed 14 August 2020.

21 Statute of the International Court of Justice, Art 36(1) and 40.

22 Rules of Court 1978, Art 38.

23 *The Gambia* (n 20) [132].

24 ibid.

25 Statute of the International Court of Justice, Art 41.

26 Rules of Court 1978, Art 73–75.

27 UNHRC (2018) (n 14) [20].

28 *The Gambia* (n 20) [113].

acts of genocide are part of a continuum, as recognised by Raphaël Lemkin in his pioneering work,[29] and therefore the intervention of the Court does not have to await the final moment, "when there is already something to apologise for; the failure to act, and the resulting catastrophe that might have been prevented".[30]

Provisional measures, much like injunctions in a domestic case, are ordered to safeguard the relevant, plausible rights of the parties that risk being extinguished before the Court determines the merits of the case.[31] Therefore, for the purposes of The Gambia's Request for indication of provisional measures, the Court was not called upon to establish the existence of breaches of the Convention imputable to a party, but to determine to its satisfaction, the existence of a plausible threat of genocide to the Rohingya.[32] In its Application, The Gambia asked the Court to order Myanmar "to do what it is already obligated to do under the Genocide Convention, but has refused to do and cannot be counted upon to do without the Court's intervention."[33] To achieve this The Gambia requested six provisional measures on "genocide-related activity"[34] – the first and the second mandate Myanmar to act with immediate effect to prevent further genocide, the third is aimed at the preservation of evidence in order to ensure the integrity of the Court's proceedings, the fourth and the fifth require Myanmar to provide periodic reports on implementing measures and the sixth instructs Myanmar to cooperate with the UN agencies in preventing and reporting genocide.[35]

III. The Order

The Genocide Convention[36] is often considered the first modern treaty protecting human rights[37] and was adopted in the aftermath of the Holocaust on 9 December 1948. The ICJ is the ultimate guardian of the Genocide

[29] Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (2nd edn, The Lawbook Exchange 2005) 79–94.

[30] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Verbatim Record 2019/18) General List No 178 62 [28] <https://www.icj-cij.org/files/case-related/178/178-20191210-ORA-01-00-BI.pdf> accessed 15 August 2020.

[31] *LaGrand* (*Germany v United States of America*) (Judgment) [2001] ICJ Rep 466 [102].

[32] *The Gambia* (n 1) [43], [44].

[33] *The Gambia* (n 30) 63 [32].

[34] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Separate Opinion of Judge Lauterpacht) [1993] 433 [73]. See *The Gambia* (n 30) 66 [6] for The Gambia's usage of the term "genocide related activity" in its pleadings.

[35] *The Gambia* (n 30) 66–72.

[36] Genocide Convention 1951.

[37] See UN Office on Genocide Prevention and Responsibility to Protect, 'The Convention on Prevention and Punishment of the Crime of Genocide' <https://www.un.org/en/genocideprevention/genocide-convention.shtml> (accessed 2 August 2020).

Convention with the duty to prevent and punish the crime of genocide. The ICJ has declared that genocide "shocks the conscience of mankind" and results in "great losses to humanity".[38] However, history has shown that genocide as a crime is notoriously difficult to prove given the high evidentiary requirements set for establishing genocidal intent. In its long history, the Court's Orders on provisional measures have been rather scarce and it has successfully held a country guilty of genocide only once before, in the case of Bosnia and Herzegovina v Serbia and Montenegro,[39] wherein, almost all allegations of genocide were found unproven, barring the genocide in Srebrenica on 11 July 1995. A mere preponderance of probability is insufficient; the evidence to establish genocidal intent must be fully conclusive and may take several years to present and substantiate beyond reasonable doubt.[40] Therefore, pending the final disposal of the case, an order on provisional measures is often the only safeguard standing between life and death for millions of persecuted minorities.

Through its landmark ruling the ICJ recognised the indispensability of provisional measures to prevent genocide by ordering a country to cease all genocidal actions until the final disposal of the case. The ICJ overcame its decadal hesitation about authorising provisional measures and not only granted them, but actively expanded upon its existing jurisprudence to humanise the legal prerequisites and relax the legal thresholds for indicating provisional measures. In an hour-long reading of the landmark verdict in open court, ICJ's 15-member bench, presided upon by Judge Yusuf Abdulqawi, concluded, "[t]he court is of the opinion that the Rohingya in Myanmar remain extremely vulnerable [to genocidal actions]".[41] The Court granted four of the six provisional measures requested by The Gambia.[42] The first two provisional measures granted are de facto restatements of State responsibility under the Genocide Convention that order Myanmar to "take all measures within its power" in relation to the members of the Rohingya population within its territory, to prevent commission of acts within the scope of Article II of the Genocide Convention, including killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about the group's destruction.[43] The Court went so far as to instruct Myanmar to ensure that any irregular armed units or organisations subject to its control do

[38] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Order of 13 September 1993) [1993] ICJ Rep 325 [51].

[39] ibid.

[40] Andrew Gattini, 'Evidentiary Issues in the ICJ's *Genocide* Judgment' [2007] J Int Crim 889.

[41] *The Gambia* (n 1) [72].

[42] ibid [86].

[43] ibid.

not conspire to commit genocide or incite commission of genocide.[44] The third provisional measure requires Myanmar to ensure the preservation of evidence related to allegations of acts within the scope of the Genocide Convention and the fourth imposes an obligation on Myanmar to submit periodic reports on implementational measures.[45]

IV. Analysis

A request for the indication of provisional measures is examined on the touchstone of three legal prerequisites: (1) first, the Court must be satisfied of its prima facie jurisdiction over the dispute including the question of the Applicant's standing (2) second, the rights whose protection is sought must be at least plausible,[46] meaning that there is a chance that the Court will eventually find a violation on the merits and there must exist a link between such rights and the measures requested and third, (3) there must be a showing of risk of irreparable prejudice before the Court delivers its final decision and of the resulting urgency.[47] An analysis of the ICJ's stand on the aforementioned legal prerequisites, in this case, reflects its proactive and evolving approach to enforcing State responsibility in the face of atrocity crimes.

A. Prima facie jurisdiction over the dispute and the question of the Gambia's Standing

The ICJ may indicate provisional measures only if the acts complained of are prima facie capable of falling within the provisions of the Genocide Convention such that "the dispute is one which the Court could have jurisdiction ratione materiae to entertain."[48] Therefore, the first step in establishing prima facie jurisdiction of the ICJ, is to determine the existence of a dispute under the meaning of the Genocide Convention and the Statute of the Court. The existence of a dispute is a matter for objective determination[49] and is defined as "a dispute between States where they hold clearly opposite views concerning the question of performance or non-performance of certain international obligations", and where

[44] ibid.

[45] ibid.

[46] See *Immunities and Criminal Proceedings* (*Equatorial Guinea v France*) (Provisional Measures, Order of 7 December 2016) [2016] ICJ Rep 1165 [71].

[47] See *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*) (Order of 8 March 2011) [2011] ICJ Rep 6.

[48] *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Islamic Republic of Iran v United States of America*) (Provisional Measures, Order of 3 October 2018) [2018] ICJ Rep 623 [30].

[49] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v Russian Federation*) (Judgment of 1 April 2011) [2011] ICJ Rep 70 [30].

"[t]he claim of one party [is] 'positively opposed' by the other".[50] The Gambia and Myanmar are UN Member States and are therefore bound by the jurisdiction of the ICJ under Article 36(1) of the Statute of the Court.[51] Being parties to the Genocide Convention, the two nations are also subject to Article IX of the Convention[52] which accords jurisdiction to the ICJ in case of a dispute between Contracting Parties relating to the interpretation, application or fulfilment of the Genocide Convention.

In its decision, the ICJ adopted a novel formula for the determination of the existence of a dispute and relaxed its threshold[53] by taking cognisance of numerous documents and statements exchanged between parties in the UNGA and other multilateral fora to suggest the existence of divergent views.[54] These included the UN FFM reports that recounted instances of widespread rape and sexual assault[55] as well as Resolutions by the Organisation of Islamic Cooperation (OIC),[56] of which The Gambia is a member, and statements by The Gambia in the UN General Assembly[57] condemning Myanmar for its alleged acts of genocide. The threshold for the ICJ to accept statements made in the context of international fora is rather high, consequently, the Court has rarely ever considered exchanges between parties in such fora to determine the existence of a dispute. In doing so, the ICJ generally attaches special importance to the author of the document, their intended or actual addressee and its content, as it did in Marshall Islands v India.[58] In this regard, the Court has held that "a statement can give rise to a dispute only if it refers to the subject-matter of a claim with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with

[50] *Iran* (n 48) [28].

[51] Statute of the International Court of Justice, Art 36(1).

[52] Genocide Convention 1951, Art IX.

[53] *The Gambia* (n 1) [27].

[54] See *Belgium Questions relating to the Obligations to Prosecute or Extradite* (*Belgium v Senegal*) (Judgment of 20 July 2012) [2012] ICJ Rep 422, 443–445 and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v Russian Federation*) (Judgement of 1 April 2011) [2011] ICJ Rep 70 [51], [53].

[55] UNHRC, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar' UN DOC A/HRC/39/CRP.2 (17 September 2018) [458]–[748].

[56] See OIC, 'Resolution No. 4/46-MM on the Situation of the Muslim Community in Myanmar' OIC DOC OIC/CFM-46/2019/MM/RES/FINAL (2 March 2019) [11(a)]; OIC, 'Final Communiqué of the 14th Islamic Summit Conference' OIC DOC OIC/SUM-14/2019/FC/FINAL (31 May 2019) [47].

[57] UNGA Official Records, 74th Session, 8th Plenary Meeting, UN DOC. A/74/PV.8 (26 September 2019) [31].

[58] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v India*) Jurisdiction and Admissibility (Judgement) [2016] ICJ Rep 255.

regard to that subject matter".[59] The existence of a dispute must be determined by an examination of facts as a matter "of substance, not form" and "may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for".[60] It is interesting to note that the ICJ applied this consideration to Myanmar's failure to respond to The Gambia's Note Verbale[61] transmitted to Myanmar's Permanent Mission to the UN on 11 October 2019, through which The Gambia's had voiced its concerns over Myanmar's ongoing breach of its obligations under the Genocide Convention and customary international law. The ICJ, while establishing prima facie existence of a dispute, noted that "the Court considers that the lack of response may be another indication of the existence of a dispute between the Parties"[62]

The last step in establishing the ICJ's prima facie jurisdiction is the ascertainment of The Gambia's standing before the Court. As mentioned earlier The Gambia v Myanmar is the first instance in the Court's history where a non-injured State filed a case alleging genocide against a non-contiguous and non-warring nation, solely on the basis of their shared values as State parties to the Genocide Convention, in a bid to enforce the mutual obligation that the authors of acts of genocide do not enjoy impunity.[63] The Gambia, in not claiming the status of an "injured state", presented the ICJ with the curious question of deciding its standing in the court of law. The ICJ drew support from its observations in Belgium v Senegal,[64] wherein, the Court had accepted the admissibility of claims brought by the Applicant on the basis of the erga omnes nature of obligations enshrined in the Convention against Torture[65] and had categorically observed that the relevant provisions in the Convention against Torture were "similar" to those in the Genocide Convention.[66] Although, Vice-President Xue states in his separate opinion that, "[t]his interpretation of the Convention against Torture, in my view, drifts away from the rules of treaty law" [67], he interestingly agrees[68] with

[59] ibid [46].
[60] *Georgia* (n 54) [30].
[61] *The Gambia* (n 1) [28].
[62] *The Gambia* (n 20) [21].
[63] *The Gambia* (n 1) [41].
[64] *Belgium Questions relating to the Obligations to Prosecute or Extradite* (*Belgium v Senegal*) (Judgement of 20 July 2012) [2012] ICJ Rep 422.
[65] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987.
[66] *Belgium* (n 69) 449 [68].
[67] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Separate Opinion of Vice-President Xue) General List No 178 [5] <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-01-EN.pdf> accessed 14 August 2020.
[68] ibid [8].

the refreshing position taken by the Court, which challenges and expands upon Article 48 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts[69] and therefore leads to a novel approach to enforcing State responsibility in the face of atrocity crimes.

The ICJ allayed Myanmar's apprehensions as to the circumvention of Article 34 of the Statute of the Court,[70] by holding that, The Gambia instituted proceedings in its own name as mandated by Article 34 and may, in its sovereign capacity, obtain support from other States or international organisations such as the OIC, since this does not amount to a circumvention of Article 34. Lastly, the ICJ also clarified that Myanmar's reservation to Article VIII of the Genocide Convention[71] does not bar the jurisdiction of the ICJ under Article IX[72] of the Convention.[73] Strikingly, the ICJ was explicit in its interpretation of the terms "competent organs of the United Nations" under Article VIII[74], wherein, the Court declared that the said terms are not broad enough so as to encompasses the Court within their scope of application. By answering the aforementioned questions of law the ICJ not only provides a reasoned Order on the issue of prima facie jurisdiction of the Court, but takes meaningful strides towards laying the groundwork for the consolidation of an autonomous legal regime of provisional measures.

B. Plausibility of rights whose protection is sought and the link between such rights and the provisional measures requested

The ICJ's orders on provisional measures play a more restorative than retributive role to "humanise the law of nations, in the dehumanised world of our days"[75] and in doing so the Court need not establish definitively the existence of fundamental rights; it is sufficient that such rights are plausible, that is, "grounded in a possible interpretation of the Convention."[76] The plausibility of rights is judged by establishing a link between the rights claimed[77] by the Applicant and

69 International Law Commission Articles on State Responsibility 2001, Art 48.
70 Statute of the Court, Art 34.
71 Genocide Convention, Art VIII.
72 ibid Art IX.
73 *The Gambia* (n 1) [36].
74 Genocide Convention, Art VIII.
75 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Provisional Measures, Order of 23 July 2018) [2018] ICJ Rep 406 [28].
76 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Provisional Measures, Order of 28 May 2009) [2009] ICJ Rep 139 [60].
77 Giorgio Gaja, 'Obligations and Rights Erga Omnes in International Law' (2005) 71(1) International Law Institute Yearbook Krakow Session 135.

the rights in dispute before the judge.[78] The Gambia sought to protect the rights of "all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Genocide Convention"[79] – the rights claimed – and deduced specific genocidal intent (dolus specialis) from the systemic oppression and persecution of the Rohingya in Myanmar, "including denial of their legal status and citizenship … followed [by] the instigation of hatred … on racial or religious grounds"[80] – the rights in dispute before the judge. Whereas, Myanmar contented that genocidal intent is not the only plausible inference that may be drawn from the evidence adduced before the Court.[81]

The plausibility of rights, more so in this case, is closely linked with the issue of standing. The Gambia's characterisation of the rights, the determination of whose violation is sought, is not essentially of a bilateral nature. Rightfully so, The Gambia appealed to the erga omnes nature of the provisions of the Genocide Convention it seeks to invoke and the Court obliged. In Bosnia and Herzegovina v Serbia and Montenegro[82] the ICJ had recognised the prohibition of genocide as a peremptory norm of international law (jus cogens) while noting that norms of jus cogens affirm the highest principles of international law. In its Order, the ICJ reaffirmed that the erga omnes partes rights mirror the erga omnes obligations enshrined in the Genocide Convention. The rights and obligations enshrined by the Convention are erga omnes[83] therefore, all 152 State parties to the Genocide Convention enjoy a legal interest in preventing and punishing acts of genocide.

The Gambia's case takes the concept of erga omnes partes to its logical extreme. Vice-President Xue expresses his "serious" reservations with regard to the supposedly low standard of plausibility applied by the Court, in his separate opinion.[84] Vice-President Xue seems to echo the argument put forth by Myanmar when he writes, "[t]he evidence and documents submitted to the Court in the present case, while displaying an appalling situation of human rights violations,

[78] See *Continental Shelf of the Aegean* (*Greece v Turkey*) (Provisional Measures, Order of 11 September 1976) [1976] ICJ Rep 3 [25].

[79] *The Gambia* (n 20) [126].

[80] UNHRC (2018) (n 55).

[81] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Verbatim Record 2019/19) General List No 178 28 [22] <https://www.icj-cij.org/files/case-related/178/178-20191211-ORA-01-00-BI.pdf> accessed 18 August 2020.

[82] *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) [2007] ICJ Rep 43 [161].

[83] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v Serbia*) (Judgment of 3 February 2015) [2015] ICJ Rep 3 [87].

[84] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Separate Opinion of Vice-President Xue) General List No 178 [2] <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-01-EN.pdf> accessed 16 August 2020.

present a case of a protracted problem of ill-treatment of ethnic minorities in Myanmar rather than of genocide".[85] In stark contrast, Judge ad hoc Kress opines, "I have come to the conclusion that the materials provided by The Gambia so far are sufficient to enable the Court to conclude that the plausibility test was met with respect to the question of genocidal intent".[86] Judge Kress proceeds to hold that, "the exceptional gravity of violations alleged does not justify the application of a stringent standard of plausibility as a prerequisite for the indication of provisional measures".[87] This dichotomy in opinions is perhaps best reconciled by The Gambia in its oral pleadings, when Mr. Reichler, Agent for The Gambia, puts it rather succinctly, "[p]lausibility is not a zero-sum game … [t]he plausibility of one explanation does not exclude the plausibility of another".[88] That is to say, "protracted problem of ill-treatment of ethnic minorities"[89] may be a constitutive of genocide and does not bar the possibility of genocide itself.

In its Order, the ICJ substantiated the appropriateness of the provisional measures requested, by citing emblematic instances of oppression referenced in UN FFM reports. These included the instances of extreme violence perpetrated against the Rohingya, the denial of legal status, identity and citizenship and the instigation of hatred on ethnic, racial and religious grounds.[90] The Court found that Myanmar's lack of accountability and public condemnation[91] of crimes of genocide and its deliberate attempt to destroy evidence of wrongdoing to cover up the crimes such as the "mass demolition and terrain clearance throughout northern Rakhine State",[92] warrant the indication of the majority of provisional measures requested.

C. Risk of irreparable prejudice and urgency

The ICJ has the power to indicate provisional measures "if there is an urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused",[93] pending the final disposal of the case. Also, "the condition of

85 ibid [3].

86 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Separate Opinion of Judge *ad hoc* Kress) General List No 178 [5] <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-03-EN.pdf> accessed 17 August 2020.

87 Ibid [6].

88 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Verbatim Record 2019/20) General List No 178 32 [7] <https://www.icj-cij.org/files/case-related/178/178-20191212-ORA-01-00-BI.pdf> accessed 16 August 2020.

89 *The Gambia* (n 84).

90 *The Gambia* (n 1) [55].

91 UNHRC (2019) (n 3) [224].

92 UNHRC (2018) (n 55) [1000]–[1003].

93 *Iran* (n 48) [78].

urgency is met when the acts susceptible of causing irreparable prejudice can 'occur at any moment' before the Court makes a final decision".[94] The burden to show the risk of irreparable prejudice and urgency falls on the Applicant. The Gambia's extensive reliance on UN reports, including reports from the UN Special Rapporteur on the human rights situation in Myanmar,[95] UN Special Advisor on the Prevention of Genocide[96] and the Independent International FFM on Myanmar,[97] coupled with the absence of prior international criminal findings posed a novel challenge to the ICJ with regard to its legal threshold for determining the reliability of reports. More so, since Myanmar challenged the credibility and impartiality of all of the aforementioned reports.

When asked to rely on third-party findings of fact, the ICJ has almost always shown a greater willingness to attach due importance to findings generated through and tested in court-like, adversarial settings, unlike the ones presented in Court by The Gambia. For example, in DRC v Uganda, the ICJ indicated its willingness to give "special attention" to "evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information".[98] The ICJ reinforced this approach in Bosnia and Herzegovina v Serbia and Montenegro, by expressing its readiness to accept factual findings made at the International Criminal Tribunal for the Former Yugoslavia.[99] Nonetheless, there have been some remarkable exceptions to this, otherwise stringent, legal standard. Such as in Croatia v Serbia, where the Court laid emphasis on the UN Special Rapporteur report for carrying "evidential weight" due to "the independent status of its author" and because it was "prepared at the request of organs of the United Nations, for the purposes of the exercise of its functions".[100]

Building upon such exceptions, in the present case, the ICJ relied extensively on the UN reports cited by The Gambia to illustrate the steps that reflect Myanmar's "continuing intention to destroy the Rohingya as a group".[101] The Gambia drew the attention of the Court to the internment camps that confine 20 per cent of Myanmar's Rohingya population[102] in addition to a State policy of severe restrictions on movement, forced starvation, denial of healthcare and

94 ibid.
95 *The Gambia* (n 20) [7].
96 ibid [9].
97 ibid [10].
98 *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (Judgement of 19 December 2005) [2005] ICJ Rep 168 [61].
99 *Bosnia* (n 82) [214].
100 *Croatia* (n 83) [189]–[191].
101 *The Gambia* (n 21) 37 [4].
102 ibid 37 [5].

education "designed to make life in northern Rakhine unsustainable for [the 600,000] Rohingya who remain [there]".[103] The UN FFM reports highlighted the verifiable patterns of violence bearing the hallmarks of genocide, which show that the Rohingya were raped and killed en masse.[104] The ICJ's ruling is progressive in proactively identifying widespread sexual violence as a constitutive of genocide. Rape as an instrument of genocide was first recognised in the Akayesu ruling in 1998[105] but has since been rarely cited as an incriminating indicator of genocidal intent. The presentation of chilling accounts of brutal sexual violence perpetrated against women, girls, men, boys and transgender individuals by the Tatmadaw was central to convincing the Court of the plausibility of rights and the urgency of the measures requested.

Lastly, the ruling left an indelible humanising impact which may be inferred from the unique standard of proof propounded by Judge Cançado Trindade in his separate opinion. According to Judge Cançado, the human vulnerability rather than the plausibility test as laid out in positivist jus gentium, should be the prerequisite to indicate provisional measures.[106] The human vulnerability consideration will have a ripple effect on the ICJ's future rulings since it originates from the promise of extending protection to the fundamental rights of persons in situations of extreme vulnerability that remains at the core of the Convention. The ICJ paid heed to the UN Mission's concluding remarks on the human rights situation in Myanmar, "the State continues to harbour genocidal intent"[107] and consequentially "the Rohingya people remain at a serious risk of genocide under the terms of the Convention".[108] Through its ruling, without pre-judging the merits of the case, the ICJ successfully developed a sophisticated approach to understanding genocide as a continuum rather than an event. This new-found understanding of one of the gravest

[103] UN OHCHR, 'Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council' (12 March 2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22806&LangID=E> accessed 7 August 2020.

[104] UNHRC (2018) (n 14) [36]–[39].

[105] *The Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T, Trial Chamber 1 (2 September 1998).

[106] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (Separate Opinion of Judge Cançado Trindade) General List No 178 [72] <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-02-EN.pdf> accessed 4 August 2020.

[107] UNHRC (2019) (n 3) [238].

[108] ibid [242].

international crimes to have plagued mankind will have profound and everlasting effects on ICJ's current jurisprudence and subsequent judgements.

IV. Conclusion

The Gambia's initiative and the ICJ's response signals the end of impunity. While Myanmar's unwillingness to utter the word "Rohingya" during the course of the proceedings, is a circle that is never likely to be squared, it is noteworthy that Myanmar's previous denials of wrongdoing in the "clearance operations" transformed into selective admissions of use of excessive force. Although, pursuant to Article 94 of the UN Charter[109] and the LaGrand case,[110] orders on provisional measures under Article 41[111] are binding on Myanmar, the lives of the Rohingya depend solely on State cooperation and a calibrated UN response helmed by the ICJ.

[109] Charter of the United Nations 1945, Art 94.
[110] *LaGrand* (*Germany v United States of America*) (Judgement) [2001] ICJ Rep 506 [109].
[111] Statute of the International Court of Justice, Art 41.