

CASE NOTE

**THE PLIGHT OF THE ROHINGYA:  
GENOCIDE ALLEGATIONS AND PROVISIONAL MEASURES IN *THE GAMBIA V  
MYANMAR* AT THE INTERNATIONAL COURT OF JUSTICE**

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*On 23 January 2020, the International Court of Justice indicated provisional measures against Myanmar in the case brought by The Gambia under the 1948 Genocide Convention. This case marks the first time that a non-injured state has brought an action at the ICJ under the Genocide Convention. The Court's provisional measures order recognized the vulnerability of the Rohingya minority in Myanmar and directed Myanmar to take 'all measures within its power' to prevent the commission of genocidal acts against the Rohingya, as well as 'effective measures' to prevent the destruction of evidence. The Court's tentative finding that the Rohingya people are a protected group under the Genocide Convention and that their precarious situation in Myanmar demanded protection was significant. However, the decision did little to clarify the Court's evolving approach to 'plausibility' in the provisional measures context, and the Court declined the opportunity to grant relief that might have gone further towards protecting the rights at issue.*

I. INTRODUCTION

In December 2019 the International Court of Justice ('ICJ') heard arguments on The Gambia's request for the indication of provisional measures in its case against Myanmar under the 1948 Genocide Convention.<sup>1</sup> Appearing before the Court as Myanmar's agent, Nobel Peace Prize laureate and State Counsellor Aung San Suu Kyi sat silently as The Gambia's legal team made the case for interim protection and described the atrocities alleged to have been exacted upon the Rohingya minority in Myanmar, including murder, rape, and torture.<sup>2</sup> Madame Suu Kyi's address to the Court on the second day of the hearing was no less remarkable, as she attempted to defend her government against allegations that many considered indefensible. She pointedly did not use the term 'Rohingya' in her remarks (except for two references to the Arakan Rohingya Salvation Army ('ARSA')) and urged the

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<sup>1</sup> Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('Genocide Convention').

<sup>2</sup> *Application of the Convention on the Prevention of the Crime of Genocide (The Gambia v Myanmar)* (International Court of Justice, General List No 178) (Hearing on Request for Provisional Measures) CR 2019/18, 22-28 [9]-[26]; 28-35 [1]-[30].

Court to resist the effort to ‘externalize accountability’.<sup>3</sup> On 23 January 2020, the Court unanimously indicated provisional measures against Myanmar.<sup>4</sup>

This note examines the Order of 23 January 2020 and its broader significance for this case and ICJ practice. Part II describes the situation of the Rohingya in Myanmar and The Gambia’s decision to bring the case. Part III summarizes the Court’s application of the test for the indication of provisional measures. Part IV evaluates the significance of the decision and identifies some of its shortcomings. Part V turns briefly to the challenges that lie ahead for The Gambia and the Rohingya in light of what the Court has decided—and not decided—at the provisional measures phase.

## II. BACKGROUND

The Rohingya are an ethnic Muslim minority in Rakhine State, a coastal province in western Myanmar bordering Bangladesh to the northwest.<sup>5</sup> Successive governments in Myanmar, a Buddhist-majority country, have refused to recognize the Rohingya as an official ethnic group,<sup>6</sup> and a 1982 law deprived the Rohingya of citizenship and other basic rights.<sup>7</sup> Even within Rakhine State, the Rohingya are a minority; the local population is mainly ethnic Rakhine (and embroiled in its own conflict with the central government).<sup>8</sup> The Rohingya in Myanmar have faced decades of systemic discrimination and oppression marked by occasional episodes of state-sanctioned and inter-communal violence.<sup>9</sup> Hate speech against

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<sup>3</sup> Ibid, CR 2019/19, 17 [24]. Observers saw the government’s refusal to use the term ‘Rohingya’ as part of long-standing efforts to dehumanise the group. See UN Human Rights Council, ‘Report of the Independent International Fact-Finding Mission on Myanmar’ (12 September 2018), UN Doc A/HRC/39/64, 14 [73]; Center for Global Policy, Rohingya Legal Forum, ‘No Place For Optimism: Anticipating Myanmar’s First Report to the International Court of Justice’ (May 2020) 4-5, <https://cgpolicy.org/wp-content/uploads/2020/05/CGP-Myanmar-Rohingya-May-2020.pdf>.

<sup>4</sup> *Application of the Convention on the Prevention of the Crime of Genocide (The Gambia v Myanmar)* (Order on Provisional Measures) (International Court of Justice, General List No 178, 23 January 2020).

<sup>5</sup> The history of the Rohingya in Myanmar is contested. For a robust response to the official government position that the Rohingya (referred to as ‘Bengalis’) are illegal immigrants from Bangladesh, see Maung Zarni & Alice Cowley, ‘The Slow-Burning Genocide of Myanmar’s Rohingya’ (2014) 23 *Pacific Rim Law & Policy Journal* 681, 689-95.

<sup>6</sup> Myanmar formally recognizes 135 ethnic groups. Eleanor Albert & Lindsay Maizland, ‘The Rohingya Crisis’ (Council on Foreign Relations, 23 January 2020), <https://www.cfr.org/backgrounder/rohingya-crisis>.

<sup>7</sup> Burma Citizenship Law, 15 October 1982, <http://www.refworld.org/docid/3ae6b4f71b.html>. See also Katherine Southwick, ‘Preventing Mass Atrocities Against the Stateless Rohingya in Myanmar: A Call for Solutions’ (2015) 68 *Journal of International Affairs* 137, 138; Zarni & Cowley, above n 5, 699-702. The 1982 law is said to have left the Rohingya ‘stateless’. Albert & Maizland, above n 6.

<sup>8</sup> UN Human Rights Council, ‘Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar (17 September 2018), UN Doc A/HRC/39/CRP.2 (‘FFM 2018 Detailed Findings’), 100 [405].

<sup>9</sup> Ibid 111-158 [458]-[663]. See also Southwick, above n 7, 139; Zarni & Cowley, above n 5, 703-720.

the Rohingya is well-documented.<sup>10</sup> UN Secretary-General António Guterres has described the Rohingya as one of the most discriminated against people in the world.<sup>11</sup>

Violence against the Rohingya in 2016 and 2017 provided the immediate predicate for the ICJ case.<sup>12</sup> As described by the Independent Impartial Fact-Finding Mission for Myanmar (the 'FFM'),<sup>13</sup> ARSA, an insurgent group, carried out three co-ordinated attacks on security posts in Rakhine State in October 2016 using 'sticks, knives, and a few firearms'.<sup>14</sup> Myanmar's military (the 'Tatmadaw') and other security forces responded with 'clearance operations' (the term used by Myanmar), which the FFM described as having involved 'serious human rights violations, including torture, rape and sexual assault, killings, and the destruction of homes and mosques'.<sup>15</sup> These events repeated themselves in August 2017 on a more horrific scale. On 25 August 2017, ARSA carried out another set of co-ordinated attacks, this time targeting up to 30 outposts across northern Rakhine State and causing twelve fatalities.<sup>16</sup> According to the FFM, the military response 'was immediate, within hours, brutal and grossly disproportionate'.<sup>17</sup> A new round of 'clearance operations' targeted hundreds of villages over the next two months.<sup>18</sup> This again involved mass killings, torture, rape and sexual assault, and the destruction of homes and property; more than 725,000 Rohingya people fled to Bangladesh by the end of September 2018.<sup>19</sup> The FFM called the military campaign 'a human rights catastrophe' and 'horrendous in scope'.<sup>20</sup> It concluded that up to 10,000 deaths had occurred and that genocidal intent (i.e., the intent to bring about the physical destruction of the Rohingya group in whole or in part) could be inferred from the actions of the Tatmadaw and government authorities.<sup>21</sup>

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<sup>10</sup> FFM 2018 Detailed Findings, above n 8, 321-346 [1302]-[1360]. See also Hannah Beech, 'Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya', *New York Times* (24 October 2017), <https://www.nytimes.com/2017/10/24/world/asia/myanmar-rohingya-ethnic-cleansing.html>; Penny Green, Thomas MacManus & Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar* (International State Crime Initiative 2015) 53-66, <http://statecrime.org/data/2015/10/ISCI-Rohingya-Report-PUBLISHED-VERSION.pdf>.

<sup>11</sup> Transcript of Secretary-General's remarks at press encounter with President of the World Bank, Jim Yong Kim (Cox's Bazar, Bangladesh, 2 July 2018), <https://www.un.org/sg/en/content/sg/press-encounter/2018-07-02/transcript-secretary-general%E2%80%99s-remarks-press-encounter>.

<sup>12</sup> 'Application Instituting Proceedings and Request for Provisional Measures', *Application of the Convention on the Prevention of the Crime of Genocide (The Gambia v Myanmar)* (International Court of Justice, General List No 178) 2-3 [6].

<sup>13</sup> The UN Human Rights Council established the FFM on 24 March 2017. UN Human Rights Council Resolution 34/22 of 24 March 2017, UN HRC 34<sup>th</sup> sess, UN Doc A/HRC/RES/34/22, [11].

<sup>14</sup> FFM 2018 Detailed Findings, above n 8, 243 [1009]-[1028], 248 [1036]-[1037]. ARSA emerged following a previous period of state-sanctioned violence against the Rohingya in 2012. *Ibid.*

<sup>15</sup> *Ibid* 256-60 [1069]-[1095].

<sup>16</sup> *Ibid* 180 [750].

<sup>17</sup> *Ibid* 180 [751].

<sup>18</sup> *Ibid.* Madame Suu Kyi asserted that the term 'clearance operations' had been 'distorted' and meant only 'to clear an area of insurgents or terrorists'. *The Gambia v Myanmar*, Hearing on Request for Provisional Measures, above n 2, CR 2019/19, 15 [12].

<sup>19</sup> FFM 2018 Detailed Findings, above n 8, 180 [751].

<sup>20</sup> *Ibid* 207 [883], 365 [1439]. For a detailed account, see *ibid* 180-242 [754]-[1004].

<sup>21</sup> *Ibid* 243 [1008], 366 [1441].

Acting with the support of the 57-member state Organisation of Islamic Cooperation ('OIC'), The Gambia, a small West African state, instituted proceedings against Myanmar at the ICJ on 11 November 2019.<sup>22</sup> The Application alleged that Myanmar's treatment of the Rohingya constituted violations of the 1948 Genocide Convention and sought various types of relief, including reparative action by Myanmar to allow for 'the safe and dignified return of forcibly displaced Rohingya and respect for their full citizenship and human rights'.<sup>23</sup> The Gambia simultaneously requested the indication of provisional measures aimed at preventing Myanmar from breaching its obligations under the Genocide Convention while the case was pending.<sup>24</sup> Three previous ICJ cases had involved alleged violations of the Genocide Convention, but this marked the first time that a non-injured state—that is, a state that did not assert a specific injury or special interest beyond being a party to the Convention—had brought such a case.<sup>25</sup>

### III. SUMMARY OF THE PROVISIONAL MEASURES ORDER

The Gambia asked the Court, pursuant to Article 41 of its Statute, to require Myanmar to take all measures within its power to prevent acts of genocide against the Rohingya group, to preserve evidence relating to the events alleged in the Application, to refrain from any action that might aggravate or extend the dispute, and to grant access and cooperation to UN fact-finding bodies investigating alleged genocidal acts against the Rohingya.<sup>26</sup> The Gambia further asked the Court to require each party to report back within four months on actions taken to comply with any such provisional measures.<sup>27</sup> In its order, the Court granted some, but not all, of the relief requested.

#### A. Prima facie jurisdiction

The Court began with prima facie jurisdiction. It noted that both states were parties to the Genocide Convention and that its jurisdiction was based on Article IX, to which neither

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<sup>22</sup> In May 2019, the OIC 'urged upon the ad hoc Ministerial Committee led by the Gambia to take immediate measures to launch the case at the International Court of Justice on behalf of the OIC'. Final Communiqué of the 14<sup>th</sup> Islamic Summit Conference held at Makkah al-Mukarramah, Saudi Arabia (31 May 2019), 11 [47], <https://www.oic-oci.org/docdown/?docID=4496&refID=1251>.

<sup>23</sup> *The Gambia v Myanmar*, Order, above n 4, [1]-[2]. The Gambia's decision to bring the case was widely attributed to then-Justice Minister Abubacarr Tambadou, a former prosecutor at the International Criminal Tribunal for Rwanda. See 'Rohingya Crisis: The Gambian Who Took Aung San Suu Kyi to the World Court', *BBC News* (23 January 2020), <https://www.bbc.com/news/world-africa-51183521>. Mr Tambadou resigned in June 2020 to become Registrar at the International Residual Mechanism for Criminal Tribunals. Press Release, 'UN Secretary-General Appoints Mr Abubacarr Marie Tambadou as Registrar of the Mechanism' (2 July 2020), <https://www.irmct.org/en/news/20-07-02-un-secretary-general-appoints-mr-abubacarr-marie-tambadou-registrar-mechanism>.

<sup>24</sup> *The Gambia v Myanmar*, Order, above n 4, [4]-[5].

<sup>25</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3. A third case was dismissed for lack of jurisdiction. See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6.

<sup>26</sup> *The Gambia v Myanmar*, Order, above n 4, [12].

<sup>27</sup> *Ibid.*

party had made any reservation.<sup>28</sup> However, Myanmar invoked its reservation to Article VIII as a bar to jurisdiction.<sup>29</sup>

### 1. Existence of a dispute

The Court could only exercise jurisdiction if a dispute between the parties existed when the case was filed.<sup>30</sup> This required the Court to ascertain whether a dispute between The Gambia and Myanmar relating to the 1948 Genocide Convention existed as of 11 November 2019.<sup>31</sup> Myanmar contended there was no such dispute because The Gambia had instituted proceedings as a ‘proxy’ for the OIC, not on its own behalf, and because communications relied upon by The Gambia did not amount to allegations that Myanmar had violated the Convention.<sup>32</sup> The Court gave short shrift to the ‘proxy’ argument, noting that The Gambia had duly submitted the case in its own name and that seeking or obtaining the support of other states or an international organisation did not preclude the existence of a bilateral dispute.<sup>33</sup> The Court then reviewed the evidence submitted by The Gambia on the existence of a dispute, including The Gambia’s statement at the UN General Assembly in September 2019 that it was prepared ‘to take the Rohingya issue’ to the ICJ. It also considered a Note Verbale dated 11 October 2019 by which The Gambia had informed Myanmar of its position that Myanmar was ‘in on-going breach’ of its obligations under the Genocide Convention and that it objected to Myanmar’s rejection of the findings of the FFM.<sup>34</sup> For the Court, this was sufficient, notwithstanding the fact that Myanmar had never responded to the Note Verbale; the failure to respond to allegations of such gravity could in fact be indicative of the existence of a dispute.<sup>35</sup>

### 2. Myanmar’s reservation to Article VIII

Article VIII of the Convention provides that contracting parties ‘may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide...’.<sup>36</sup> Myanmar argued that only Article VIII, not Article IX, permitted a state that was not ‘specially affected’ by the alleged violations to initiate an ICJ case; the reservation to

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<sup>28</sup> Ibid [3]. Article IX provides:

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.

Genocide Convention, above n 1, art IX.

<sup>29</sup> *The Gambia v Myanmar*, Order, above n 4, [19].

<sup>30</sup> Ibid [26].

<sup>31</sup> Ibid [20]. For critical assessments of the ‘dispute’ requirement, see Michael A Becker, ‘The Dispute That Wasn’t There: Judgments in the Nuclear Disarmament Cases at the International Court of Justice’ (2017) 6 *Cambridge International Law Journal* 4; Juliette McIntyre, ‘Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction and Admissibility before the International Court’ (2018) 19 *Melbourne Journal of International Law* 546.

<sup>32</sup> *The Gambia v Myanmar*, Order, above n 4, [23].

<sup>33</sup> Ibid [25].

<sup>34</sup> Ibid [27]-[28].

<sup>35</sup> Ibid [29].

<sup>36</sup> Genocide Convention, above n 1, art VIII.

Article VIII thus meant that it had not consented to the Court's jurisdiction in that scenario.<sup>37</sup> The Court rejected this interpretation, finding that Article VIII and Article IX have 'distinct areas of application'; the former addressed 'in general terms' how states might take action within the United Nations to enforce the treaty, but only the latter referred specifically to the submission of disputes to the Court.<sup>38</sup>

Since at least some of The Gambia's claims were 'capable of falling within the provisions of the Genocide Convention',<sup>39</sup> and considering the apparent existence of a dispute and non-applicability of Myanmar's reservation, there was prima facie jurisdiction.<sup>40</sup>

## B. Standing

The Gambia's legal standing posed a separate question. Myanmar acknowledged that The Gambia, as a party to the Genocide Convention, had an interest in Myanmar's compliance but contended that only a state specially affected by Myanmar's alleged violations could bring the case.<sup>41</sup> Rejecting that argument, the Court found that any party to the Genocide Convention was entitled to invoke the responsibility of another state party because of the *erga omnes partes* character of the obligations in question—that is, obligations owed to a group of states that protect a collective interest.<sup>42</sup> The parties to the Genocide Convention had 'a common interest' in the prevention of genocide and the avoidance of impunity for acts of genocide. The Gambia thus had standing.<sup>43</sup>

## C. Plausibility

The Court then turned to whether the rights claimed by The Gambia on the merits were 'at least plausible'.<sup>44</sup> It noted the obligation under Article I of the Genocide Convention 'to prevent and punish' the crime of genocide as defined in Article II and the punishable acts set forth in Article III, including direct and public incitement to commit genocide and complicity in genocide.<sup>45</sup> Further noting the aim of the Convention to protect national,

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<sup>37</sup> *The Gambia v Myanmar*, Order, above n 4, [32].

<sup>38</sup> *Ibid* [35].

<sup>39</sup> *Ibid* [30]-[31].

<sup>40</sup> *Ibid* [36]. Myanmar is the only contracting party to have made a reservation to Article VIII. The legal effect of that reservation is unclear, as Article VIII has been described as retaining only an 'expository character' that does not add to the power of any UN organ. Giorgio Gaja, 'The Role of the United Nations in Preventing and Suppressing Genocide', in Paola Gaeta, ed, *The UN Genocide Convention: A Commentary* (OUP 2009) 397, 400.

<sup>41</sup> *The Gambia v Myanmar*, Order, above n 4, [39].

<sup>42</sup> *Ibid* [41].

<sup>43</sup> *Ibid* [41]-[42]. See also text accompanying notes 71-79.

<sup>44</sup> *Ibid* [44].

<sup>45</sup> *Ibid* [49]-[50]. Article II defines genocide as 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.'

ethnic, racial, and religious groups, the Court observed that ‘the Rohingya in Myanmar appear to constitute a protected group’ under Article II.<sup>46</sup> The Court then referred to a December 2018 UN General Assembly resolution that expressed grave concern at human rights violations in Myanmar and to the reports of the FFM, including its conclusion that ‘factors allowing the inference of genocidal intent [were] present’.<sup>47</sup> The Court noted that hundreds of thousands of Rohingya had fled to Bangladesh following the events of 2016 and 2017 and Myanmar’s admission that the clearance operations might have involved violations of international law.<sup>48</sup> Based on these facts and circumstances, the Court found that the right of the Rohingya group in Myanmar to be protected from acts of genocide was plausible, as was The Gambia’s right to seek Myanmar’s compliance with the Genocide Convention.<sup>49</sup>

The Court’s express language referred to the plausibility of the rights at issue in the case rather than the plausibility of the claims against Myanmar in support of those rights. But the parties’ arguments focused on the latter, and the Court’s analysis followed suit. In particular, Myanmar contended that the Court could only indicate provisional measures if it were to find ‘evidence of the required specific genocidal intent’—including whether it was plausible that genocidal intent was the only inference that could be drawn from that evidence.<sup>50</sup> Invoking the Court’s case law, Myanmar argued that if alternative inferences—other than genocidal intent—could be drawn from the evidence, the Court should find The Gambia’s claims not plausible.<sup>51</sup> The Court rejected the proposition that the ‘exceptional gravity of the allegations’ required it to probe more deeply into the existence of genocidal intent at the provisional measures phase and, essentially, adopt the high standard applicable on the merits.<sup>52</sup> For the Court, it was apparently sufficient that The Gambia alleged facts which plausibly demonstrated that the subject-matter of the case concerned alleged violations of rights under the Genocide Convention for which Myanmar might bear responsibility. The Court did not state directly why the resolutions and reports that it referenced were relevant to the plausibility of those rights—as opposed to the plausibility of the claims. In reality, the Court appeared to determine not only that the rights asserted by The Gambia under the Genocide Convention were plausible, but also that the claim that Myanmar had breached its obligations under the Convention was at least plausible based on the facts alleged.

The Court then examined whether the provisional measures sought were sufficiently linked to the rights asserted. The Court considered that measures directing Myanmar to prevent acts of genocide directed at the Rohingya from taking place and to preserve evidence relating to the alleged violations were ‘by their very nature’ aimed at preserving the rights at

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Genocide Convention, above n 1, art II.

<sup>46</sup> *The Gambia v Myanmar*, Order, above n 4, [52]. Judge ad hoc Kress, who Myanmar appointed, emphasized that whether the Rohingya group have protected status under Article II did not receive close attention during the proceedings and that the Court’s statement was ‘in no way whatsoever’ prejudicial to the merits. *The Gambia v Myanmar*, Order, above n 4, Declaration of Judge Ad Hoc Kress, [6]-[7].

<sup>47</sup> *The Gambia v Myanmar*, Order, above n 4, [54]-[55].

<sup>48</sup> *Ibid* [53], [55].

<sup>49</sup> *Ibid* [56]. See also text accompanying notes 83-89.

<sup>50</sup> *Ibid* [47].

<sup>51</sup> *Ibid*.

<sup>52</sup> *Ibid* [56]. Judge ad hoc Kress observed that ‘one might wonder whether the distinct—that is, the protective—function of provisional measures does not point in the opposite direction, precisely because fundamental values are at stake’. See Declaration of Judge Ad Hoc Kress, above n 46, [4].

issue.<sup>53</sup> However, the Court found that ‘no question arose’ as to a link between the requested ‘non-aggravation’ measure and the rights at issue in the case,<sup>54</sup> and that the request for a measure compelling Myanmar to grant access and cooperation to UN investigators was not ‘necessary in the circumstances of the case’.<sup>55</sup>

D. Urgency and risk of irreparable prejudice

The final requirements were urgency and risk of irreparable prejudice. The Court emphasized that it did not need to establish that violations of the Genocide Convention had already taken place, but whether there was a real and imminent risk that such violations might occur before the Court could render a final decision.<sup>56</sup> Myanmar argued that no such risk was present. It pointed to international support for its on-going efforts to facilitate the return of the displaced Rohingya people in Bangladesh—support that ‘would not be forthcoming if there was an imminent or ongoing risk of genocide’.<sup>57</sup> It further contended that genocidal intent would be inconsistent with its ‘initiatives aimed at bringing stability to Rakhine State’ and holding ‘accountable those responsible for past violence’.<sup>58</sup>

The Court was unpersuaded. Myanmar’s plans to promote ethnic reconciliation and to hold its military accountable for violations of international law did ‘not appear sufficient in themselves to remove the possibility that acts causing irreparable prejudice to the rights invoked by The Gambia for the protection of the Rohingya in Myanmar could occur’.<sup>59</sup> Referring to the FFM’s conclusion that the Rohingya people were ‘at serious risk of genocide’, the Court described members of the Rohingya group still in Myanmar as ‘extremely vulnerable’.<sup>60</sup> It further noted a UN General Assembly resolution from 27 December 2019 (after the close of the provisional measures hearing) that referred to continued violence by military and security forces against ‘unarmed individuals in Rakhine State’ and ‘the government seizure of Rohingya lands from which Rohingya Muslims were evicted and their homes destroyed’.<sup>61</sup> Finally, the Court observed that the possible existence of an internal armed conflict in Rakhine State did not release Myanmar from its obligations under the Genocide Convention.<sup>62</sup> On this basis, the Court found a real and imminent risk of irreparable prejudice to the rights invoked by The Gambia.<sup>63</sup>

E. Provisional measures indicated

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<sup>53</sup> *The Gambia v Myanmar*, Order, above n 4, [61].

<sup>54</sup> *Ibid* [61]. The Court stated that it did not consider a non-aggravation measure necessary in light of the other measures that were indicated. *Ibid* [83]. Non-aggravation measures are commonplace, but the Court does not typically explain why such measures are deemed necessary or not.

<sup>55</sup> *The Gambia v Myanmar*, Order, above n 4, [62].

<sup>56</sup> *Ibid* [65]-[66].

<sup>57</sup> *Ibid* [68].

<sup>58</sup> *Ibid* [68].

<sup>59</sup> *Ibid* [73].

<sup>60</sup> *Ibid* [72].

<sup>61</sup> *The Gambia v Myanmar*, Order, above n 4, [73]. See UN General Assembly Resolution 74/246 of 27 December 2019, UN GAOR 74<sup>th</sup> sess, UN Doc A/RES/74/246.

<sup>62</sup> *The Gambia v Myanmar*, Order, above n 4, [74]

<sup>63</sup> *Ibid* [75].

As all the requirements were met, the Court indicated provisional measures against Myanmar.<sup>64</sup> First, it ordered Myanmar ‘to take all measures within its power’ to prevent the commission of acts ‘within the scope of Article II’ of the Genocide Convention in relation to the members of the Rohingya group in its territory.<sup>65</sup> Secondly, it ordered Myanmar to ensure that its military and any irregular armed units, organizations, and persons subject to its control, direction, or influence not commit acts within the scope of Articles II and III of the Convention. Thirdly, it ordered Myanmar to ‘take effective measures to prevent the destruction and ensure the preservation of evidence’ relating to alleged acts within the scope of Article II. Finally, it directed Myanmar to report back to the Court ‘on all measures taken to give effect’ to the order within four months, and every six months thereafter, until a final decision in the case was reached, with The Gambia having the right to comment.<sup>66</sup>

The Court’s Order was met with celebration and relief by Rohingya communities and human rights campaigners that had spent years trying to bring attention to the plight of the Rohingya.<sup>67</sup> Myanmar’s response struck a different tone. In ‘taking note’ of the Court’s decision, Myanmar observed that its own Independent Commission of Enquiry (‘ICOE’) had found that war crimes, but not genocide, had taken place in Rakhine State.<sup>68</sup> Myanmar also asserted that human rights actors had ‘presented a distorted picture of the situation in Rakhine’ and that the ICJ decision was an effort by the Court to protect itself from ‘possible accusations of failure to take preventive action’.<sup>69</sup>

#### IV. EVALUATION

A unanimous ruling by the ICJ is always striking, and the 17-0 decision in *The Gambia v Myanmar* strongly suggested a consensus within the Court that the gravity of the allegations meant that it could not leave the situation unaddressed.<sup>70</sup> Whether intended or not, the decision also had the effect of giving formal acknowledgement to the suffering of the Rohingya people—an act of considerable symbolic weight. However, the Court did not

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<sup>64</sup> Ibid [86].

<sup>65</sup> See above n 45.

<sup>66</sup> *The Gambia v Myanmar*, Order, above n 4, [82].

<sup>67</sup> See, eg, Human Rights Watch, ‘Interview: Landmark World Court Order Protects Rohingya from Genocide’ (27 January 2020), <https://www.hrw.org/news/2020/01/27/interview-landmark-world-court-order-protects-rohingya-genocide>; Amanda Hodge, ‘Myanmar Denies Genocide in Rakhine as Rohingya Celebrate ICJ Ruling’, *The Australian* (14 July 2020), <https://www.theaustralian.com.au/world/myanmar-denies-genocide-in-rakhine-as-rohingya-celebrate-icj-ruling/news-story/1d6149a385a3d70b0c2adab46e5de045>;

<sup>68</sup> Myanmar Ministry of Foreign Affairs, ‘Press Statement on the decision by the ICJ on ‘provisional measures’ in the case brought by The Gambia against Myanmar’ (23 January 2020), <https://www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-9843>. Myanmar established the ICOE on 30 July 2018, and the ICOE released an executive summary of its findings three days before the Court’s ruling. See <https://www.icoe-myanmar.org/icoe-pr-final-report>. The FFM had questioned the independence and impartiality of the ICOE, and human rights groups described it as deeply flawed. See Global Justice Center, ‘Myanmar’s Independent Commission of Enquiry: Structural Issues and Flawed Findings’ (February 2020), [https://globaljusticecenter.net/files/20200203\\_ICOEFact\\_sheet.pdf](https://globaljusticecenter.net/files/20200203_ICOEFact_sheet.pdf).

<sup>69</sup> Myanmar Press Statement, above n 68.

<sup>70</sup> Vice-President Xue’s separate opinion conveyed this idea. Notwithstanding her serious reservations about ‘the plausibility of the present case under the Genocide Convention’, the Vice-President stated that the situation demanded preventive measures because of ‘the gravity and scale of the alleged offences’ and the risk of further armed conflicts in Rakhine State. *The Gambia v Myanmar*, Order, above n 4, Separate Opinion of Vice-President Xue, 1 [2]-[3], 3 [9]-[10].

necessarily go as far as it might have to protect the rights at issue in the case, and the decision clarified some issues while leaving others uncertain. This section considers four ways in which the decision may bear on ICJ practice before examining some problematic aspects of the relief granted.

#### 1. Significance of the decision to ICJ practice

First, the Court appeared to reaffirm the standing of non-injured states to bring cases that seek to enforce obligations *erga omnes partes*.<sup>71</sup> The Court's reasoning was consistent with its approach in two prior cases that raised this issue. In 2012, the Court affirmed Belgium's standing to bring a case against Senegal concerning alleged violations of the 1984 Convention Against Torture (CAT).<sup>72</sup> Belgium asserted a special interest because of Senegal's failure to comply with its request under the CAT to extradite Hissène Habré (the ex-Chadian dictator accused of torture), but the Court ruled that the *erga omnes partes* character of Senegal's CAT obligations entitled Belgium, or any other treaty party, to invoke Senegal's responsibility and make a claim, with or without a special interest.<sup>73</sup> Two years later, the judgment in the *Whaling Case* also implicitly confirmed the legal standing of a non-injured state.<sup>74</sup> Australia did not claim to have been specially affected by Japan's alleged violations of the 1946 International Convention on the Regulation of Whaling (ICRW) and instead sought to enforce obligations owed by Japan to all ICRW parties.<sup>75</sup> Viewed alongside those decisions, the Court's order in *The Gambia v Myanmar* was not ground-breaking; it reinforced an established principle.<sup>76</sup> However, in previous cases involving non-injured states, there was typically some type of extra-legal connection (whether historical, geographical, or otherwise) that helped to explain the applicant state's willingness to bring the case.<sup>77</sup> Australia's interest in litigating Japanese whaling undoubtedly bore some connection to the relative geographic proximity of that activity to Australia and a long

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<sup>71</sup> See text accompanying notes 41-43 above.

<sup>72</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422.

<sup>73</sup> *Ibid* 448-450 [65]-[70].

<sup>74</sup> *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226. During the oral proceedings, Judge Bhandari asked Australia whether it had suffered any injury as a result of Japan's alleged conduct. See *Whaling in the Antarctic* (Oral Proceedings), CR 2013/13, 73. In response, Australia asserted that the ICRW established obligations in the 'common interest' that every party to the ICRW had a right to see met. See *Whaling in the Antarctic* (Oral Proceedings) CR 2013/18, 18-19 [16], 33-34 [18]-[20].

<sup>75</sup> See *ibid* 246 [40].

<sup>76</sup> It also suggested alignment between the Court's approach and Article 48 of the ILC Articles on State Responsibility for Internationally Wrongful Acts, the provision that addressed invocation of responsibility by non-injured states. See International Law Commission, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) art 48. The Court did not mention Article 48, but its reasoning drew no distinction between the entitlement of a non-injured state to invoke another state's responsibility and the standing of the non-injured state to seek recourse at the ICJ, if a jurisdictional basis exists. Note that Vice-President Xue, who disagreed with the Court's approach to standing in *Belgium v Senegal*, signaled her continuing disagreement with the Court's position. Separate Opinion of Vice-President Xue, above n 70, 1-3 [4]-[8].

<sup>77</sup> The Court did not address standing in the cases brought by the Marshall Islands in 2014 against India, Pakistan, and the United Kingdom regarding nuclear disarmament. The Marshall Islands was acting as a non-injured state, but there were long-standing historical links between the Marshall Islands and the subject-matter of its claims. See Becker, above n 31, at 6.

tradition of anti-whaling activism in that country.<sup>78</sup> Moreover, Belgium did not present itself solely as a ‘state other than an injured state’ in the case against Senegal; its decision to bring the case stemmed from domestic court proceedings in Belgium that concerned claims against Habré.<sup>79</sup> By contrast, The Gambia made clear from the outset that its interest was rooted exclusively in the *erga omnes partes* nature of the obligations owed under the Genocide Convention.<sup>80</sup> The Gambia’s decision to bring the case—at the potential cost of political blowback or retaliation from other actors—may encourage other non-injured states to make greater use of ICJ proceedings to enforce ‘common interest’ treaties that allow for recourse to the Court.

Secondly, the Court’s concise rejection of Myanmar’s arguments about the behind-the-scenes role of the OIC signalled the Court’s unwillingness to concern itself with the machinations or motivations that may underlie a state’s decision to seize the Court.<sup>81</sup> This *laissez-faire* stance might encourage scenarios in which one or more states provide funding or other material support for ICJ litigation by another state, particularly with respect to disputes about obligations *erga omnes*. It remains to be seen whether there are circumstances in which such arrangements could be problematic for the ICJ.<sup>82</sup> It is Myanmar’s prerogative to continue litigating the ‘proxy’ argument, or any of its other arguments on jurisdiction and admissibility, in the form of preliminary objections.<sup>83</sup> However, in light of the Court’s response to those arguments in the provisional measures order, such objections appear highly unlikely to succeed (but would delay a judgment on the merits).

Thirdly, the decision did not clarify the precise scope of the ‘plausibility’ requirement, which, as Judge ad hoc Kress pointed out, ‘remains a challenge to describe . . . with precision’.<sup>84</sup> Without expressly saying so, the Court mainly examined the plausibility of The Gambia’s factual allegations and legal claims, rather than its rights under the Genocide Convention (which were hardly in doubt).<sup>85</sup> Yet in doing so the Court did not provide any new guidance about what it means to assess the plausibility of legal claims, even as this appears to have become an integral part of the plausibility analysis.<sup>86</sup> For example, the Court did not explain whether the plausibility requirement was met because The Gambia alleged facts that, if proven, would be capable of demonstrating violations of the Genocide Convention by Myanmar, or whether the Court also determined that those factual allegations were ‘at least plausible’ because they had some evidentiary support and were not manifestly

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<sup>78</sup> See Donald R Rothwell, ‘The Antarctic Whaling Case: Litigation in the International Court and the Role Played by NGOs’ (2013) 3 *The Polar Journal* 399.

<sup>79</sup> *Obligation to Prosecute or Extradite*, Judgment, above n 72, 432-433 [19]-[21].

<sup>80</sup> *The Gambia v Myanmar*, Application, above n 12, 6 [15], 8 [21], 41 [123].

<sup>81</sup> See text accompanying notes 32-33 above.

<sup>82</sup> The Court has yet to engage with the phenomenon of third-party funding, a practice that has received more attention in other contexts. See, eg, Eric De Brabandere & Julia Lepeltak, ‘Third-Party Funding in International Investment Arbitration’ (2012) 27 *ICSID Review* 379.

<sup>83</sup> Preliminary objections must be lodged within three months of the submission of the Memorial. Rules of Court, art 79(1).

<sup>84</sup> Declaration of Judge Ad Hoc Kress, above n 46, 1 [2].

<sup>85</sup> See text accompanying notes 44-52 above.

<sup>86</sup> See Massimo Lando, ‘Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice’ (2018) 31 *Leiden Journal of International Law* 641; Cameron Miles, ‘Provisional Measures and the “New” Plausibility in the Jurisprudence of the International Court of Justice’ (2018) *British Yearbook of International Law* (forthcoming).

unfounded.<sup>87</sup> Nor did the Court clarify the extent to which the rights or defences of the state against whom provisional measures are sought might be part of the plausibility analysis.<sup>88</sup> Nonetheless, the Court's approach followed its practice since 2016, when, in *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, it first appeared to extend the scope of the plausibility analysis to the underlying legal claims and factual allegations—a pattern that has repeated itself in subsequent cases.<sup>89</sup> The Court's reluctance to provide greater clarity about the practical import of this shift for litigants may largely reflect a desire to maintain as much flexibility as possible over the case-by-case application of the plausibility requirement.<sup>90</sup>

Fourthly, the Court drew extensively on third-party fact-finding to make the preliminary determinations required at the provisional measures phase. As noted above, it referred to UN General Assembly resolutions and the FFM reports on several points, and those materials provided the basis for two of its key findings: that the Rohingya appeared to be a 'protected group' under the Genocide Convention—a weighty determination in view of Myanmar's refusal to recognize the Rohingya as an ethnic group; and that the Rohingya in Myanmar 'remain extremely vulnerable'.<sup>91</sup> However, the Court did not address why it was willing to credit the factual findings and assessments contained in those reports and resolutions or by what standard it was assessing their reliability. Vice-President Xue observed simply that 'the weight' of the FFM reports 'cannot be ignored'.<sup>92</sup> Such questions are of lesser importance at the provisional measures phase, when the evidentiary burden is less exacting and the Court's determinations are without prejudice. However, it should not be presumed that the Court's reliance on such reports at the provisional measures phase will be replicated on the merits. The Court has historically been more willing to rely on third-party findings generated through an adversarial, court-like process.<sup>93</sup> Most reports by UN commissions of inquiry, fact-finding missions, and special rapporteurs—including those

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<sup>87</sup> Vice-President Xue indicated that she considered it necessary to establish the plausibility of factual allegations and the inferences drawn from those facts. Separate Opinion of Vice-President Xue, above n 70, 1 [2]-[3].

<sup>88</sup> On this possibility, see *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v USA)* (Provisional Measures) [2018] ICJ Rep 623, 641-43 [65]-[69].

<sup>89</sup> See Lando, above n 86, 648-50. This shift may be better explained by the particularities of individual cases (such as whether a respondent state has challenged the existence of the rights at issue) than to any concerted effort by the Court to make the plausibility requirement more demanding. Ibid 652-658.

<sup>90</sup> The order in *Ukraine v Russia* highlighted the unclear evidentiary burden that attaches to plausibility, especially when claims are inferential. See Miles, above n 86, 38-39. In that case, the Court found that Ukraine had failed to produce sufficient evidence to support a determination that its asserted rights under the International Convention for the Suppression of the Financing of Terrorism were plausible; the Court further implied that Ukraine had also failed to demonstrate that several of the rights that it asserted under the International Convention on the Elimination of All Forms of Discrimination were plausible. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russia)* (Provisional Measures) [2017] ICJ Rep 104, 131-32 [75]-[76]. 135 [82]-[83]. See also Iryna Marchuk, 'Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russia)' (2017) 18 *Melbourne Journal of International Law* 436, 445-455.

<sup>91</sup> See text accompanying notes 46-49 and 60-63 above.

<sup>92</sup> Separate Opinion of Vice-President Xue, above n 70, 3 [9].

<sup>93</sup> Michael A Becker, 'The Challenges for the ICJ in the Reliance on UN Fact-Finding Reports in the Case against Myanmar', *EJIL:Talk!* (14 December 2019), <https://www.ejiltalk.org/the-challenges-for-the-icj-in-the-reliance-on-un-fact-finding-reports-in-the-case-against-myanmar/>. In the previous genocide cases, the ICJ was able to rely heavily on the work of the International Criminal Tribunal for the former Yugoslavia. It will not be able to follow that model in the case against Myanmar. Ibid.

leaned upon by The Gambia—do not follow that model. Myanmar can be expected to attack the credibility and impartiality of the reports invoked by The Gambia, even while asking the Court to credit the findings and conclusions of the ICOE. An open question is whether the FFM's efforts at methodological transparency will persuade the Court to give weight to its findings.<sup>94</sup> One idea may be to call the individuals involved in the creation of such reports as witnesses, thus giving them an opportunity under questioning to defend their work and respond to criticisms.<sup>95</sup>

## 2. Questions Raised by the Provisional Measures

Although the Court was persuaded that the situation of the Rohingya demanded interim protection, the provisional measures indicated did not go as far as The Gambia had sought. The Court's approach generated uncertainty about what exactly was required of Myanmar, and whether the measures could be expected to have any real impact.

### a. The obligation to prevent the commission of acts within the scope of Article II

The first provisional measure directed Myanmar 'to take all measures within its power to prevent the commission of all acts falling within the scope of Article II' of the Genocide Convention; the second provisional measure required Myanmar to ensure that its military and other armed units under its direction not commit such acts. The Gambia had requested the Court to enumerate specific types of acts that Myanmar needed to prevent, including extrajudicial killings, physical abuse, rape and other forms of sexual violence, as well as the destruction of homes, villages, and livestock, and the deprivation of food and other necessities of life.<sup>96</sup> Noting that the provisional measures in the *Bosnia* case in 1993 had failed to prevent the Srebrenica massacre two years later, The Gambia argued that 'something more' was needed and urged the Court to provide a non-exhaustive list of genocidal acts 'which must not recur'.<sup>97</sup> But the Court declined to identify certain types of conduct that could, in effect, be understood presumptively as potential acts of genocide within the scope of Article II.<sup>98</sup> Doing so might have clarified specifically what acts Myanmar was required to prevent. Instead, the Court seemed simply to reiterate Myanmar's general obligations under the Genocide Convention.

However, the first and second provisional measures are open to at least two different interpretations—one which may suggest too little and another which may suggest too much, depending on whether the Court intended 'acts within the scope' of Article II to refer only to acts undertaken with genocidal intent. Whether the intentional killings, torture and sexual violence, destruction of villages, deprivations of food or medicine, and restrictions on travel and marriage alleged by The Gambia were carried out with genocidal intent are questions at the heart of this case on the merits. Even while conceding that human rights abuses and war crimes may have occurred in Rakhine State, Myanmar has flatly denied that any of the

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<sup>94</sup> See FFM 2018 Detailed Findings, above n 8, 7-11 [8]-[32].

<sup>95</sup> Even if such individuals were not called as witnesses by the parties, the Court could seek to arrange for their attendance to give evidence in the proceedings. Rules of Court, art 74.

<sup>96</sup> *The Gambia v Myanmar*, Order, above n 4, [12].

<sup>97</sup> *The Gambia v Myanmar*, Hearing on Request for Provisional Measures, above n 2, CR 2019/18, 70 [21]. The Gambia invited the Court to go even further, such as by directing Myanmar not to place restrictions on where Rohingya people could live or on the issuance of birth certificates. Ibid CR 2019/20, 36 [16].

<sup>98</sup> One commentator suggested a reluctance by the Court to give any impression that the past commission of such acts had already been proven. Marko Milanovic, 'ICJ Indicates Provisional Measures in the Myanmar Genocide Case', *EJIL:Talk!* (23 January 2020), <https://www.ejiltalk.org/icj-indicates-provisional-measures-in-the-myanmar-genocide-case/>.

alleged conduct was undertaken with genocidal intent—and it would presumably say the same about anything that might occur while the case is pending. If the Court meant for acts ‘within the scope’ of Article II to cover only acts that incorporate the mental element of genocide, the requirement that Myanmar take measures to prevent the commission of such acts would seem to offer very limited protection. Myanmar could be expected to argue that any conduct alleged to demonstrate non-compliance with the Court’s order was not covered by the first two provisional measures because of the continued absence of genocidal intent.

On an alternative reading, the Court’s order could be understood to require Myanmar to take all measures within its power to prevent the commission of acts that could constitute the *actus reus* of genocide—that is, to prevent the objective conduct necessary for the commission of genocidal acts, without taking the subjective element into account. From the standpoint of effectiveness, this reading might seem more convincing. But it also raises questions, such as whether the Court therefore meant its order to require Myanmar to put an end to on-going policies and actions that The Gambia has characterized as acts falling within the scope of Article II, including restrictions on movement and the confiscation of agricultural lands and livestock from the Rohingya.<sup>99</sup> If the Court intended its order to have this effect, it should have made this explicit. Furthermore, the broader scope of Myanmar’s obligations under this alternative reading of the first and second provisional measures leaves unclear whether the inadvertent killing of a member of the Rohingya group (for example, as the result of armed conflict between the Tatmadaw and non-Rohingya armed groups) would necessarily amount to non-compliance.<sup>100</sup>

It seems more likely that the Court’s true aim was limited to preventing overt and intentional acts of violence from being perpetrated against the Rohingya, and was not necessarily meant to demand more from Myanmar at this stage, including the deeper structural reforms that The Gambia seeks on the merits.<sup>101</sup> Despite the Court’s instruction to Myanmar to take ‘all measures within its power’ to prevent the commission of acts within the scope of Article II—language that campaigners have seized upon to push for the broadest possible interpretation of the Court’s order—the Court could hardly have intended Myanmar to take actions that would, in effect, suggest the Court’s prejudgement of certain aspects of the case (such as whether specific policies can be characterized as part of a state policy of genocide).<sup>102</sup> Nor is it reasonable to presume the imposition of such specific and far-reaching

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<sup>99</sup> Ibid CR 2019/18, 40 [15]-[16]; CR 2019/20, 36 [16].

<sup>100</sup> The Court’s order was specific to acts taken against the Rohingya, not other ethnic groups in Myanmar that may also be at risk. Nonetheless, observers suggested that escalating violence and civilian deaths in Rakhine State during the first half of 2020 were *prima facie* evidence of Myanmar’s non-compliance with the Court’s order, even though that violence largely concerned a separate conflict between the Tatmadaw and the Arakan Army, an ethnic Rakhine group that is distinct from the Rohingya. See, eg, Center for Global Policy, above n 3, 5-6. A joint statement by Australia, Canada, the United Kingdom, and the United States in June 2020 also seemed to conflate a new round of clearance operations in Rakhine State (not necessarily targeting Rohingya villages) with Myanmar’s obligations under the provisional measures. See Statement from Diplomatic Missions in Myanmar (27 June 2020), at <https://mm.usembassy.gov/statement-from-diplomatic-missions-in-myanmar-0627/>.

<sup>101</sup> *The Gambia v Myanmar*, Application, above n 12, 38 [112].

<sup>102</sup> Following the Court’s decision, some NGOs asserted that Myanmar was failing to abide by the provisional measures because it had not yet begun to dismantle discriminatory laws and structures that target the Rohingya, or to bring the military under civilian control. See International Commission of Jurists, ‘Myanmar: Government Must Do Far more To Comply With International Court of Justice’s Order On Protection of Rohingya Population’ (22 May 2020), <https://www.icj.org/myanmar-government-must-do-far-more-to-comply-with-international-court-justices-order-on-protection-of-rohingya-population/>; Global Justice Center, ‘Q&A: The Gambia v Myanmar: Rohingya Genocide at The International Court of Justice’ (May 2020), 4-5,

obligations by implication. Nonetheless, some of the unrealistic expectations that emerged in the wake of the Court's order were at least partially a problem of the Court's own making because of the ambiguous wording in the *dispositif*.

Ultimately, there were not reports of widescale and wanton violence directed against the Rohingya in Myanmar during the first half of 2020—the type of conduct that the Court's order was, at a minimum, unequivocally intended to prevent. But new developments raised questions about Myanmar's compliance, even under a more restrained interpretation of the order. This included the imposition of a mobile internet 'blackout' over much of Rakhine State—a tactic that arguably hindered the capacity to document alleged abuses or the potential destruction of evidence.<sup>103</sup> The UN High Commissioner for Human Rights raised concerns that Tatmadaw forces had burned down and destroyed up to a dozen abandoned Rohingya villages in May 2020.<sup>104</sup> The Rohingya in detention camps within Myanmar also reportedly faced new forms of discrimination and abuse in the context of Myanmar's response to the COVID-19 global pandemic, conduct that also might suggest non-compliance.<sup>105</sup> The prosecution of Rohingya individuals for attempting to flee Myanmar without official permission raised additional doubts.<sup>106</sup>

Finally, it may be too easy to take a dismissive view of the first and second provisional measures if they are seen as merely replicating Myanmar's general obligations under the Genocide Convention, with no separation of the objective and subjective elements in Article II. Even if this correctly describes what the Court did, it does not mean that the measures have lacked any practical function. The formal reminder by the ICJ to Myanmar of its existing obligations under the Genocide Convention might yet have a chilling effect that causes some actors to refrain from objectionable conduct in which they otherwise would have engaged, but for the Court's intervention. Whether the order has that type of impact may depend less on the precise legal contours of the interim protection that the Court granted than on the simple fact that the Court granted that protection.

b. The reporting requirement

A final point concerns the fourth provisional measure, which required Myanmar to report back to the Court at regular intervals on the actions it has taken to implement the order. This inclusion of the reporting requirement (in exercise of Article 78 of the Rules of Court) presumably sought to put pressure on Myanmar to take its obligations under the Genocide Convention and the Court's order seriously. Reporting requirements are not unprecedented at

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[https://www.globaljusticecenter.net/files/20200519\\_ICJ\\_QandA\\_Update\\_FINAL.pdf](https://www.globaljusticecenter.net/files/20200519_ICJ_QandA_Update_FINAL.pdf). These views appeared to reflect an overly broad interpretation of the Court's order and the function of provisional measures.

<sup>103</sup> See Global Justice Center, above n 102, 4.

<sup>104</sup> Statement by Michelle Bachelet, UN High Commissioner for Human Rights, 'Oral Update on the Human Rights Situation of Rohingya People (S-27/1)' (30 June 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26018&LangID=E>.

<sup>105</sup> Param-Preet Singh & Nadia Hardman, 'Pandemic Adds New Threat for Rohingyas in Myanmar', *The Diplomat* (28 May 2020), <https://thediplomat.com/2020/05/pandemic-adds-new-threat-for-rohingyas-in-myanmar/>.

<sup>106</sup> Myint Zaw Oo & Kyaw Lwin Oo, 'Myanmar Court Jails 15 Rohingya For Two Years For Trying to Flee Country' *Radio Free Asia* (6 March 2020), <https://www.rfa.org/english/news/myanmar/rohingya-jailed-03062020155637.html>. However, the UN High Commissioner for Human Rights indicated in June 2020 that hundreds of Rohingya that had been imprisoned for traveling outside Rakhine State had been released. See Bachelet Statement, above n 104. On the impact of freedom of movement restrictions on the Rohingya and other ethnic minorities in Myanmar, see Laetitia Van den Assum, 'Time To Begin Dismantling Movement Restrictions in Rakhine', *Frontier Myanmar* (10 June 2020), <https://www.frontiermyanmar.net/en/time-to-begin-dismantling-movement-restrictions-in-rakhine/>.

the ICJ, but they are not standard practice either.<sup>107</sup> The Court did not impose anything similar in three other recent provisional measures orders where reporting requirements might have been appropriate.<sup>108</sup> Nor did the Court include a reporting requirement when it indicated provisional measures in 1993 in the *Bosnia* case, an omission that may have influenced the Court in 2020.<sup>109</sup> In this sense, the decision to require periodic reports from Myanmar was significant (and went beyond The Gambia's request for only a single report from each side).

However, the reporting requirement was also a missed opportunity. Myanmar duly submitted its first report to the Court on 22 May 2020, and, consistent with the Court's past practice, the report was confidential. However, it stands to reason that public scrutiny would enhance the objectives of the reporting requirement in this case. It would enable the Rohingya community and other well-placed observers, such as human rights monitoring bodies, to bring attention to any misrepresentations or omissions that the reports may contain. It might also dispel any misperception that non-disclosure of the reports signals the Court's acceptance or approval of whatever assertions they may contain.<sup>110</sup> For these reasons, it was unfortunate that The Gambia did not specifically request that the reports be public, especially given the absence of any clear legal requirement mandating their confidentiality.<sup>111</sup> The lack of public access to the reports should also be considered alongside the Court's rejection of The Gambia's request for a measure directing Myanmar to grant access and cooperation to UN investigators, which might have provided another form of oversight over implementation of the order. The arguments in support of that request were underdeveloped,<sup>112</sup> but the

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<sup>107</sup> The Court has imposed a reporting requirement on nine previous occasions: *Fisheries Jurisdiction (United Kingdom v Iceland)* (*Federal Republic of Germany v Iceland*) (Provisional Measures) [1972] ICJ Rep 30, 35; [1972] ICJ Rep 12, 18. *Avena and Other Mexican Nationals (Mexico v. USA)* (Provisional Measures) [2003] ICJ Rep 92 [59]; *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v United States)* (Provisional Measures) [2008] ICJ Rep 311 [80]; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russia)* (Provisional Measures) [2008] ICJ Rep 353, 399 [149]; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (*Cambodia v Thailand*) (Provisional Measures) [2011] ICJ Rep 537, 556 [69]; *Certain Activities Carried Out By Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Provisional Measures) [2011] ICJ Rep 6, 28 [86] and [2013] ICJ Rep 354, 370 [59]; and *Jadhav (India v Pakistan)* (Provisional Measures) [2017] ICJ Rep 231, 245-46 [58], [61].

<sup>108</sup> See *Ukraine v Russia* (Provisional Measures), above n 90; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v UAE)* (Provisional Measures) [2018] ICJ Rep 406; and *Iran v USA* (Provisional Measures), above n 88. Out of those three cases, only Iran requested a reporting requirement; the Court did not explain its omission from the provisional measures indicated against the United States. *Iran v USA* (Provisional Measures), above n 88, 628 [14]. Some other international courts and tribunals routinely require reports on compliance with measures of interim relief. For example, the International Tribunal for the Law of the Sea has a standing requirement that parties must inform the Tribunal 'as soon as possible' about compliance. Rules of the Tribunal, art 95(1), UN Doc. ITLOS/8 (17 March 2009). In practice, these reports are made public—either immediately on the Tribunal's website with party consent, or eventually as part of the Tribunal's official publications.

<sup>109</sup> *Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)*, above n 25, [1993] ICJ Rep 3 and [1993] ICJ Rep 325.

<sup>110</sup> See Kingsley Abbott, Michael A Becker & Bruno Gelinas-Faucher, 'Why So Secret? The Case for Public Access to Myanmar's Reports on Implementation of the ICJ's Provisional Measures Order', *OpinioJuris* (25 August 2020), <https://opiniojuris.org/2020/08/25/rohingya-symposium-why-so-secret-the-case-for-public-access-to-myanmars-reports-on-implementation-of-the-icjs-provisional-measures-order/>.

<sup>111</sup> *Ibid.* Myanmar's reports and The Gambia's responses may eventually appear in the *ICJ Pleadings, Oral Arguments, Documents* series, but only after the termination of the case. However, there is no reasonable expectation of permanent confidentiality.

<sup>112</sup> *The Gambia v Myanmar*, Hearing on Provisional Measures, above n 2, CR 2019/18, 71 [24]-[26]; CR 2019/20 37-38 [21]-[22]. A significant problem may have been the open-ended nature of the request. As one commentator

Court's laconic assertion that it did not deem such a measure 'necessary in the circumstances of the case' was entirely insufficient, especially given its acknowledgement of the precarious situation of the Rohingya in Myanmar.<sup>113</sup>

Despite the non-public nature of Myanmar's initial report, it can be assumed that Myanmar, at a minimum, drew the Court's attention to three presidential directives from April 2020. The first directive instructed government officials to ensure that acts mentioned in Articles II and III of the Genocide Convention are not committed, and the second directive prohibited the destruction of evidence and property in northern Rakhine State, including evidence relating to the incidents referred to in the ICOC's final report or to the acts listed in Article II of the Convention.<sup>114</sup> The third directive instructed officials to denounce and prevent all forms of hate speech.<sup>115</sup> At the time of writing, it remained unknown what further representations Myanmar may have made (including how these directives have been implemented)—or how The Gambia chose to respond. The Gambia has the right to return to the Court at any time to seek new or modified provisional measures if it considers that Myanmar is failing to comply—or if new developments on the ground require different or more far-reaching measures.<sup>116</sup> This may be the type of case that will invite the repeated use of provisional measures if the situation of the Rohingya within Myanmar deteriorates further.

#### V. WHAT LIES AHEAD?

A decision on the merits in this case remains a few years away, but it can hardly come soon enough for the hundreds of thousands of Rohingya subsisting in harsh conditions at camps across the border in Bangladesh—or for those who remain in Myanmar in other difficult circumstances. For those who may have hoped that the Court's order would speed up repatriation, its actual effect may be the opposite. By finding that the Rohingya in Myanmar were extremely vulnerable to potential violence and human rights abuses, the Court's decision added weight to the arguments of those who have resisted the premature pursuit of initiatives aimed at allowing the Rohingya in Bangladesh to return to Rakhine State, without the necessary protections in place to ensure a safe and dignified return.<sup>117</sup>

Notwithstanding its success at the provisional measures phase, The Gambia still faces the considerable challenge of persuading the Court that the events of 2016 and 2017 constituted acts of genocide against the Rohingya.<sup>118</sup> Even when there is abundant evidence

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put it, the rejection was 'hardly a surprising result' in view of the 'intrusiveness of such a measure'. See Milanovic, above n 98.

<sup>113</sup> Order, above n 4, [62]. Myanmar invoked its reservation to Article VIII of the Genocide Convention in opposition to this request, but the Court did not engage with that argument. Ibid [59].

<sup>114</sup> Republic of the Union of Myanmar, Office of the President, Directive No 1/2020 (8 April 2020), at <https://www.president-office.gov.mm/en/?q=briefing-room/announcements/2020/04/09/id-10002>.

<sup>115</sup> Republic of the Union of Myanmar, Office of the President, Directive No 3/2020 (20 April 2020), <https://www.president-office.gov.mm/en/?q=briefing-room/announcements/2020/04/21/id-10006>.

<sup>116</sup> Rules of Court, arts 75-76.

<sup>117</sup> See Hannah Ellis-Peterson & Shaikh Azizur Rahman, 'Rohingya Refugees Turn Down Second Myanmar Repatriation Effort', *The Guardian* (22 August 2019), <https://www.theguardian.com/world/2019/aug/22/rohingya-refugees-turn-down-second-myanmar-repatriation-effort>; Human Rights Watch, 'Myanmar/Bangladesh: Plan Puts Rohingya At Risk' (2 November 2018), <https://www.hrw.org/news/2018/11/02/myanmar/bangladesh-plan-puts-rohingya-risk>.

<sup>118</sup> On challenges posed by the Court's case law, see Melanie O'Brien, 'The Rohingya Cases before International Courts and the Crime of Genocide', *OpinioJuris* (25 August 2020), <https://opiniojuris.org/2020/08/25/rohingya-symposium-the-rohingya-cases-before-international-courts-and-the-crime-of-genocide/>.

of mass atrocity, genocide is very difficult to prove as a matter of law. As the ICJ reiterated most recently in *Croatia v Serbia*, an inference of genocidal intent from a pattern of conduct must be ‘the only inference that could reasonably be drawn from the acts in question’.<sup>119</sup>

Myanmar made clear during the provisional measures hearing that it will make every effort to present the Court with alternative explanations for what took place in Rakhine State. Myanmar has already suggested that the ‘clearance operations’ were aimed at forcing the remaining Rohingya in Myanmar to flee to Bangladesh rather than at their physical destruction (a theory that Myanmar attributed to the prosecution in parallel activity at the International Criminal Court)—or that the Tatmadaw was engaged only in counter-insurgency, not genocide.<sup>120</sup> While it contested the estimated number of fatalities, Myanmar also contended that even ‘10,000 deaths out of a population of well over one million might suggest something other than an intent to physically destroy the group’.<sup>121</sup> These are some of the arguments The Gambia will face. Short of persuading the Court that it needs to modify its restrictive approach, it remains for The Gambia to demonstrate how the evidence in this case can navigate the narrow path to genocidal intent that the Court has carved out—and that Myanmar is eager to close off at every pass. There is a long road ahead for the Rohingya.

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<sup>119</sup> *Croatia v Serbia* (Judgment), above n 25, 67 [148]; see also *ibid* 122 [417]. The ‘single inference’ test has long been the subject of criticism. See, eg, David Scheffer, ‘The World Court’s Fractured Ruling on Genocide’ (2007) 2 *Genocide Studies & Prevention* 123, 125-129. For a nuanced assessment of how the ICJ applied that standard in *Croatia v Serbia*, see Paul Behrens, ‘Between Abstract Event and Individualized Crime: Genocidal Intent in the Case of Croatia’ (2015) 28 *Leiden Journal of International Law* 923.

<sup>120</sup> *The Gambia v Myanmar*, Oral Hearing on Provisional Measures, above n 2, CR 2019/19, 29 [25]-[27], 35 [43].

<sup>121</sup> *Ibid* CR 2019/19, 37 [48].