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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 ('ICJ') indicated provisional measures against Myanmar in the case brought by The Gambia under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('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 recognised 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.

CONTENTS

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

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against Myanmar under the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*').[1] 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.[2] 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'))[3] and urged the Court to resist the effort to '*externalize* accountability'.[4] On 23 January 2020, the Court unanimously indicated provisional measures against Myanmar.[5]

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 ICJ case. Part III summarises 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 north-west.[6] Successive governments in Myanmar, a Buddhist-majority country, have refused to recognise the Rohingya as an official ethnic group,[7] and the implementation of

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1 *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*').

2 'Verbatim Record 2019/18', *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (International Court of Justice, General List No 178, 10 December 2019).

3 'Verbatim Record 2019/19', *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (International Court of Justice, General List No 178, 11 December 2019) 13 [6], 18 [27].

4 Ibid 17 [24] (emphasis in original). Observers have seen the government's refusal to use the term 'Rohingya' as part of longstanding efforts to dehumanise the group: see, eg, Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, 39th sess, Agenda Item 4, UN Doc A/HRC/39/64 (12 September 2018) 14 [73]; Rohingya Legal Forum, Center for Global Policy, *No Place for Optimism: Anticipating Myanmar's First Report to the International Court of Justice* (Report, May 2020) 4–5.

5 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Provisional Measures)* (International Court of Justice, General List No 178, 23 January 2020) ('*The Gambia v Myanmar (Provisional Measures)*').

6 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, eg, Maung Zarni and Alice Cowley, 'The Slow-Burning Genocide of Myanmar's Rohingya' (2014) 23(3) *Pacific Rim Law and Policy Journal* 683, 691–5.

7 Myanmar formally recognises 135 ethnic groups: Eleanor Albert and Lindsay Maizland, Council on Foreign Relations, 'The Rohingya Crisis' (Report, 23 January 2020) <https://www.cfr.org/backgrounder/rohingya-crisis>, archived at <https://perma.cc/YR6K-5T4J>.

a 1982 law has effectively deprived the Rohingya of citizenship and other basic rights.[8] 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).[9] The Rohingya in Myanmar have faced decades of systemic discrimination and oppression marked by occasional episodes of state-sanctioned and intercommunal violence.[10] Hate speech against the Rohingya is well documented.[11] United Nations Secretary-General António Guterres has described the Rohingya as one of the most discriminated-against peoples in the world.[12]

Violence against the Rohingya in 2016 and 2017 provided the immediate predicate for the ICJ case.[13] As described by the Independent International Fact-Finding Mission on Myanmar ('FFM'),[14] ARSA, an insurgent group, carried out three coordinated attacks on security posts in Rakhine State in October 2016 using 'sticks, knives and a few firearms'.[15] 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'.[16] These events repeated themselves in August 2017 on a more horrific scale. On 25 August 2017, ARSA carried out another set of coordinated attacks, this time targeting up to 30 outposts across northern Rakhine State and causing 12 fatalities.[17] According to the FFM, the military response 'was

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8 *Burma Citizenship Law* (Burma) 15 October 1982, s 3 <https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/docs/Citizenship%20Law.htm>, archived at <https://perma.cc/X6LD-327D>. On the content and enforcement of the 1982 law, see Nick Cheesman, 'How in Myanmar "National Races" Came to Surpass Citizenship and Exclude Rohingya' (2017) 47(3) *Journal of Contemporary Asia* 461, 471–3. See also Katherine Southwick, 'Preventing Mass Atrocities against the Stateless Rohingya in Myanmar: A Call for Solutions' (2015) 68(2) *Journal of International Affairs* 137, 139; Zarni and Cowley (n 6) 699–702, 708. The 1982 law is said to have left the Rohingya 'stateless': Albert and Maizland (n 7).

9 Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, 39th sess, Agenda Item 4, UN Doc A/HRC/39/CRP.2 (17 September 2018) 100–1 [406]–[407] ('*FFM 2018 Detailed Findings*').

10 Ibid 111–58 [458]–[663]; Southwick (n 8) 139; Zarni and Cowley (n 6) 705–27.

11 *FFM 2018 Detailed Findings*, UN Doc A/HRC/39/CRP.2 (n 9) 321–46 [1302]–[1360]. See also Hannah Beech, 'Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya', *The New York Times* (online, 24 October 2017) <https://www.nytimes.com/2017/10/24/world/asia/myanmar-rohingya-ethnic-cleansing.html>, archived at <https://perma.cc/5R8X-Y8AZ>; Penny Green, Thomas MacManus and Alicia de la Cour Venning, International State Crime Initiative, *Countdown to Annihilation: Genocide in Myanmar* (Report, 2015) 53–66.

12 United Nations Secretary-General, 'Transcript of Secretary-General's Remarks at Press Encounter with President of the World Bank, Jim Yong Kim' (Press Encounter, 2 July 2018) <https://www.un.org/sg/en/content/sg/press-encounter/2018-07-02/transcript-secretary-general's-remarks-press-encounter>, archived at <https://perma.cc/6SK7-LTYJ>.

13 'Application Instituting Proceedings and Request for Provisional Measures', *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (International Court of Justice, General List No 178, 11 November 2019) [6].

14 The UN Human Rights Council established the FFM on 24 March 2017: *Situation of Human Rights in Myanmar*, HRC Res 34/22, 34th sess, 57th mtg, Agenda Item 4, UN Doc A/HRC/RES/34/22 (3 April 2017, adopted 24 March 2017) para 11.

15 *FFM 2018 Detailed Findings*, UN Doc A/HRC/39/CRP.2 (n 9) 248 [1036]. See also at 243–6 [1009]–[1028]. ARSA emerged following a previous period of state-sanctioned violence against the Rohingya in 2012: at 243 [1009].

16 Ibid 256 [1070]. See also at 256–60 [1069]–[1095].

17 Ibid 180 [750].

immediate, within hours, brutal and grossly disproportionate'.[18] A new round of 'clearance operations' targeted hundreds of villages over the next two months.[19] 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.[20] The FFM called the military campaign 'a human rights catastrophe'[21] and 'horrendous in scope'.[22] It concluded that up to 10,000 deaths had occurred and that genocidal intent (ie 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.[23]

Acting with the support of the 57-member state Organization of Islamic Cooperation ('OIC'),[24] The Gambia, a small West African state, instituted proceedings against Myanmar at the ICJ on 11 November 2019.[25] In the Application, The Gambia 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'.[26] 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.[27] Three previous ICJ cases had involved alleged violations of the *Genocide*

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18 Ibid 180 [751].

19 Ibid. Madame Suu Kyi asserted that the term 'clearance operation' had been 'distorted' and meant only 'to clear an area of insurgents or terrorists': 'Verbatim Record 2019/19' (n 3) 15 [12].

20 *FFM 2018 Detailed Findings*, UN Doc A/HRC/39/CRP.2 (n 9) 180 [751]–[752], 183–5 [765]–[773].

21 Ibid 207 [883].

22 Ibid 365 [1439]. See also at 180–242 [754]–[1004].

23 Ibid 243 [1008], 366 [1441].

24 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': Organization of Islamic Cooperation, *Final Communiqué of the 14th Islamic Summit Conference: Session of Hand in Hand toward the Future*, Doc No OIC/SUM-14/2019/FC/FINAL, 31 May 2019, 11 [47].

25 *The Gambia v Myanmar (Provisional Measures)* (n 5) [1].

26 Ibid [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* (online, 23 January 2020) <https://www.bbc.com/news/world-africa-51183521>, archived at <https://perma.cc/MYC5-64SB>. Mr Tambadou resigned in June 2020 to become Registrar at the International Residual Mechanism for Criminal Tribunals: United Nations International Residual Mechanism for Criminal Tribunals, 'UN Secretary-General Appoints Mr Abubacarr Marie Tambadou as Registrar of the Mechanism' (Press Release, 2 July 2020) <https://www.irmct.org/en/news/20-07-02-un-secretary-general-appoints-mr-abubacarr-marie-tambadou-registrar-mechanism>, archived at <https://perma.cc/VK2K-XSHH>.

27 *The Gambia v Myanmar (Provisional Measures)* (n 5) [4]–[5].

Convention,[28] but the action by The Gambia 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 *Genocide Convention* — had brought such a case.

III SUMMARY OF THE PROVISIONAL MEASURES ORDER

The Gambia asked the ICJ, pursuant to art 41 of the *Statute of the International Court of Justice*, 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 to and to cooperate with UN fact-finding bodies investigating alleged genocidal acts against the Rohingya.[29] 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.[30] In its order, the Court granted some, but not all, of the relief requested.

A *Prima Facie Jurisdiction*

The ICJ began with prima facie jurisdiction. It noted that both states were parties to the *Genocide Convention* and that its jurisdiction was based on art IX, to which neither party had made any reservation.[31] However, Myanmar invoked its reservation to art VIII as a bar to jurisdiction.[32]

1 *Existence of a Dispute*

The ICJ could only exercise jurisdiction if a dispute between the parties existed when the case was filed.[33] 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.[34] Myanmar contended there was no such dispute because The Gambia had instituted proceedings as a 'proxy' for the OIC, not on

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28 *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 ('*Croatia v Serbia*'). A third case was dismissed for lack of jurisdiction: *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. A fourth case, which raised questions relating to the interpretation and application of the *Genocide Convention*, was discontinued: *Trial of Pakistani Prisoners of War (Pakistan v India) (Order)* [1973] ICJ Rep 347.

29 *The Gambia v Myanmar (Provisional Measures)* (n 5) [12].

30 Ibid.

31 Ibid [19]–[20]. Article IX of the *Genocide Convention* (n 1) 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.

32 *The Gambia v Myanmar (Provisional Measures)* (n 5) [32].

33 Ibid [20].

34 Ibid. 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(1) *Cambridge International Law Journal* 4 ('The Dispute That Wasn't There'); Juliette McIntyre, 'Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction and Admissibility before the International Court' (2018) 19(2) *Melbourne Journal of International Law* 546.

its own behalf, and because communications relied upon by The Gambia did not amount to allegations that Myanmar had violated the *Genocide Convention*.[35] 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.[36] 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.[37] It also considered a *note verbale*, dated 11 October 2019, by which The Gambia had informed Myanmar of its position that Myanmar was 'in ongoing breach' of its obligations under the *Genocide Convention* and that it objected to Myanmar's rejection of the findings of the FFM.[38] 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.[39]

2 *Myanmar's Reservation to Article VIII*

Article VIII of the *Genocide 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'.[40] Myanmar argued that only art VIII, not art IX, permitted a state that was not 'specially affected' by the alleged violations to initiate an ICJ case; the reservation to art VIII thus meant that Myanmar had not consented to the Court's jurisdiction in that scenario.[41] The Court rejected this interpretation, finding that arts VIII and IX have 'distinct areas of application': the former addressed 'in general terms' how states might take action within the UN to enforce the treaty, but only the latter referred specifically to the submission of disputes to the Court.[42]

Since at least some of The Gambia's claims were 'capable of falling within the provisions of the *Genocide Convention*',[43] and considering the apparent existence of a dispute and non-applicability of Myanmar's reservation, there was prima facie jurisdiction.[44]

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35 *The Gambia v Myanmar (Provisional Measures)* (n 5) [23].
36 Ibid [25].
37 Ibid [27].
38 Ibid [28].
39 Ibid.
40 *Genocide Convention* (n 1) art VIII.
41 *The Gambia v Myanmar (Provisional Measures)* (n 5) [32].
42 Ibid [35].
43 Ibid [30].
44 Ibid [31], [36]. Myanmar is the only contracting party to have made a reservation to art VIII. The legal effect of this reservation is unclear, as art VIII has been described as retaining only an 'expository character' that does not add to the power of any UN organ: see Giorgio Gaja, 'The Role of the United Nations in Preventing and Suppressing Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) 397, 400.

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.[45] Rejecting this argument, the ICJ 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 that are owed to a group of states in the protection of a collective interest.[46] The states party to the *Genocide Convention* had 'a common interest' in the prevention of genocide and the avoidance of impunity for acts of genocide.[47] The Gambia thus had standing.[48]

C *Plausibility*

The ICJ then turned to whether the rights claimed by The Gambia for adjudication at the merits phase were 'at least plausible'.[49] It noted the obligation under art I of the *Genocide Convention* 'to prevent and punish' the crime of genocide, as defined in art II, and the punishable acts set forth in art III, including direct and public incitement to commit genocide and complicity in genocide.[50] Further noting the aim of the *Genocide Convention* to protect national, ethnical, racial and religious groups, the Court observed that 'the Rohingya in Myanmar appear to constitute a protected group' under art II.[51] The Court then referred to a December 2018 UN General Assembly resolution that expressed grave concern about human rights violations in Myanmar[52] and to the reports of the FFM, including its conclusion that 'factors allowing the inference of genocidal intent [were] present'.[53] The Court noted Myanmar's admission that the 'clearance operations' might have involved violations of international law, and recalled that hundreds of thousands of Rohingya had fled to Bangladesh following the events

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45 *The Gambia v Myanmar (Provisional Measures)* (n 5) [39].

46 Ibid [41].

47 Ibid.

48 Ibid [42]. See also below nn 79–89 and accompanying text.

49 Ibid [43].

50 Ibid [49]–[50]. Article II of the *Genocide Convention* (n 1) 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:
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> (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.

51 *The Gambia v Myanmar (Provisional Measures)* (n 5) [52]. Judge ad hoc Kress, who Myanmar appointed, emphasised that whether the Rohingya group have protected status under art II did not receive close attention during the proceedings and that the Court's statement was 'in no way whatsoever' prejudicial to the merits: at [6]–[7] (Judge ad hoc Kress).

52 Ibid [54], citing *Situation of Human Rights in Myanmar*, GA Res 73/264, UN GAOR, 73rd sess, 65th plen mtg, Agenda Item 74 (c), Supp No 49, UN Doc A/RES/73/264 (22 January 2019).

53 *The Gambia v Myanmar (Provisional Measures)* (n 5) [55], quoting *FFM 2018 Detailed Findings*, UN Doc A/HRC/39/CRP.2 (n 9) [1441].

of 2016 and 2017.[54] 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*.[55]

The ICJ'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.[56] 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.[57] 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.[58] For the Court, it was apparently sufficient that The Gambia alleged facts that 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 *Genocide Convention* was at least plausible based on the facts alleged.

The ICJ 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 issue.[59] 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,[60] 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'.[61]

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54 *The Gambia v Myanmar (Provisional Measures)* (n 5) [53], [55].

55 Ibid [56]. See also below nn 94–101 and accompanying text.

56 Ibid [47].

57 Ibid; 'Verbatim Record 2019/19' (n 3) 25–8 [14]–[22].

58 *The Gambia v Myanmar (Provisional Measures)* (n 5) [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': at [4] (Judge ad hoc Kress).

59 Ibid [61].

60 Ibid. The Court stated that it did not consider a non-aggravation measure necessary in light of the other measures that were indicated: at [83]. Non-aggravation measures are commonplace, but the Court does not typically explain why such measures are deemed necessary or not.

61 Ibid [62].

D *Urgency and Risk of Irreparable Prejudice*

The final requirements were urgency and risk of irreparable prejudice. The ICJ emphasised 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.[62] Myanmar argued that no such risk was present. It pointed to international support for its ongoing 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'.[63] 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'.[64]

The ICJ 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'.[65] Referring to the FFM's conclusion that the Rohingya people remain 'at serious risk of genocide', the Court described members of the Rohingya group still in Myanmar as 'extremely vulnerable'.[66] 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 to the 'government seizure of Rohingya lands from which Rohingya Muslims were evicted and their homes destroyed'.[67] 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*.[68] On this basis, the Court found a 'real and imminent risk of irreparable prejudice to the rights invoked by The Gambia'.[69]

E *Provisional Measures Indicated*

As all the requirements were met, the ICJ indicated provisional measures against Myanmar.[70] First, it ordered Myanmar 'to take all measures within its power to prevent the commission of all acts within the scope of Article II' of the *Genocide Convention* in relation to the members of the Rohingya group in its territory.[71] Secondly, it ordered Myanmar to ensure that its military, and any irregular armed units, organisations and persons subject to its control, direction or

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62 Ibid [65]–[66].
63 Ibid [68].
64 Ibid.
65 Ibid [73].
66 Ibid [72].
67 Ibid [73], quoting *Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar*, GA Res 74/246, UN GAOR, 74th sess, 52nd plen mtg, Agenda Item 70 (c), Supp No 49, UN Doc A/RES/74/246 (15 January 2020, adopted 27 December 2019) Preamble para 16.
68 *The Gambia v Myanmar (Provisional Measures)* (n 5) [74].
69 Ibid [75].
70 Ibid [86].
71 Ibid.

influence, do not commit acts within the scope of arts II and III of the *Genocide Convention*.[72] 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 art II of the *Genocide Convention*.[73] 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.[74]

The ICJ'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.[75] Myanmar's response struck a different tone. '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.[76] 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'.[77]

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.[78] Whether intended or not, the decision also had the effect of giving formal

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72 Ibid.

73 Ibid.

74 Ibid [82], [86].

75 See, eg, Interview with Param-Preet Singh (Amy Braunschweiger, Human Rights Watch, 27 January 2020) <https://www.hrw.org/news/2020/01/27/interview-landmark-world-court-order-protects-rohingya-genocide>, archived at <https://perma.cc/68WM-7W3Z>; Richard C Paddock, 'UN Court's Order on Rohingya Is Cheered, but Will Myanmar Comply?', *The New York Times* (online, 24 January 2020) <https://www.nytimes.com/2020/01/24/world/asia/myanmar-rohingya-genocide.html>, archived at <https://perma.cc/QSR9-9ZKC>.

76 Ministry of Foreign Affairs (MMR), 'Press Statement on the Decision by the ICJ on "Provisional Measures" in the Case Brought by The Gambia against Myanmar' (Press Statement, 23 January 2020) <https://www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-9843>, archived at <https://perma.cc/Q7BS-E7UV> ('Myanmar Press Statement'). 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 Office of the Independent Commission of Enquiry (MMR), 'Press Release' (Press Release, 20 January 2020) <https://www.icoe-myanmar.org/icoe-pr-final-report>, archived at <https://perma.cc/VCQ9-GQG9>. The FFM questioned the independence and impartiality of the ICOE, and human rights groups have described it as deeply flawed: see Global Justice Center, *Myanmar's Independent Commission of Enquiry: Structural Issues and Flawed Findings* (Factsheet, February 2020) <https://globaljusticecenter.net/files/20200203_ICOEfact_sheet.pdf>, archived at <https://perma.cc/J9NK-4765>; 'Myanmar Finds War Crimes but No Genocide in Rohingya Crackdown', *Al Jazeera* (online, 21 January 2020) <https://www.aljazeera.com/news/2020/1/21/myanmar-finds-war-crimes-but-no-genocide-in-rohingya-crackdown>, archived at <https://perma.cc/FL9Y-ASK2>.

77 'Myanmar Press Statement' (n 76).

78 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 (Provisional Measures)* (n 5) [2]–[3], [9]–[10] (Vice-President Xue').

acknowledgement to the suffering of the Rohingya people — an act of considerable symbolic weight. However, the Court did not 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 Part considers four ways in which the decision may bear on ICJ practice before examining some problematic aspects of the relief granted.

A *Significance of the Decision to ICJ Practice*

First, the ICJ appeared to reaffirm the standing of non-injured states to bring cases that seek to enforce obligations *erga omnes partes*.[79] 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 and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[80] Belgium asserted a special interest because of Senegal's failure to comply with its request under the Treaty to extradite Hissène Habré (the former Chadian dictator accused of torture), but the Court ruled that the *erga omnes partes* character of Senegal's obligations under that treaty entitled Belgium, or any other state party to that treaty, to invoke Senegal's responsibility and make a claim, with or without a special interest.[81] Two years later, the judgment in the *Whaling in the Antarctic* case also implicitly confirmed the legal standing of a non-injured state.[82] Australia did not claim to have been specially affected by Japan's alleged violations of the 1946 *International Convention for the Regulation of Whaling* ('*ICRW*')[83] and instead sought to enforce obligations owed by Japan to all *ICRW* parties.[84] Viewed alongside those decisions, the Court's order in *The Gambia v Myanmar* was not

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79 See above nn 45–8 and accompanying text.

80 *Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422 ('*Belgium v Senegal*'); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*Convention against Torture*').

81 *Belgium v Senegal* (n 80) 448–50 [64]–[70].

82 *Whaling in the Antarctic (Australia v Japan) (Judgment)* [2014] ICJ Rep 226 ('*Whaling Case*').

83 *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).

84 *Whaling Case* (n 82) 246 [40]. During the oral proceedings, Judge Bhandari asked Australia whether it had suffered any injury as a result of Japan's alleged conduct: 'Verbatim Record 2013/13', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 3 July 2013) 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: 'Verbatim Record 2013/18', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 9 July 2013) 19 [16], 33–4 [18]–[20].

groundbreaking; it reinforced an established principle.[85] 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.[86] Australia's interest in litigating Japanese whaling undoubtedly bore some connection to the relative geographic proximity of that activity to Australia and a long tradition of anti-whaling activism in that country.[87] 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 Hissène Habré.[88] 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*.[89] 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.[90]

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85 It also suggested alignment between the Court's approach and art 48 of the International Law Commission's ('ILC') *Draft Articles on State Responsibility for Internationally Wrongful Acts*, the provision on invocation of responsibility by non-injured states: International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Agenda Item 162, Supp No 10, UN Doc A/56/10 (2001) ch IV(E)(1) ('Draft Articles on Responsibility of States for Internationally Wrongful Acts') art 48. The Court did not mention art 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: *The Gambia v Myanmar (Provisional Measures)* (n 5) [41]–[42]. Note that Vice-President Xue, who disagreed with the Court's approach to standing in *Belgium v Senegal*, signalled her continuing disagreement with the Court's position: at [4]–[8] (Vice-President Xue').

86 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: *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India) (Jurisdiction and Admissibility)* [2016] ICJ Rep 255; *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan) (Jurisdiction and Admissibility)* [2016] ICJ Rep 552; *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) (Preliminary Objections)* [2016] ICJ Rep 833. The Marshall Islands was acting as a non-injured state, but there were longstanding historical links between the Marshall Islands and the subject matter of its claims: see Becker, 'The Dispute That Wasn't There' (n 34) 6.

87 See Donald R Rothwell, 'The Antarctic Whaling Case: Litigation in the International Court and the Role Played by NGOs' (2013) 3(2) *Polar Journal* 399.

88 *Belgium v Senegal* (n 80) 432–3 [19]–[21].

89 'Application Instituting Proceedings and Request for Provisional Measures' (n 13) [15], [21], [123].

90 Note that in September 2020 the Netherlands declared plans to bring a case at the ICJ against Syria for alleged violations of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, unless the dispute was resolved by other means: Ministry of Foreign Affairs (NLD), 'The Netherlands Holds Syria Responsible for Gross Human Rights Violations' (News Item, 18 September 2020) <https://www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations>, archived at <https://perma.cc/G7XY-6FWN>. See also Priya Pillai, 'On the Anvil: The Netherlands v Syrian Arab Republic at the International Court of Justice?', *Opinio Juris* (Blog Post, 29 September 2020) <http://opiniojuris.org/2020/09/29/on-the-anvil-the-netherlands-v-syrian-arab-republic-at-the-international-court-of-justice/>, archived at <https://perma.cc/9HLE-FHAP>.

Secondly, the ICJ'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.[91] 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.[92] 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.[93] However, in light of the Court's response to those arguments in the provisional measures order, such objections appear highly unlikely to succeed (but they would delay the delivery of any 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'.[94] Without expressly saying so, the ICJ 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).[95] 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.[96] 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 it was met because those factual allegations had some evidentiary support and were not manifestly unfounded.[97] 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.[98] Nonetheless, the Court's approach followed its practice since 2016,

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91 See above nn 35–6 and accompanying text.

92 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 and Julia Lepeltak, 'Third-Party Funding in International Investment Arbitration' (2012) 27(2) *ICSID Review* 379.

93 Preliminary objections must be lodged within three months of the submission of the Memorial: International Court of Justice, *Rules of Court* (adopted 14 April 1978) art 79*bis*(1). The Gambia submitted its Memorial on 23 October 2020: 'The Gambia Submits Case against Myanmar for Rohingya Genocide', *South Asian Monitor* (online, 24 October 2020) <https://southasianmonitor.net/en/issues/the-gambia-submits-case-against-myanmar-for-rohingya-genocide>, archived at <https://perma.cc/27HZ-6GSR>.

94 *The Gambia v Myanmar (Provisional Measures)* (n 5) [2] (Judge ad hoc Kress).

95 See above nn 49–58 and accompanying text.

96 See Massimo Lando, 'Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice' (2018) 31(3) *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* (advance).

97 Vice-President Xue indicated that she considered it necessary to establish the plausibility of factual allegations and the inferences drawn from those facts: *The Gambia v Myanmar (Provisional Measures)* (n 5) [2] (Vice-President Xue).

98 On this possibility, see, eg, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America) (Provisional Measures)* [2018] ICJ Rep 623, 641–3 [65]–[69] ('*Iran v USA (Provisional Measures)*').

when, in *Immunities and Criminal Proceedings*,[99] 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.[100] The Court's reluctance to provide greater clarity about the practical import of this shift for litigants may reflect a desire to maintain as much flexibility as possible over the case-by-case application of the plausibility requirement.[101]

Fourthly, the ICJ 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 these 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 recognise the Rohingya as an ethnic group — and that the Rohingya in Myanmar 'remain extremely vulnerable'.[102] 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. In a separate opinion, Vice-President Xue observed simply that 'the weight' of the FFM reports 'cannot be ignored'.[103] 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 at the merits phase. The Court has historically been more willing to rely on third party findings generated through an adversarial, court-like process.[104] Most reports by UN commissions of inquiry, fact-finding missions and special rapporteurs — including those leaned upon by The Gambia — do not follow that

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99 *Immunities and Criminal Proceedings (Equatorial Guinea v France) (Provisional Measures)* [2016] ICJ Rep 1148.

100 Lando (n 96) 648–50. This shift may be better explained by the particularities of individual cases (such as whether a respondent state challenged the existence of the rights at issue) than to any concerted effort by the Court to make the plausibility requirement more demanding: at 652–8.

101 The order in *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 Russian Federation) (Provisional Measures)* [2017] ICJ Rep 104 ('*Ukraine v Russia*') highlighted the unclear evidentiary burden that attaches to plausibility, especially when claims are inferential: Miles (n 96) 38–9. 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: *Ukraine v Russia* (n 101) 131–2 [75]–[76]. 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 Racial Discrimination* were plausible: at 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(2) *Melbourne Journal of International Law* 436, 445–55.

102 See above nn 51–5, 66–9 and accompanying text.

103 *The Gambia v Myanmar (Provisional Measures)* (n 5) [9] (Vice-President Xue).

104 Michael A Becker, 'The Challenges for the ICJ in the Reliance on UN Fact-Finding Reports in the Case against Myanmar', *EJIL:Talk!* (Blog Post, 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/>, archived at <https://perma.cc/RNY9-TLLH>. In the previous *Genocide Convention* 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 a similar approach in the case against Myanmar.

model.[105] 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.[106] 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.[107]

B *Questions Raised by the Provisional Measures*

Although the ICJ 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.

1 *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 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 do not commit such acts.[108] The Gambia had requested the ICJ 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.[109] Noting that the 1993 provisional measures in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* ('*Bosnia Case*')[110] 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 that 'must not recur'.[111] But the Court declined to identify specific types of conduct that could, in effect, be understood presumptively as potential acts of

105 Ibid.

106 See *FFM 2018 Detailed Findings*, UN Doc A/HRC/39/CRP.2 (n 9) 7–11 [8]–[32].

107 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* (n 93) art 62.

108 *The Gambia v Myanmar (Provisional Measures)* (n 5) [86].

109 Ibid [12].

110 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Provisional Measures)* [1993] ICJ Rep 3 ('*Bosnia Case (Provisional Measures)*').

111 'Verbatim Record 2019/18' (n 2) 70 [21]. The Gambia invited the Court to go even further, including by directing Myanmar not to place restrictions on where Rohingya people could live or on the issuance of birth certificates: 'Verbatim Record 2019/20', *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (International Court of Justice, General List No 178, 12 December 2019) 36 [15]–[16].

genocide within the scope of art II.[112] Doing so might have clarified 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 ICJ intended 'acts within the scope' of art 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 alleged conduct was undertaken with genocidal intent[113] — and it would presumably say the same about anything that might occur while the case is pending. If the Court meant acts 'within the scope' of art 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 noncompliance with the Court's order is not covered by the first two provisional measures because of the continued absence of genocidal intent.

On an alternative reading, the ICJ'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 intended its order to require Myanmar to put an end to ongoing policies and actions that The Gambia has characterised as acts falling within the scope of art II of the *Genocide Convention*, including restrictions on movement and the confiscation of agricultural lands and livestock from the Rohingya.[114] 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 a result of

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112 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!* (Blog Post, 23 January 2020) <https://www.ejiltalk.org/icj-indicates-provisional-measures-in-the-myanmar-genocide-case/>, archived at <https://perma.cc/3YR6-8DN5>.

113 'Myanmar Press Statement' (n 76); 'Verbatim Record 2019/19' (n 3) 15–17 [15]–[23], 18–19 [28].

114 'Verbatim Record 2019/18' (n 2) 38–9 [10], 40 [15]–[16]; 'Verbatim Record 2019/20' (n 111) 36 [16].

armed conflict between the Tatmadaw and non-Rohingya armed groups) would necessarily amount to noncompliance.[115]

It seems more likely that the ICJ's true aim was limited to preventing overt and intentional acts of violence from being perpetrated against the Rohingya and that the Court did not intend to demand more from Myanmar at this stage, including the deeper structural reforms that The Gambia is seeking on the merits.[116] Despite the Court's instruction to Myanmar to take 'all measures within its power' to prevent the commission of acts within the scope of art II[117] — 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 characterised as part of a state policy of genocide).[118] Nor is it reasonable to presume the imposition of such specific and far-reaching 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 no reports of widescale and wanton violence directed against the Rohingya in Myanmar during the first half of 2020 — the type of conduct that the ICJ's order was, at a minimum, unequivocally intended to prevent. But other 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.[119] The UN High Commissioner for Human Rights raised concerns that Tatmadaw forces had burned down and destroyed up to a dozen

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115 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 noncompliance with the Court's order, even though this 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, Rohingya Legal Forum, Center for Global Policy (n 4) 5–6. A joint statement by Australia, Canada, the UK 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 order: US Embassy in Burma, 'Statement from Diplomatic Missions in Myanmar' (Media Release, 27 June 2020) <https://mm.usembassy.gov/statement-from-diplomatic-missions-in-myanmar-0627/>, archived at <https://perma.cc/5JBR-NZVS>.

116 Application Instituting Proceedings and Request for Provisional Measures' (n 13) [112].

117 *The Gambia v Myanmar (Provisional Measures)* (n 5) [79].

118 Following the Court's decision, some non-governmental organisations 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, eg, International Commission of Jurists, 'Myanmar: Government Must Do Far More to Comply with International Court Justice's Order on Protection of Rohingya Population' (Press Release, 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/>, archived at <https://perma.cc/S8UN-9RE3>; Global Justice Center, *Q&A: The Gambia v Myanmar* (Factsheet, May 2020) 4–5 <https://www.globaljusticecenter.net/blog/19-publications/1258-updated-q-a-the-gambia-v-myanmar-rohingya-genocide-at-the-international-court-of-justice-2>, archived at <https://perma.cc/35CW-G83H>. These views appear to reflect an overly broad interpretation of the Court's order and the function of provisional measures.

119 See Global Justice Center (n 118) 4.

abandoned Rohingya villages in May 2020.[120] 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 noncompliance.[121] The prosecution of Rohingya individuals for attempting to flee Myanmar without official permission raised additional doubts.[122]

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 art II. Even if this correctly describes what the ICJ 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.

2 *The Reporting Requirement*

A final point concerns the fourth provisional measure, which required Myanmar to report back to the ICJ at regular intervals on the actions it has taken to implement the order.[123] This inclusion of the reporting requirement — in exercise of art 78 of the *Rules of Court*[124] — 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 the ICJ, but they

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120 Michelle Bachelet, UN High Commissioner for Human Rights, 'Oral Update on the Human Rights Situation of Rohingya People (S-27/1)' (Speech, Human Rights Council, 30 June 2020) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26018&LangID=E>, archived at <https://perma.cc/2ZWW-EWXV>.

121 Param-Preet Singh and Nadia Hardman, 'Pandemic Adds New Threat for Rohingyas in Myanmar' *The Diplomat* (online, 28 May 2020) <https://thediplomat.com/2020/05/pandemic-adds-new-threat-for-rohingyas-in-myanmar/>, archived at <https://perma.cc/S7D5-7G4D>.

122 Myint Zaw Oo and Kyaw Lwin Oo, 'Myanmar Court Jails 15 Rohingya for Two Years for Trying to Flee Country', *Radio Free Asia* (online, 6 March 2020) <https://www.rfa.org/english/news/myanmar/rohingya-jailed-03062020155637.html>, archived at <https://perma.cc/BY6M-2G7N>. 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 were released: Bachelet (n 120). On the impact 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* (online, 10 June 2020) <https://www.frontiermyanmar.net/en/time-to-begin-dismantling-movement-restrictions-in-rakhine/>, archived at <https://perma.cc/XKR5-45FG>.

123 *The Gambia v Myanmar (Provisional Measures)* (n 5) [86].

124 *Rules of Court* (n 93) art 78.

are not standard practice either.[125] The Court did not include anything similar in three other recent provisional measures orders where reporting requirements might have been appropriate.[126] Nor did the Court include a reporting requirement when it indicated provisional measures in 1993 in the *Bosnia Case*,[127] an omission that may have influenced the Court in 2020. 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 party).

However, the reporting requirement was also a missed opportunity. Myanmar duly submitted its first report to the ICJ on 22 May 2020, and, consistent with the Court's past practice, the report was confidential.[128] 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 groups, 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

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125 The Court has imposed a reporting requirement on nine previous occasions: *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland) (Provisional Measures)* [1972] ICJ Rep 12, 18; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland) (Provisional Measures)* [1972] ICJ Rep 30, 35; *Avena and Other Mexican Nationals (Mexico v United States of America) (Provisional Measures)* [2003] ICJ Rep 77, 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 of America) (Mexico v United States of America) (Provisional Measures)* [2008] ICJ Rep 311, 332 [80]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (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]; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Provisional Measures)* [2013] ICJ Rep 354, 370 [59]; *Jadhav (India v Pakistan) (Provisional Measures)* [2017] ICJ Rep 231, 245 [58], 246 [61].

126 *Ukraine v Russia* (n 101) 140–1 [106]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates) (Provisional Measures)* [2018] ICJ Rep 406, 433–4 [79]; *Iran v USA (Provisional Measures)* (n 98) 652 [102]. Out of those three cases, only Iran requested a reporting requirement: at 628 [14]. The Court did not explain its omission from the provisional measures indicated against the US. 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: International Tribunal for the Law of the Sea, *Rules of the Tribunal*, Doc No ITLOS/8 (adopted 28 October 1997, amended 25 September 2020) art 95(1). 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: see Kingsley Abbott, Michael A Becker and Bruno Gelinas-Faucher, 'Rohingya Symposium: Why So Secret? The Case for Public Access to Myanmar's Reports on Implementation of the ICJ's Provisional Measures Order', *Opinio Juris* (Blog Post, 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/>, archived at <https://perma.cc/8JP9-K9FK>.

127 *Bosnia Case (Provisional Measures)* (n 110) 24 [52]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia v Montenegro)) (Provisional Measures)* [1993] ICJ Rep 325, 349–50 [61].

128 The only confirmation of Myanmar's submission was a tweet from the ICJ's official Twitter account: @CIJ_ICJ (Twitter, 25 May 2020, 7:01pm AEST) <https://twitter.com/CIJ_ICJ/status/1264843908477050880>, archived at <https://perma.cc/BE7Y-YTUA>.

or approval of whatever assertions they may contain.[129] For these reasons, it is 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.[130] 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,[131] but the 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.[132]

Despite the non-public nature of Myanmar's initial report, it can be assumed that Myanmar, at a minimum, drew the ICJ's attention to three presidential directives from April 2020. The first directive instructed government officials to ensure that acts mentioned in arts II and III of the *Genocide Convention* are not committed,[133] 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 ICOE's final report or relating to the acts listed in art II of the *Genocide Convention*.[134] The third directive instructed officials to denounce and prevent all forms of hate speech.[135] At the time of writing, it remains unknown what further representations Myanmar may have made (including how these directives have been implemented) or how The Gambia has chosen 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.[136] This may be the type of case that invites the repeated use of provisional measures if the situation of the Rohingya within Myanmar deteriorates further.

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129 See Abbott, Becker and Gelinas-Faucher (n 126).

130 Ibid. Myanmar's reports and The Gambia's responses should eventually appear in the ICJ *Pleadings, Oral Arguments, Documents* series, but only after the termination of the case. In this light, there is no reasonable expectation of permanent confidentiality.

131 'Verbatim Record 2019/18' (n 2) 71 [24]–[26]; 'Verbatim Record 2019/20' (n 111) 37–8 [21]–[22]. As one commentator put it, the rejection was 'hardly a surprising result' in view of the 'intrusiveness of such a measure': Milanovic (n 112). However, the indication of such a measure would not have been entirely without precedent: see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Provisional Measures)* [1996] ICJ Rep 13, 23–4 [46], 25 [49(5)].

132 *The Gambia v Myanmar (Provisional Measures)* (n 5) [62]. Myanmar invoked its reservation to art VIII of the *Genocide Convention* in opposition to this request, but the Court did not engage with that argument: at [59].

133 Permanent Secretary, Office of the President (MMR), *Compliance with the Convention on the Prevention and Punishment of the Crime of Genocide* (Directive No 1/2020, 8 April 2020) <https://www.president-office.gov.mm/en/?q=briefing-room/announcements/2020/04/09/id-10002>, archived at <https://perma.cc/95GG-MEFH>.

134 Permanent Secretary, Office of the President (MMR), *Preservation of Evidence and Property in Areas of Northern Rakhine State* (Directive No 2/2020, 8 April 2020) <https://www.president-office.gov.mm/en/?q=briefing-room/announcements/2020/04/09/id-10004>, archived at <https://perma.cc/7MPW-JRQ7>.

135 Permanent Secretary, Office of the President (MMR), *Prevention of Incitement to Hatred and Violence (or) Prevention of Proliferation of Hate Speech* (Directive No 3/2020, 20 April 2020) <https://www.president-office.gov.mm/en/?q=briefing-room/announcements/2020/04/21/id-10006>, archived at <https://perma.cc/9LH8-XKFD>.

136 *Rules of Court* (n 93) arts 75–6.

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 ICJ's order would speed up repatriation, its actual effect may be the opposite. By finding that the Rohingya in Myanmar remain 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.[137]

Notwithstanding its success at the provisional measures phase, The Gambia still faces the considerable challenge of persuading the ICJ that the events of 2016 and 2017 constituted acts of genocide against the Rohingya.[138] Even when there is abundant evidence of mass atrocity, genocide is very difficult to prove as a matter of law. As the ICJ reiterated most recently in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (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'.[139]

Myanmar made clear during the provisional measures hearing that it will make every effort to present the ICJ with alternative explanations for what took place in Rakhine State. Myanmar has already noted the argument that the 'clearance operations' could have been 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 counterinsurgency, not genocide.[140] 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'.[141] 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

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137 See, eg, Hannah Ellis-Petersen and Shaikh Azizur Rahman, 'Rohingya Refugees Turn Down Second Myanmar Repatriation Effort', *The Guardian* (online, 22 August 2019) <https://www.theguardian.com/world/2019/aug/22/rohingya-refugees-turn-down-second-myanmar-repatriation-effort>, archived at <https://perma.cc/2QVM-NSWG>; 'Myanmar/Bangladesh: Plan Puts Rohingya at Risk', *Human Rights Watch* (News Post, 2 November 2018) <https://www.hrw.org/news/2018/11/02/myanmar/bangladesh-plan-puts-rohingya-risk>, archived at <https://perma.cc/H35M-UCXK>.

138 On challenges posed by the Court's case law, see Melanie O'Brien, 'Rohingya Symposium: The Rohingya Cases before International Courts and the Crime of Genocide', *Opinio Juris* (Blog Post, 25 August 2020) <https://opiniojuris.org/2020/08/25/rohingya-symposium-the-rohingya-cases-before-international-courts-and-the-crime-of-genocide/>, archived at <https://perma.cc/QA98-R8ZQ>.

139 *Croatia v Serbia* (n 28) 67 [148]. See also at 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(2) *Genocide Studies and Prevention* 123, 125–9. For a nuanced assessment of how the ICJ applied this standard in *Croatia v Serbia*, see Paul Behrens, 'Between Abstract Event and Individualized Crime: Genocidal Intent in the Case of Croatia' (2015) 28(4) *Leiden Journal of International Law* 923.

140 'Verbatim Record 2019/19' (n 3) 29 [25]–[27], 35 [43].

141 Ibid 38 [48].

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.