THE GAMBIA V. MYANMAR AT THE I.C.J.: GOOD SAMARITANS TESTING STATE RESPONSIBILITY FOR ATROCITIES ON THE ROHINGYA

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ABSTRACT

The Rohingya ethnic group of Myanmar's Rakhine State have suffered systemic discrimination and violence for several decades. An overwhelming majority of Rohingya had to either flee their homes, or stay and suffer from deplorable conditions. While a majority of states have condemned the atrocities perpetrated on the Rohingya, decisive action or even unequivocal condemnation in the U.N. General Assembly has been stymied by various political and strategic factors. The Gambia, a small African state, has taken upon itself to test the legal responsibility of Myanmar for atrocities on the Rohingya by filing a case at the International Court of Justice ("I.C.J." or "the Court") in November 2019. This Article seeks to explore how the case may play out as it proceeds in the I.C.J. and what it may or may not mean for the Rohingya by analyzing the Court's provisional order, its record of hearings, and its jurisprudence along with other international courts.

INTRODUCTION

The Rohingya community of Myanmar's Rakhine province is one of the most persecuted communities the world has seen in the last several decades. The international community of states and non-state actors have, from time to time, voiced their concerns about the systemic deprivation of rights, discriminatory treatment, and violence perpetrated on the Rohingya. However, any concerted action has been stymied by the strategic interests of some powerful states condoning the activities of Myanmar authorities. Indeed, it may be somewhat puzzling that the international community condemns the undemocratic rule in Myanmar but fails to recognize the Rohingya's systemic tribulations. Even a state like Bangladesh, which has been quite severely affected by the influx of Rohingya taking refuge in its territories has not set in

motion any international legal avenue to legally impugn Myanmar's activities.

The Republic of The Gambia ("Gambia"), a state located more than 11,500 kilometers away from Myanmar,[1] have balked at the trend of inaction by filing a case against Myanmar on November 11, 2019. Gambia accused Myanmar of violating the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention").[2] As Gambia has not directly suffered from the atrocities of Myanmar, in material terms, this move by Gambia may be characterised as gratuitous like that of a good Samaritan—a person who helps strangers when they have trouble.[3] This case has put the I.C.J. (widely referred to as the World's Court) at center stage to dispense justice for Rohingya. Ideally, the I.C.J. will bring about change to the desperate conditions experienced by the Rohingya, illuminating the life of those bereft of any real hope for tomorrow.

Furthermore, this case presents an opportunity to shed light on those that support or condone Myanmar's atrocious crimes. Powerful states, such as China,[4] Russia,[5] and India,[6] have helped solidify Myanmar's position because of its close economic and strategic ties with Myanmar's government.

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1. D. Wes Rist, *What Does the ICJ Decision on The Gambia v. Myanmar Mean?*, 24 ASIL INSIGHTS 2 (Feb. 27, 2020), https://www.asil.org/insights/volume/24/issue/2/what-does-icj-decision-gambia-v-myanmar-mean.

2. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

3. This is not to imply that Gambia, as a state party to the Genocide Convention, has no interest in ensuring the legal compliance with provisions of the Convention. Additionally, in some countries, there are laws requiring a person to come to the rescue of another who is exposed to some grave physical harm, when there is no danger of risk of injury to the rescuer. *See* John T. Pardun, *Good Samaritan Laws: A Global Perspective*, 20 LOY. L.A. INT'L & COMP. L.J. 591 (1998).

4. *See infra* notes 282-89 and the accompanying text.

5. Mike Blanchfield, *China, Russia under pressure from Myanmar Rohingya genocide ruling: Bob Rae*, NATIONAL POST (Jan. 23, 2020), https://nationalpost.com/pmn/news-pmn/canada-news-pmn/canada-applauds-international-court-decision-on-myanmar-rohingya-genocide.

6. *Why India did not raise Rohingya issue during Modi's Myanmar visit*, HINDUSTAN TIMES (Sept. 7, 2017), https://www.hindustantimes.com/editorials/here-is-why-india-did-not-raise-rohingya-issue-during-modi-s-myanmar-visit/story-xJNkmGsJtv9JBWIK2SKMsO.html.

Part I provides a detailed background of the persecution of the Rohingyas in Myanmar. Part II explains why and how Gambia moved to the I.C.J., seeking justice for the Rohingyas. Part III describes the claims brought before the I.C.J. by Gambia and Myanmar's response. Part IV analyzes the salient features of the I.C.J.'s provisional orders passed on January 23, 2020, and what the orders suggest as to the I.C.J.'s final judgment. Part V sheds some light on what a judgment in upholding Gambia's claims may practically mean for the persecuted Rohingya.

I. BACKGROUND AND CURRENT CRISIS OF THE ROHINGYA PEOPLE

The plight of the Rohingya in Rakhine today has a long history behind it. To understand this, one needs to look at the ethnic make-up and history of Myanmar. Generally speaking, the term "Rohingya" refers to the Muslim population from the Northern Rakhine State living in Myanmar who have their distinct language and cultural practices.[7] To understand this, one needs to look at the ethnic make-up and history of Myanmar.[8] The Rohingya form a racial, linguistic, and religious minority, and have been subjected to recurring persecution and forced displacement for centuries.[9] Such assaults have commenced since 1784, and subsequent armed confrontations during the British colonial era led to additional displacements after independence, which gave the Myanmar government to the subterfuge to deem the Rohingya as "illegal migrants."[10] In 1948, Myanmar (formerly known as Burma) obtained independence from Britain through armed conflict.[11]

While tensions between the Rohingya Muslims and Buddhists in Rakhine State have existed for a very long time, a particularly

7. Megan Specia, *The Rohingya in Myanmar: How Years of Strife Grew into a Crisis*, N.Y. TIMES (Sept. 13, 2017), https://www.nytimes.com/2017/09/13/world/asia/myanmar-rohingya-muslim.html.

8. *Id.*

9. Samuel Cheung, *Migration Control and the Solutions Impasse in South and Southeast Asia: Implications from the Rohingya Experience*, 25 J. REFUGEE STUD. 50, 51 (2011).

10. *Id.* at 51.

11. Harrison Akins, *The Two Faces of Democratization in Myanmar: A Case Study of the Rohingya and Burmese Nationalism*, 38 J. MUSLIM MINORITY AFF., 229, 235 (2018).

noticeable boiling point came in 1982 when Myanmar's junta passed a law that recognized eight ethnicities who were entitled to citizenship, with the exclusion of the Rohingya, although they had previously enjoyed at least de jure equal rights from British Rule until 1948.[12] The Citizenship Law of 1982 states for being eligible to citizenship, a person must belong to one of 135 recognized national ethnic groups or that their ancestors must have settled in the country before 1823.[13] Members of the Rohingya minority and other Muslim groups were neither included in the list of these 135 recognized ethnic groups nor could they document the length of their families' settlement in Myanmar because of "Operation Dragon King," launched in 1977 (conducted in Rakhine in 1978), the purpose of which was ostensibly to designate citizens and foreigners in accordance with the law and take action against illegal intruders.[14] However, before 1962, the civil government had recognized 144 ethnic groups, and the Rohingya were included in them.[15] The Government of Myanmar still denies the Rohingya citizenship and even excluded them from their 2014 census, refusing to recognize them once again.[16]

Citizens of Myanmar have not shown any real concern for the Rohingya—who make up approximately one million out of fifty million people—and they seem to perceive them as intruders.[17] The main ethnic

12. Krishnadev Calamur, *The Misunderstood Roots of Burma's Rohingya Crisis*, THE ATLANTIC (Sept. 25, 2017), https://www.theatlantic.com/international/archive/2017/09/rohingyas-burma/540513/#Correction1.

13. U.N. DEPT. OF ECON. AND SOC. AFF., PROMOTING INCLUSION THROUGH SOCIAL PROTECTION: REPORT ON THE WORLD SOCIAL SITUATION 2018, 102, https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2018/07/1-1.pdf.

14. Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar's Rohingya*, 23 PAC. RIM L. & POL'Y J. 683, 707 (2014).

15. *Id.*; A.K.M. Ahsan Ullah, *Rohingya Crisis in Myanmar: Seeking Justice for the "Stateless,"* 32 J. CONTEMPORARY CRIM. JUST. 285, 286 (2016).

16. *Myanmar Rohingya: What you need to know about the crisis*, BBC NEWS, (Jan. 23, 2020), https://www.bbc.com/news/world-asia-41566561; Specia, *supra* note 7.

17. Md. Rizwanul Islam, *ASEAN Must Show Its Mettle over the Rohingya Crisis*, BANGKOK POST (Oct. 14, 2017), https://www.bangkokpost.com/opinion/opinion/1341991/asean-must-show-its-mettle-over-the-rohingya-crisis.

groups living in Myanmar are the Bamar, Karen, Shan, Mon, Chin, Kachin, Rakhine and Karenni.[18] Other ethnic groups with substantial numbers include the Pa-O, Wa, Kokang, Palaung, Akha, and Lahu.[19] Due to the Rohingya's lack of citizenship rights and systemic persecution in Myanmar, the Rohingya have fled from their homes in Myanmar to Bangladesh in several exoduses. The persecution of Rohingya has continued unabated for many years because of domestic support and the international community's inertia.[20] There appears to be a direct nexus between the Myanmar military and the origin of the systemic atrocities on the Rohingya. Military brutality and discrimination directed toward the Rohingya have been a norm for a long time but the first wave of large scale violence occurred in 1977. [21] This first wave marks the starting point of today's crisis.[22] In 1977, the Burmese government "cracked down" on illegal immigration, resulting in killings, mass arrests, torture, and other abuses against the Rohingya Muslims.[23] This resulted in more than 200,000 Rohingya Muslims fleeing to Bangladesh.[24] Myanmar's junta's narrative was that around 20,000 "Bengalis" fled to Bangladesh to avert Myanmar's examination of their legal status.[25] Resource constraints inhibited Bangladesh's government and it did not have a favorable attitude towards the Rohingya. [26] Bangladesh repatriated the Rohingya back to Myanmar

18. Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples – Myanmar/Burma*, REFWORLD (Sept. 2017), https://www.refworld.org/docid/4954ce41c.html.

19. *Id.*

20. Md. Rizwanul Islam, *Rohingya Crisis: Sanctions Must Target Myanmar Leadership*, NEW STRAITS TIMES (Oct. 3, 2017, 7:11 PM), https://www.nst.com.my/opinion/columnists/2017/10/286818/rohingya-crisis-sanctions-must-target-myanmar-leadership; Islam, *ASEAN Must Show Its Mettle*, *supra* note 17.

21. Engy Abdelkader, *The Rohingya Muslims in Myanmar: Past, Present, and Future*, 15 OR. REV. INT'L. L. 101, 103 (2013).

22. *See id*.

23. *Id*. at 103 n.12.

24. *Id*.

25. *Id*.

26. *Id*.

against their will in 1979.[27] The next Rohingya exodus from Myanmar occurred between 1991 to 1992 when roughly 250,000 Rohingya crossed to the Cox's Bazar region in Bangladesh.[28] The Bangladeshi government issued an executive order declaring the Rohingya to be designated as *prima facie* refugees solely because they were Muslim.[29] However, in 2000, the Bangladeshi government enacted a contentious repatriation program resulting in the repatriation of almost 250,000 Rohingya to Myanmar.[30]

Bangladesh experienced a third wave of arrivals in June 2012, after lethal sectarian violence erupted in the Rakhine State between ethnic Arakan Buddhists, the Rohingya, and other Muslims.[31] The sectarian violence flared after the rape and murder of a Buddhist woman in May 2012, which was then followed by revenge attacks against the Rohingya.[32] During this time, there was widespread use of Facebook to spread hate speech and incite violence.[33] This round of violence escalated and eventually resulted in a virtually state-sanctioned attack against the Rohingya and other Muslims living in Rakhine.[34] In October 2015, the International Human Rights Clinic at Yale Law School and Fortify Rights, a human rights NGO, published a legal report finding "strong evidence" the Myanmar Army, Air Force, Police Force, and armed civilians collectively committed genocidal acts in Myanmar.[35]

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27. *See id*; Katie Dock, *Breaking a Cycle of Exodus: Past Failures to Protect Rohingya Refugees Should Shape Future Solutions*, STIMSON (June 21, 2020), https://www.stimson.org/2020/breaking-a-cycle-of-exodus/.

28. Cheung, *supra* note 9, at 3; *see id.* at 103 n.13.

29. Cheung, *supra* note 9, at 3.

30. *Id*.

31. *All You Can Do is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State*, HUMAN RIGHTS WATCH (Apr. 22, 2013), https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims.

32. Specia, *supra* note 7.

33. Emma Irving, *Suppressing Atrocity Speech on Social Media*, 113 AM. J. INT'L L. UNBOUND 256, 256 (2019) (observing that social media companies should make more concerted efforts towards self-regulation, given the lack of any coherent national and international legal response and the role social media companies play in acting as a conduit for inciting atrocities).

34. Specia, *supra* note 7.

35. Alina Lindblom et al., *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State?* ALLARD K. LOWENSTEIN INT'L HUMAN

Accordingly, it recommended the United Nations adopt a resolution to establish a commission of inquiry on the human rights situation in Rakhine.[36] On November 22, 2017, then acting United States Secretary of State, Rex Tillerson, issued a press statement observing that "[a]fter a careful and thorough analysis of available facts, it is clear that the situation in northern Rakhine State constitutes ethnic cleansing against the Rohingya."[37]

According to the United Nations High Commissioner for Refugees ("UNHCR"), more than 723,000 Rohingya have fled to Bangladesh since August 2017.[38] Kutupalong, the largest refugee settlement in the world, alone is home to more than 600,000 refugees.[39] The Rohingya exodus has strained Bangladesh's fledgling economy and infrastructure. The enormity of the exodus can be appreciated from the fact that from mid-August to early October 2017, more Rohingya had fled to Bangladesh than those fleeing from conflict and war-ridden countries in the Middle East and Africa to Europe through the Mediterranean Sea in 2016.[40] On this occasion, Bangladeshis initially tolerated, if not welcomed the Rohingya, and many Bangladeshis seem to have a favorable opinion in sheltering the persecuted Rohingyas.[41]

RIGHTS CLINIC: YALE L. SCH., 10, 15, 64 (Oct. 2015), https://www.fortifyrights.org/downloads/Yale_Persecution_of_the_Rohingya_October_2015.pdf.

36. *Id*.

37. Press Release, Rex Tillerson, U.S. Dept. of State, *Efforts to Address Burma's Rakhine State Crisis* (Nov. 22, 2017), https://perma.cc/3P4H-SAVL.

38. Kamrul Hasan, *Rohingya Crisis: Population exploding as 91,000 babies are born in two years*, DHAKA TRIB. (Aug. 29, 2019), https://www.dhakatribune.com/bangladesh/rohingya-crisis/2019/08/29/rohingya-crisis-population-exploding-as-91-000-babies-are-born-in-two-years.

39. *Myanmar Rohingya: What you need to know about the crisis*, *supra* note 16.

40. Md. Rizwanul Islam, *Sanctions Must Target Myanmar Leadership*, *supra* note 20.

41. Md. Rizwanul Islam, *The Rohingya imbroglio*, THE INDEPENDENT (Dec. 5, 2016), http://dspace.bracu.ac.bd/xmlui/bitstream/handle/10361/7956/The%20Independent_05%20December%202016.pdf?sequence=1&isAllowed=y; Abu Afsarul Haider, *Rohingya - A people not wanted anywhere*, THE DAILY STAR (Jan. 26, 2019, 12:00 AM), https://www.thedailystar.net/opinion/human-rights/news/rohingya-people-not-wanted-anywhere-1692907; Tazreena Sajjad, *As Bangladesh Hosts over a Million Rohingya Refugees, a Scholar Explains What Wotivated the Country to Open up Its*

However, many Bangladeshis still harbor strong resentments in letting Rohingyas continue to shelter in Bangladesh because of the strain on the Cox's Bazar region's resources.[42] Further, many Bangladeshis perceive the Rohingya as criminals or believe that some of them travel abroad on fake Bangladeshi passports and commit crimes, which undermines the image of Bangladesh.[43] Thus, most Rohingyas living in Bangladesh are bereft of any proper work opportunities[44] and have a bare minimum existence with little hope for a meaningful life in Bangladesh.

According to a 2019 report by United Nations investigators, the Rohingya within Rakhine remain in "deplorable" conditions and face a "serious risk of genocide."[45] This report accused Myanmar's military of "harbor[ing] genocidal intent" towards the Rohingya and renewed "war crimes," including forced labor and torture against civilians.[46] Myanmar's military claims that it is carrying out attacks on the Rohingya to "root out" rebels and bring stability to the country.[47] In reality, Myanmar damages its own security far more than any claimed gains by trampling on its citizens' human rights.[48] Further, Myanmar's military has shown itself to be incapable of maintaining peace and security within its own borders.[49] The violence perpetrated on the

Borders, THE CONVERSATION, (Oct. 6, 2020), https://theconversation.com/as-bangladesh-hosts-over-a-million-rohingya-refugees-a-scholar-explains-what-motivated-the-country-to-open-up-its-borders-133609.

42. Islam, *ASEAN Must Show Its Mettle*, *supra* note 17; *A Sustainable Policy for Rohingya Refugees in Bangladesh*, INTERNATIONAL CRISIS GROUP (Dec. 27, 2019), https://www.crisisgroup.org/asia/south-asia/bangladesh/303-sustainable-policy-rohingya-refugees-bangladesh; *Bangladesh: Rohingya Refugees Stranded at Sea*, HUMAN RIGHTS WATCH (Apr. 25, 2020, 12:00 AM), https://www.hrw.org/news/2020/04/25/bangladesh-rohingya-refugees-stranded-sea.

43. Islam, *The Rohingya imbroglio*, *supra* note 41.

44. *See* Kathryn Reid et. al, *Rohingya refugee crisis: Facts, FAQs, and how to help*, WORLD VISION https://www.worldvision.org/refugees-news-stories/rohingya-refugees-bangladesh-facts (last updated June 12, 2020).

45. Elise Carlson-Rainer & Anish Goel, *Myanmar's Military Is Only Hurting Itself*, FOREIGN POLICY (Nov. 8, 2019), https://foreignpolicy.com/2019/11/08/myanmar-military-rohingya/.

46. *Id*.

47. *Id*.

48. *Id*.

49. *Id*.

Rohingya may actually help some extremist groups to hire disillusioned young Rohingyas.[50] Currently, with more than half a million Rohingya believed to be still living in Myanmar's northern Rakhine province, U.N. investigators warn there is a "serious risk [] genocidal actions may occur or recur."[51] As of March 2019, Bangladesh announced it would no longer accept any Rohingya fleeing Myanmar.[52]

II. THE GAMBIA TAKING MYANMAR TO THE I.C.J.

The neighboring Association of Southeast Asian Nations ("ASEAN") members have mildly protested against Myanmar's treatment of the Rohingya and some powerful states such as China, India, and Russia have jockeyed for influence in Myanmar to advance their economic interests.[53] In examining the international communities response to the atrocities against the Rohingyas, it is remarkable that a small African country with no direct nexus to the atrocities—Gambia—has sought to avenge the Rohingyan cause. It was somewhat by chance that Abubacarr Marie Tambadou ("Tambadou"), the Attorney-General and Minister of Justice of Gambia visited the Rohingya in Bangladesh.[54] The travails of the Rohingya moved Tambadou, and eventually with support from other member states of the Organization of Islamic Cooperation ("OIC"), Gambia decided to take the matter to the I.C.J.[55] In May 2019, Tambadou introduced a resolution to the OIC Committee to inspect alleged abuses against the Rohingya and

50. Wa Lone & Antoni Slodkowski, *'And then they exploded': How Rohingya insurgents built support for assault*, REUTERS (Sept. 6, 2017, 7:14 PM), https://www.reuters.com/article/us-myanmar-rohingya-insurgents-insight/and-then-they-exploded-how-rohingya-insurgents-built-support-for-assault-idUSKCN1BI06J.

51. *Myanmar Rohingya: What you need to know about the crisis*, *supra* note 16.

52. *Rohingya Crisis: Bangladesh will no longer take in Myanmar* refugees, BBC NEWS (Mar. 1, 2019), https://www.bbc.com/news/world-asia-47412704.

53. Md. Rizwanul Islam, *Gambia's Genocide Case Against Myanmar: A Legal Review*, THE DIPLOMAT (Nov. 19, 2019), https://thediplomat.com/2019/11/gambias-genocide-case-against-myanmar-a-legal-review/.

54. Shola Lawal, *Tiny Gambia stands up for the Rohingya*, AFRICA INSIDERS (Dec. 18, 2018) https://africanarguments.org/2019/12/18/africa-insiders-tiny-gambia-stands-up-for-the-rohingya/.

55. *Id*.

convinced the 57-member organization to back a formal case against Myanmar.[56]

Gambia filed its I.C.J. application on November 11, 2019. The application concerns acts the Government of Myanmar perpetrated and condoned against members of the Rohingya.[57] These acts include killing, causing serious bodily and mental harm, inflicting conditions that are calculated to bring about physical destruction, imposing measures to prevent births, and forcible transfers.[58] In its I.C.J. application, Gambia argues these acts are genocidal in character because it is attempting to destroy the Rohingya, in whole or in part.[59] Myanmar's government violated the Genocide Convention by committing these acts against the Rohingya.[60] Under Article II of the Genocide Convention:

> genocide means 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.[61]

Polish scholar Raphael Lemkin coined the term "genocide" in his book, *Axis Rule in Occupied Europe*, which was published during the

56. Aaron Ross, *With memories of Rwanda: The Gambian minister taking on Suu Kyi*, REUTERS (Dec. 5, 2019) https://www.reuters.com/article/us-myanmar-rohingya-world-court-gambia/with-memories-of-rwanda-the-gambian-minister-taking-on-suu-kyi-idUSKBN1Y91HA.

57. Application Instituting Proceedings and Request for Provisional Measures (Gam. v. Myan.), Application, 2019 I.C.J. 2 (Nov. 11) https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf (hereinafter Gambia v. Myanmar Application).

58. *Id*. at 4.

59. *Id*.

60. *Id*.

61. Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277.

Second World War.[62] The prosecutor at the International Military Tribunal in Nuremberg used the term genocide in some speeches, but the term was not used in the London Charter establishing the Nuremberg International Military Tribunal or in the judgment.[63]

Beyond the Genocide Convention, the U.N. General Assembly Outcome Document of the Summit of Heads of State and Government of September 16, 2005 (at the level of Heads of State and Government of U.N. member states) casts an important legal duty upon states in the realm of state responsibility (widely known as the responsibility to protect).[64] This instrument affirmed state's responsibility to protect against genocide both within and beyond borders.[65] It proclaims that every state has the legal responsibility to protect its populations from genocide, and this responsibility would necessitate "the prevention of such crimes, including their incitement, through appropriate and necessary means."[66] Gambia may argue that the extraterritorial and collective responsibility entails that states are obliged to take actions collectively "in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide."[67]

62. *See* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS xi (1st ed.1944).

63. Yuval Shany, *The Road to the Genocide Convention and Beyond*, THE UN GENOCIDE CONVENTION: A COMMENTARY 3, 7 (Paola Gaeta ed., 1st ed. 2009).

64. G.A. Res. 60(1), ¶ 138 (Oct. 24, 2005). For commentaries on this, *see* Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, 101 AM. J. INT'L L. 99 (2007); Alicia L. Bannon, *The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism*, 115 YALE L.J. 1157 (2006).

65. G.A. Res. 60(1), ¶ 138 (Oct. 24, 2005).

66. *Id*.

67. *Id*. ¶ 139. However, the political and strategic considerations have meant that the international community of states have hardly succeeded in honoring this responsibility; *see* Aidan Hehir, *The Permanence of I of Inconsistency: Libya, the Security Council, and the Responsibility to Protect*, 38 INT'L SEC. 137-159 (2013).

Myanmar violated other essential obligations under the Genocide Convention.[68] Gambia's petition alleged Myanmar attempted to commit genocide, conspired to commit genocide, incited genocide, was complicit in genocide, and failed to prevent and punish genocide.[69] Gambia was mindful of the *jus cogens*[70] character of the prohibition of genocide and the *erga omnes* or *erga omnes partes*[71] character of the obligations that are owed under the Genocide Convention.[72] Therefore, Gambia instituted proceedings to establish Myanmar's responsibility for violations of the Genocide Convention, "to hold it [] accountable under international law for its genocidal acts against the Rohingya," and to utilize the Court to guarantee the maximum "possible protection for those who remain at grave risk from future acts of genocide."[73]

Regarding the I.C.J.'s jurisdiction, Gambia argued that both Gambia and Myanmar are State Parties to the Genocide Convention.[74] The Genocide Convention requires each State Party have an interest to comply in any given case. Gambia has standing because any State Party to the Genocide Convention may invoke the obligation of another State Party to determine the alleged failure to comply with its obligations *erga omnes partes* and to bring that failure to an end.

The Court concluded Gambia has *prima facie* standing to submit its dispute to the I.C.J. with Myanmar on the basis of alleged violations of obligations under the Genocide Convention.[75] The petition was asserted pursuant to Article 36(1) of the I.C.J. Statute and Article IX of

68. Application Instituting Proceedings and Request for Provisional Measures (Gam. v. Myan.), Application, 2019 I.C.J. 4 (Nov. 11) https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf.

69. *Id*.

70. *Jus cogens* means peremptory norms of international law. *See* Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988).

71. *Erga omnes* or *erga omne partes* obligations are obligations owed to the community of states, not to a particular state. CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW (2005).

72. Gam. v. Myan., Application, 2019 I.C.J. 12, ¶ 15 (Nov. 11).

73. *Id*.

74. *Id*. at 12, ¶ 17.

75. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order, 2020 I.C.J. 28, ¶ 42 (Jan. 23), https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf (hereinafter Gambia v. Myanmar Order).

the Genocide Convention, and accordingly, the Court had jurisdiction to hear Gambia's claims.[76]

Article IX has been invoked before the I.C.J. on a few occasions.[77] Gambia's situation was unique because it was the first time a State Party invoked Article IX when its own nationals were not the alleged victims of either genocide or another violation of any provision of the Genocide Convention.[78]

III. THE GAMBIA'S CLAIMS AND MYANMAR'S RESPONSE

Gambia argued Myanmar, through its state organs, agents, and other persons and entities acting on the instructions of or under the direction and control of Myanmar, is liable for violating its obligations under Articles I, III, IV, V, and VI of the Genocide Convention.[79] Specifically, the alleged violations of the Genocide Convention include, but are not limited to:

> committing genocide in violation of Article III(a); conspiring to commit genocide in violation of Article III(b); directly and publicly inciting to commit genocide in violation of Article III(c); attempting to commit genocide in violation of Article III(d); complying in genocide in violation of Article III(e); failing to prevent genocide in violation of Article I; failing to punish genocide in violation of

76. *Id*. ¶ 3.

77. *See*, *e.g*., Trial of Pakistani Prisoners of War (Pak. v. India), Pleadings, 1973 I.C.J. 328 (May 11); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. (Feb. 26); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Yugoslavia), Application, 1999 I.C.J. (July 2).

78. *Questions and Answers on Gambia's Genocide Case Against Myanmar before the International Court of* Justice, HUMAN RIGHTS WATCH (Dec. 5, 2019), https://www.hrw.org/news/2019/12/05/questions-and-answers-gambias-genocide-case-against-myanmar-international-court#_Why_is_this. In this regard, Pakistan's allegation was not that its citizens were victims of genocide, rather it argued that that under the Geneva Conventions of 1949 and the Genocide Convention, 1948, India was legally obliged to promptly repatriate prisoners of war which the latter failed to comply. *See* Md. Rizwanul Islam, *Justice for Bangladesh: Pakistan's Little Remembered Promise*, THE DIPLOMAT (May 11, 2017), https://thediplomat.com/2017/05/justice-for-bangladesh-pakistans-little-remembered-promise/.

79. Gam. v. Myan., Application, 2019 I.C.J. 56, ¶ 111.

> Articles I, IV, and VI; and failing to enact the necessary legislation to give effect to the provisions of the Genocide Convention and to provide effective penalties for persons guilty of genocide or of any of the acts enumerated in Article III.[80]

Gambia cites an Independent International Fact-Finding Mission on Myanmar ("IIFFMM"), which the UNHRC established in March 2017. The purpose of the IIFFMM was "to establish the facts and circumstances surrounding the alleged recent human rights violations by military and security forces in Myanmar."[81] The damning observations of the independent body published in September 2019 found Myanmar failed to perform its obligations to prevent, investigate, and punish genocide and failed to have effective legislation criminalizing and punishing genocide.[82] Gambia added that Myanmar was aware the IIFFMM established by the UNHRC welcomed the efforts of States, specifically Bangladesh and Gambia, and the OIC "to encourage and pursue a case against Myanmar before the Court under the Convention on the Prevention and Punishment of the Crime of Genocide."[83] Gambia alleged Myanmar entirely rejected the IIFFMM reports and the conclusions contained therein.[84]

Although Gambia made clear it believed Myanmar's actions constituted a clear violation of its obligations under the Convention, Myanmar rejected any suggestion it violated the Genocide Convention and denied any government wrongdoing.[85] Myanmar also contended that because of its reservations to Articles VI and VIII of the Genocide Convention, the I.C.J. lacked jurisdiction to hear the matter.[86]

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80. *Id*.

81. U.N. Human Rights Council, *Independent International Fact-Finding Mission on Myanmar*, https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Index.aspx (last visited Nov. 8, 2020). "The mandate of the IIFFMM ended in September 2019." *Id*.

82. Human Rights Council, Detailed findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/42/50, ¶ 9 (Sept. 16, 2019).

83. *Id*. ¶ 40.

84. *See* Gam. v. Myan., Application, 2019 I.C.J. 16, ¶¶ 21-22.

85. *Id*.

86. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan;.), Request for the Indication of Provisional Measures, 2020 I.C.J. 6, 11, ¶¶ 19, 32 (Jan. 23), https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf.

Article VI of the Geneva Convention provides that a person charged with genocide shall be tried by a competent tribunal of the state where the offense occurs or by an international penal tribunal. In its reservation, Myanmar has only asserted the exclusive jurisdiction of its national tribunals over the trial of individuals for committing any offense under the Genocide Convention and nothing more.[87] In the current case, the Gambians were not seeking to prosecute any Myanmarese for genocide; instead, the state of Myanmar which is on the dock, rendering Article VI inapplicable.[88] Article VIII of the Genocide Convention provides the contracting parties to the Convention "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."[89] Thus, it appears that this provision might only apply to situations where a state party seeks the intervention of the United Nations Security Council ("UNSC").[90] Further, "even in that situation it seems unsure how Myanmar's reservation might override the provisions of the Charter of the United Nations," which authorizes, and likely dictates, the UNSC's actions.[91] Any other interpretation would allow a party's unilateral position to override a provision of a separate multilateral treaty.

The above concept is further supported by the fact that Myanmar, like other states, decided against expressing reservations to Article IX of the Genocide Convention. Given that the I.C.J., in its Advisory Opinion on Reservations to the Genocide Convention, upheld the legality of reservations,[92] such an exercise by Myanmar could have prohibited the I.C.J. from exercising its jurisdiction.[93] However, several opinions from the Case of Armed Activities on the Territory of the Congo indicate that removing I.C.J.'s jurisdiction, despite reservations,

87. Islam, *A Legal Review*, *supra* note 53.

88. *Id*.

89. Genocide Convention, *supra* note 2, art. 8.

90. Islam, *A Legal Review*, supra note 53.

91. *Id*.

92. *See generally* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

93. This is because the only basis for the I.C.J.'s jurisdiction here is Article IX of the Genocide Convention.

would have been a tall task.[94] It is a little uncertain even despite such a reservation because at least some judges of the Court would not have reconsidered its previous pronouncement, which is somewhat implicit from the separate opinion of some judges in the Case of Armed Activities on the Territory of the Congo.

In that case, a majority of the Court held that neither the *erga omnes* nor the *jus cogens* character of the genocide prohibition could by themselves confer jurisdiction because jurisdiction is based on the parties' consent.[95] The majority of the judges also held that the reservation to Article IX was compatible with the object and purpose of the Convention.[96] However, Judge Koroma, in his dissenting opinion, observed that such a reservation was incompatible with the object and purpose of the Genocide Convention.[97] Judges Higgins, Kooijmans, Elaraby, Owada, and Simma issued a joint separate opinion observing that, in the future, the I.C.J. should reconsider the compatibility of reservations to Article IX with the object and purpose of the Genocide Convention in more detail.[98]

Myanmar argued that the Court lacked jurisdiction under Article IX of the Genocide Convention because there was no direct dispute between the parties; Gambia filed the case merely on behalf of the OIC.[99] In the past, the I.C.J. has held that it is empowered to issue provisional measures so long as there is not a manifest lack of jurisdiction as would be evident from the observation of the I.C.J. in the Anglo-Iranian Oil Case that "it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of

94. Armed Activities on the Territory of the Congo (New Application: 2002), Jurisdiction of the Court and Admissibility of the Application (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 6 (Feb. 3) (hereinafter Congo Cases).

95. *Id*. at 31, ¶ 64.

96. *Id*. at 32, ¶¶ 66-67.

97. *Id*. at 55-63, ¶¶ 11-26 (dissenting Opinion of Koroma, J.).

98. *Id*. at 72, ¶ 29 (joint separate opinion by Higgins, J., Koojimans, J., Elaraby, J., Owada, J., Simma, J.)("It is thus not self-evident that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration.").

99. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam.v. Myan.), Request for the Indication of Provisional Measures, 2020 I.C.J. 8, ¶ 23 (Jan. 23), https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf.

international jurisdiction."[100] However, the I.C.J. seems to have recently shifted towards a more restrictive position on jurisdictional requirements. The shift began with the Nuclear Tests Cases, where it held that a mere *prima facie* showing of jurisdiction is sufficient before issuing provisional measures.[101]

Similarly, in the Nicaragua Case, the Court observed that although its final satisfaction about the existence of jurisdiction is not necessary before issuing provisional measures, "it ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded."[102] The I.C.J. reiterated a similar idea in the LaGrand Case.[103] Clearly, this is a rational choice because if the provisional measures are not preceded by at least a *prima facie* showing of jurisdiction, the I.C.J.'s later merit findings could be tarnished by lack of jurisdiction. Therefore, as the I.C.J. has issued provisional measures, it seems to have rejected Myanmar's assertion that there is no direct dispute with Gambia.[104] Of particular importance is a *Note Verbale* of October 11, 2019, from Gambia's Permanent Mission to the United Nations to Myanmar's Permanent Mission, expressing concerns over the findings of the IIFFMM and Myanmar's corresponding rejection.[105] This conclusion that there is a legal dispute between the parties in this case

100. Anglo-Iranian Oil Co. Case (U.K. v. Iran), Interim Measures, 1951 I.C.J. Rep. 89, 93 (July 5) (hereinafter Anglo-Iranian Oil Co. Case).

101. *See* Nuclear Tests Case (Austrl. v. Fr.), Request for the Indication of Interim Measures of Protection Order, 1973 I.C.J. 99, 101, ¶ 13 (June 22); *see also* Nuclear Tests Case (N.Z. v. Fr.), Request for the Indication of Interim Measures of Protection Order, 1973 I.C.J. 135, 137 ¶ 14 (June 22).

102. U.S. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Provisional Measures, 1984 I.C.J. 169, 175, ¶ 14 (May 10). For a detailed background of the case, *see generally* Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM.. L. REV. 1445 (1985).

103. *See* LaGrand Case (Ger. v. U.S.), Merits, 1999 I.C.J. 9, 13, ¶ 13. (Mar. 3). *See also* Sir Robert Jennings, *The LaGrand Case*, 1 L. & PRACTICE OF INT'L COURTS & TRIBUNALS 13 (2002) (providing a detailed background of the LaGrand Case).

104. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order, 2020 I.C.J. 10 (Jan. 23), https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf.

105. Application Instituting Proceedings and Request for Provisional Measures (Gam. v. Myan.), Application, 2019 I.C.J. 16, ¶ ¶ 21-22 (Nov. 11), https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf.

may be further supported by the finding of the Court in *Belgium v. Senegal* that in the context of torture, each State Party has an interest in compliance with provisions of the Convention. Thus, that case establishes that there exists "the entitlement of each State [P]arty to the Convention to make a claim concerning the cessation of an alleged breach by another State [P]arty," as Gambia has asserted.[106] Hence, "every state party can have 'standing' to invoke the responsibility of another State Party without the requirement of having any 'special interest.'"[107] Even from a normative policy point of view, as state agents may more often than not be involved in perpetrating genocide, it is perhaps important that the standing of a state in bringing cases at the I.C.J. on atrocious crimes such as genocide is viewed in a liberal manner. Otherwise, determining state responsibility for genocide may remain beyond the reach of the I.C.J.

IV. THE PROVISIONAL ORDER OF THE I.C.J. IN LIGHT OF THE COURT'S JURISPRUDENCE

Although Myanmar ratified the Genocide Convention with reservations to Article VIII, it does not deprive Gambia of the possibility to bring its dispute with Myanmar to the I.C.J. under Article IX of the Convention.[108] Article VIII of the Genocide Convention provides that "[a]ny Contracting Party 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 or any of the other acts enumerated in Article III." Regarding Myanmar's proposition that reservations to Article VIII apply to the jurisdiction of the I.C.J., the Court accepted it could be included within the definition of the words "competent organs of the United Nations."[109] The context of this article is different.[110] Article VIII's use of the words "calling upon to act" indicates there are competent political organs within the United Nations, which could act to prevent or suppress genocidal acts.[111] On the other hand, Article IX

106. *Id*. at 62, ¶ 124.
107. *Id*.
108. Gam. v. Myan., Order, 2020 I.C.J. 12, ¶ 36 (Jan. 23).
109. *Id*. at 11, ¶ 35.
110. *Id*. at 12, ¶ 35.
111. *Id*. at 11, ¶ 35.

specifically addresses the issue of adjudication of disputes between parties to the Convention, and thus, the individual procedural rules controlled by these two articles are distinct. Therefore, Article VIII may not necessarily inhibit the application of Article IX.[112]

Gambia's I.C.J. application contained a request for the implementation of provisional orders, submitted pursuant to Article 41 of the I.C.J. Statute and Articles 73, 74, and 75 of the Rules of Court. The request was made to preserve the rights Gambia claims under the Convention, while the Court's final decision in the case remains pending.[113] The I.C.J.'s power to issue a provisional order is a special discretionary power which it may resort to only in exceptional circumstances.[114] This power is evident from the following words in Article 41(1) of the Statute of the I.C.J., which states that "if [the Court] considers that circumstances so require," it may issue a provisional order. As long as the I.C.J. may exercise *ratione personae* and *ratione materiae* jurisdiction over a matter, the power to implement provisional orders is deemed to be an inherent power of international courts and tribunals like that of their domestic counterparts.[115] The I.C.J. Statute clarifies the purpose of the provisional order is to "preserve the respective rights of either party," pending the final judgement of the Court.[116] Thus, it is implicit in these wordings that provisional orders are not necessarily *judgments* on the respective claims by the parties. Rather, these orders serve as a stopgap measure to ensure that the value of the final judgment is not diminished by the continuing acts of the parties pending the final judgment. In the Fisheries Jurisdiction Cases, the I.C.J. has further observed that aside from preserving the rights of the respective parties, provisional measures "presuppose[] that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the

112. *Id*.

113. *Id*. at 2, ¶ 4.

114. *Id*. at 19, ¶ 65.

115. Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint against the International Fund for Agricultural Development, Advisory Opinion, 2010 I.C.J. 1, 16 ¶ 35. (Oct. 29), https://www.icj-cij.org/files/case-related/146/16743.pdf.

116. *Statute of the International Court of Justice*, art. 41(1), Oct. 24, 1945, 33 U.N.T.S. 993.

measures which are in issue."[117] In a number of cases, the Court has stressed the nexus between an irreparable loss to be incurred by a party and the need for a provisional order.[118] There is a clear conflict between the first and the last of these three aspects in the pronouncement of the I.C.J. in this case. If a provisional order is implemented to *preserve* the respective rights of the parties, then the order would serve as I.C.J.'s preliminary determination of the rights of the parties, and so the third statement that the final judgment should not be interpreted cannot stand. However, these three prongs can be read disjunctively, and not all of them may be at play in a single case.[119]

Another discernible trend of the Court exercising its jurisdiction to issue provisional orders on the ground of irreparable loss has been under humane consideration, which is evident inter alia, in the LaGrand Case, the Avena and other Mexican Nationals Case, and the Armed Activities in Congo Case.[120] In all three cases, the lives of individuals were at issue, and the I.C.J. went on to issue provisional orders. The I.C.J. in *Ukraine v. Russia*, has further clarified that "power of the Court to indicate provisional [orders] will be exercised only if there is urgency [meaning] there is a real and imminent risk that there will be irreparable prejudice to the rights in dispute before the [I.C.J.] provides a final

117. Fisheries Jurisdiction Case (Germ. v. Ice.), Interim Measures, 1972 I.C.J. 34, ¶ 22 (Aug. 17); Fisheries Jurisdiction Case (U.K. v. Ice.), Interim Measures, 1972 I.C.J. 12, 16, ¶ 21 (Aug. 17) (hereinafter Fisheries Jurisdiction Cases).

118. *See, e.g.*, United States Diplomatic and Consular Staff in Tehran Case (U.S. v. Iran), Request for the Indication of Provisional Measures, 1979 I.C.J. 7, 19, ¶ 36 (Dec. 15); Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosn. & Herz. v. Serb. & Montenegro), Further Provisional Measures, 1993 I.C.J. 325, 342 ¶ 35 (Sept. 13); The Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. 248, 257, ¶¶ 35-36 (Apr. 9); LaGrand Case, The Vienna Convention on Consular Relations (Ger.v. U.S.), Provisional Measures, 1999 I.C.J. 9, 14, ¶¶ 22-24 (Mar. 3); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Provisional Measures, 2000 I.C.J. 111 127-128, ¶¶ 39, 43 (July 1); Avena and Other Mexican Nationals Case (Mex. v. U.S.), Provisional Measures, 2003 I.C.J. 77, 89-91, ¶¶ 49, 55 (Feb. 5).

119. If they are to be read conjunctively then, as is explained here, there could be a clear conflict between the first and third prong.

120. THE INTERNATIONAL COURT OF Justice, HANDBOOK 6, 63 (7th ed. 2018), https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf (last visited Aug. 9, 2020).

decision."[121] In this case, the Court decided that restrictions on the Mejlis (a self-governing body of the Crimean Tatar people in Crimea) in the ability of Tatars to choose representative institutions, and restrictions on the availability of Ukrainian-language education in Crimean schools, posed the threat of irreparable harm.[122] While both of these are matters of important civil and political rights, there was no immediate danger to human lives in either of them, and by accepting them as sufficient grounds for issuing provisional order, the I.C.J. might have signaled that even in the absence of any immediate danger to human lives, it may issue a provisional order.

Despite ambiguity of the I.C.J.'s authority to issue binding provisional orders,[123] the dispute over this authority has been settled in *LaGrand*, where the Court unambiguously held that provisional orders are binding on the parties.[124] The Court reasoned it was the object and purpose of its Statute to ensure that litigants refrain from actions that might have a prejudicial effect in executing its final judgment.[125] In light of this decision, Gambia requested the I.C.J. to specify provisional measures that would effectively protect their claim and prevent aggravation or extension of the dispute pending final judgment.[126] Gambia argued the I.C.J. had *prima facie* jurisdiction to indicate provisional orders because Gambia and Myanmar dispute the interpretation, application, and fulfillment of their obligations under the Genocide Convention.[127]

Additionally, Myanmar raised the issue of the required evidentiary threshold for the I.C.J. to issue its provisional measures. Myanmar

121. 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 (Ukr. v. Russ.), Request for the Indication of Provisional Measures, 2017 I.C.J. 104, 136, ¶ 89 (Apr. 19).

122. *Id*. at 138-40, ¶¶ 97, 98, 106.

123. *See* Eelco Szabo, *Provisional Measures in the World Court: Binding or Bound to Be Ineffective?*, 10 LEIDEN J. INT'L L. 475 (1997) (discussing the debate of the binding nature of the ICJ's provisional orders).

124. LaGrand Case (Ger.v. U.S.), Judgment, 2001 I.C.J. 466, 502-503, ¶¶ 102-03 (June 27).

125. *Id*.

126. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order, 2020 I.C.J. 4, 14, ¶¶ 12, 46 (Jan. 23), https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf.

127. *Id*. at 12, ¶ 37.

maintained that the I.C.J. must consider the exceptional gravity of the alleged violations in assessing whether the required level of plausibility was met.[128] In this regard, if the evidence in support of the application can support alternative inferences contrary to the alleged genocidal conduct, then the I.C.J. must conclude the claims concerning genocide are not plausible.[129] In view of the function of provisional measures to safeguard the respective rights of either party pending its final judgment, the I.C.J. did not consider that the exceptional gravity of the allegations is a decisive factor warranting the determination of the existence of genocidal intent.[130] The I.C.J. observed that the facts and circumstances mentioned above are satisfactory to conclude the rights and allegations claimed by Gambia are plausible.[131] These rights and allegations are the right of the Rohingya in Myanmar to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of Gambia to seek compliance by Myanmar with its obligations not to commit and to prevent and punish genocide in accordance with the Convention.[132] The reference to the facts and circumstances imply the I.C.J. has not limited itself to the legal plausibility, but has also considered the *factual plausibility* of Myanmar's claims. This is a form of rudimentary assessment on the merits.

Gambia specifically argued that the Rohingya remaining in Myanmar face serious threats to their existence, placing them in vital need of protection.[133] Myanmar denied that a real and imminent risk of irreparable prejudice exists in the present case, since repatriation initiatives have been taken by the country for the return of displaced Rohingya presently in Bangladesh, whose support would not be forthcoming if there was an imminent or ongoing risk of genocide, as well as trying to bring about stability within the Rakhine State.[134] Nevertheless, the Court has been of the opinion that the Rohingya in

128. *Id*. at 15, ¶ 47.

129. *Id*.

130. *Id*. at 18, ¶ 56.

131. *Id*.

132. *Id*.

133. Application Instituting Proceedings and Request for Provisional Measures (Gam. v. Myan.), Application, 2019 I.C.J. 54-56, ¶ 110 (Nov. 11), https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf.

134. Gam. v. Myan., Order, 2020 I.C.J. at 20, ¶ 68.

Myanmar remain extremely vulnerable.[135] The Court has also noted that Myanmar did not present concrete measures aimed particularly at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention.[136] The Court has observed that regardless of the situation that Myanmar's government is facing in the Rakhine State, Myanmar remains under the obligations incumbent upon it as a State Party to the Genocide Convention.[137] The Court, hence, has been of the view that Myanmar must take strong measures to guarantee the preservation of any evidence related to allegations of acts within the scope of Article II of the Genocide Convention.[138] Indeed, the I.C.J. ordered that:

> Myanmar shall in accordance with its obligations under the Genocide Convention, in relation to the Rohingya group in its territory, take all measures to prevent the commission of all acts within the scope of Article II of this Convention, specifically: (a) killing members of the group; (b) causing serious bodily or mental harm to the 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; and (d) imposing measures intended to prevent births within the group.[139]

Myanmar shall also ensure that its military, as well as any irregular armed units, do not commit any criminal activities, including conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, or complicity in genocide against the Rohingya.[140] Likewise, Myanmar must take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Genocide Convention.[141] Lastly, Myanmar is required to submit a report to the I.C.J. on all measures taken to give effect to this order

135. *Id*. at 21, ¶ 72.
136. *Id*. at 22, ¶ 73.
137. *Id*. at 22, ¶ 74.
138. *Id*. at 23, ¶ 81.
139. *Id*. at 23, ¶ 79.
140. *Id*. at 23, ¶ 80.
141. *Id*. at 24, ¶ 82.

within four months, as from the date of the order, and thereafter every six months, until a final judgment is rendered.[142]

The I.C.J. considered the direct link between the rights claimed and the provisional measures requested. It reasoned that the first three provisional measures sought by Gambia are aimed at inter alia, preserving the rights it asserts under the Genocide Convention. This includes the right of the Rohingya group to be protected from genocide and other acts mentioned in Articles II and III, and requires that Myanmar preserve evidence.[143] Under the provisional measures, the I.C.J. indicates Myanmar shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Genocide Convention.[144] In particular, "on the preservation of the standard of evidence, while there will continue to be concerns [pertaining] to access [principally] for the Independent Investigative Mechanism for Myanmar and the International Criminal Court [("I.C.C.")], this order places an [obvious] legal obligation on Myanmar."[145] New technology used by rights organizations may assist in tracking and recording any corrosion of evidence.[146]

The I.C.J. has considered Gambian prayers aim to preserve the rights asserted in the Genocide Convention.[147] Specifically, the right of the Rohingya and its members to be protected from acts of genocide and other acts mentioned in Article III, and the right of Gambia to see Myanmar comply with its legal obligations to prevent and punish acts identified and prohibited under Articles II and III of the Convention.[148]

The I.C.J. decided there was an insufficient link between the rights Gambia seeks to protect and the purposes of the fourth and fifth provisional measures.[149] In addition, the sixth provisional measure requested by Gambia was not necessary under the circumstances of the

142. *Id*. at 23-24, ¶ 82.

143. *Id*. at 19, ¶ 61.

144. *Id*. at 23, ¶ 81.

145. Priya Pillai, *ICJ Order on Provisional Measures: The Gambia v. Myanmar*, Opinio Juris, (Jan. 24, 2020), http://opiniojuris.org/2020/01/24/icj-order-on-provisional-measures-the-gambia-v-myanmar/.

146. *Id*.

147. Gam. v. Myan., Order, 2020 I.C.J. at 19, ¶ 61.

148. *Id*.

149. *Id*.

case.[150] However, according to the 1982 Citizenship Law, the I.C.J. determined the Rohingya in Myanmar remain extremely vulnerable.[151] In the Court's resolution 74/246 of December 27, 2019, the U.N. General Assembly reiterated "that, in spite of the fact [] Rohingya Muslims lived in Myanmar for generations prior to the independence of Myanmar, they were made stateless by the enactment of the 1982 Citizenship Law and were eventually disenfranchised, in 2015, from the electoral process."[152]

The 1954 Convention on the Status of Stateless Persons established the legal definition for stateless persons under Article 1(1): individuals who are not considered citizens or nationals under the operation of the laws of any country. Generally, a person's citizenship and nationality may be determined based on the laws of a country where an individual is born or where his or her parents were born.[153] However, a person can also lose citizenship and nationality in a number of ways, including when a country stops to exist, or when a country adopts nationality laws that discriminate against certain groups.[154] Nevertheless, as this Article discusses in Section VI(E), the power of a state in conferring and stripping citizenship is arguably not unfettered in contemporary international law.

V. LOOKING THROUGH THE CRYSTAL BALL: WHAT THE PROVISIONAL MEASURES SAY (OR DO NOT SAY) ABOUT POTENTIAL JUDGMENT ON THE MERITS

Despite the explicit wordings of the I.C.J., which state "judgment should not be anticipated,"[155] provisional orders may indirectly provide

150. *Id*. at 19, ¶ 62.

151. *Id*. at 21, ¶ 72.

152. *Id*.

153. U.N. High Comm'r for Refugees, *Statelessness*, https://www.unhcr.org/statelessness.html, (last visited Dec. 1, 2020).

154. *Id*.

155. Fisheries Jurisdiction Case (Germ. v. Ice.), Interim Measures, 1972 I.C.J. 34, ¶ 22 (Aug. 17); Fisheries Jurisdiction Case (U.K. v. Ice.), Interim Measures, 1972 I.C.J. 16, ¶ 21 (Aug. 17); *see also* Anglo-Iranian Oil Co. Case (U.K. v. Iran), Interim Measures, 1951 I.C.J. 89, 93 (July 5). This is consistent with the practice of the Court's predecessor, P.C.I.J. in which The Factory at Chorzów (Interim Measures), 2007 P.C.I.J. Rep. Series A No. 12, at 10 (Nov. 21) stating "the Court, in Judgment No. 8, by which it declared itself to have jurisdiction to give judgment upon the merits

some clues to the final judgment on the merits. Indeed, by merely adopting provisional measures, the I.C.J. cannot completely avoid prejudging, at least temporarily, until the matter is resolved.[156] By adopting the provisional measures some may argue the Court is signaling that it does manifestly lack jurisdiction. Again, when the I.C.J. holds provisional measures it should be issued to preserve the rights of a party from suffering an irreparable harm, however, it may end up preserving a right that does not exist under the international law or that may not be a right belonging to the claimant state, unless it first establishes the existence of that right.[157]

A. Responsibility of States for Genocide

In the Bosnia case, the I.C.J. established an important point and took a different approach from the holding of the Nuremberg International Military Tribunal, which held that it was not States, but individuals who commit international crimes:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced… The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.[158]

In this case, the I.C.J. held States may commit the crime of genocide. When a State is responsible for acts of genocide, it may be

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in the case in question, has reserved for judgment on the merits the claims formulated in the Application."

156. Rüdiger Wolfrum, *Provisional Measures of the International Tribunal for the Law of the Sea*, 37 INDIAN J. INT'L. L. 3, 432 (1997).

157. Dimitris Kontogiannis, *Provisional Measures in Ukraine v. Russia: From Illusions to Reality or a Prejudgmnet in Disguise?*, EJIL:TALK! (Nov. 8, 2019), https://www.ejiltalk.org/provisional-measures-in-ukraine-v-russia-from-illusions-to-reality-or-a-prejudgment-in-disguise/.

158. Judgment and Sentences, Int'l Mil. Tribunal at Nuremberg (Oct. 1, 1946), *as reprinted in* 41 AM. J. INT'L. L. 172, 220-221 (1947).

subject to the I.C.J.'s jurisdiction under Article IX. The I.C.J. clarified that States owe a duty to prevent genocide:

> [I]n the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as ''a crime under international law'': by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, inter alia, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.[159]

Here, the I.C.J. also concluded that States are under an obligation to not commit the crime of genocide.[160] If they do not observe this duty, they will incur State responsibility. The judgment confirms that ''[I]f an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.''[161] Thus, it seems to be firmly established now that if members of state organs are found to have committed a genocidal act, it would be possible to hold that Myanmar is legally responsible for genocide.

159. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 42, 113, ¶ 166 (Feb. 26).

160. *Id*. at 118, ¶ 179.

161. *Id*.

B. Rohingya as a Protected Group under the Genocide Convention

One issue Judge ad hoc Kress lamented was the I.C.J. did not sufficiently address the question of whether the Rohingya are a protected group within the meaning of Article II of the Genocide Convention.[162] He explained that his preference was based on the fact that the question of the Rohingyas' protected group status under the Genocide Convention escaped closer attention during the proceedings.[163] As he pointed out, the Court simply stated "the Rohingya appear to constitute a protected group within the meaning of Article II of the Genocide Convention."[164] There is a strong chance the Rohingya group may fulfill the criteria of a "protected group," thus deserving the protection under the Genocide Convention. Many reports have established that several of the acts of genocide recognized in the Genocide Convention have been committed by the Myanmar military targeting the Rohingya people.[165] Such acts include killing members of a targeted group, causing serious bodily and mental harm, and deliberate creation of the conditions of life calculated to bring about the destruction of such a protected group in whole or in part, as defined in the Genocide Convention.[166] The failure of Myanmar's leaders to offer even the most basic recognition of historical wrongs as part of the transition to democracy contributed to the carrying out of acts of mass atrocity against the Rohingya.[167]

To understand this better, the elements of genocide and applicable forms of responsibility need to be considered. Genocide determination comprises a consideration of three primary elements: (1) enumerated

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162. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Declaration of Judge *ad hoc* Kress, 2020 I.C.J. 1, 2 ¶ 7 (Jan. 23), https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-03-EN.pdf.

163. *Id*.

164. *Id*.

165. Refugees Int'l, *Report: A Call to Action on Myanmar's Genocide Against the Rohingya* (Apr. 30, 2020), https://www.refugeesinternational.org/reports/2020/4/27/a-call-to-action-on-myanmars-genocide-against-the-rohingya.

166. *Id*.

167. Catherine Renshaw, *Myanmar's Genocide and the Legacy of Forgetting*, 48 GA. J. INT'L. & COMP. L. 425, 470 (2019).

acts of violence; (2) committed against a protected group; and (3) with the intent to destroy this group in whole or in part.[168] As stated above, the Genocide Convention defines genocide in terms of acts of violence against national, ethnic, racial, or religious groups. During the drafting of the Genocide Convention, there were efforts by some to include cultural or political groups, but these attempts failed due to the desire to protect stable groups as opposed to fluid ones.[169] The International Criminal Tribunal for Rwanda held that "a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner."[170] The Rohingya may be conceptualized as an ethnic group, given their unique cultural traditions and dialect, and as a racial group, given subjective perceptions among Myanmar society that the Rohingya constitute a different "race" than the majority population.[171] The Rohingya constitute a protected religious group, being a Muslim minority in a predominantly Buddhist society.[172] In this regard, Myanmar officials have justified policies of communal exclusion on the grounds that the Rohingya constitute a separate race.[173]

The Rohingya have experienced violence that may be deemed a genocide. Under the Convention, it identifies five acts that constitute the *actus reus* of genocide: (1) killing members of the group; (2) causing serious bodily and mental harm to members of the group; (3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (4) imposing measures intended to prevent birth within the group; and (5) forcibly transferring

168. Beth Van Schaack, *On Crimes Against the Rohingya: Determining the Commission of Genocide in Myanmar, Legal and Policy Considerations*, 17 J. INT'L CRIM. JUST. 285, 291 (2019), https://www-cdn.law.stanford.edu/wp-content/uploads/2019/09/Genocide-Against-the-Rohingya-JICL.pdf.

169. ANTONIO CASSESSE & PAOLA GAETA, CASSESSE'S INTERNATIONAL CRIMINAL LAW 119 (Oxford Univ. Press, 3d ed., 2013).

170. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 511 (Sept. 2, 1998), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf.

171. *Id*.

172. Schaack, *supra* note 168, at 292.

173. *Id*.

children of the group to another group.[174] The inclusion of these various acts within the *actus reus* suggests genocide can occur without the extensive mass killings of members of the group and through the commission of other forms of acute harm that fall short of extermination.[175]

C. The Standard of Evidence and Burden of Proof

Although the I.C.J. is a court of general jurisdiction, it functions more like an appellate court than a trial court—disputed questions of fact generally do not take a prominent place.[176] Both the I.C.J.'s Statute and Rules do not have any specific provision dealing with the standard of proof or burden of proof. Thus, the Court has a great degree of freedom in these matters. Article 56 of the Statute demands that the Court "shall state the reasons on which it is based." However, any detailed exposition of this provision is yet to happen. The I.C.J. seems to have a deferential attitude towards the agents of the state presenting the cases. However, the materials produced by them can pose problems when disputed facts are at issue, and the losing party may fairly or unfairly be skeptic of the treatment of evidence presented.[177]

Evidentiary issues played a key role in the Bosnia case, and it is highly likely those issues would be a major issue in this case too. At the outset, it is useful to recall the evidentiary threshold for establishing State responsibility may hinge on the gravity of the charge against a state. This is evident from the observation of the I.C.J. which states:

> The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive . . . The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have

174. *Id*. at 293.

175. *Id*.

176. William A. Schabas, *Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes*, 2 GENOCIDE STUD. & PREVENTION: AN INT'L J. 101, 107 (2007).

177. J. R. Crook, *Current Development: The 2003 Judicial Activity of the International Court of Justice*, 98 AM. J. INT'L. L. 309, 309-311 (2004).

> been clearly established. The same standard applies to the proof of attribution for such acts.[178]

The above observation is evocative of a typical criminal court's approach to the trial of cases, and not typically followed in a judicial body like the I.C.J., which is a civil judicial forum. This led to the majority of the Court's judges to not hold Serbia liable for the crime of genocide (with the exception of the massacre of more than 7,000 men and boys at Srebrenica in July 1995).[179] The I.C.J. may be more readily willing to issue provisional measures; however, when it comes to the judgment on the merits, the Court may take a rather restrained approach in holding a State liable for committing genocide. While dismaying for the advocates of those trying to ensure state responsibility for the crime of genocide, this approach has been lauded in the academic commentary for its propensity to ensure coherence between international criminal and civil fora.[180] This is because if a relaxed approach is taken regarding an evidentiary burden in a civil matter, it is possible that a person working in an official capacity may be acquitted of genocide in an international court, but at the same time, that person's state may be found liable for genocide in an international civil court.[181]

If past jurisprudence is followed, any official document within the possession of Myanmar's authorities desired to be withheld by them, could well be allowed on the grounds of state secrecy, as is what occurred in Bosnia.[182] By invoking its power under Article 49 of the I.C.J. Statute, the Court could "call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal."[183] However, it abstained from doing so.[184] This would mean that any documents within the possession of Myanmar law enforcement agencies may be withheld from the I.C.J. If that happens,

178. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. at 129, ¶ 209 (Feb. 2).

179. *Id*. at 238, ¶ 471(5).

180. Schabas, *supra* note 176, at 108-09.

181. *Id*.

182. Bosn. & Herz. v. Serb. & Montenegro, Judgment, 2007 I.C.J. 128, ¶ 205 (Feb. 2).

183. *Id*. at 57, 128, ¶¶ 44, 205.

184. *Id*. at 128, ¶ 205.

the onus would be on the Gambians to prove their case with other materials. In particular, assuming that the Court is satisfied with the existence of *actus reus*, then for proving the *mens rea*, Myanmar's non-disclosure of official materials could make it harder to prove the genocidal intent of the authorities of Myanmar.[185] However, it may somewhat help Gambia that the I.C.J. has this settled jurisprudence that the existence of a negative fact may not lie on the applicant.[186]

It is promising for Gambia that Vice-President Xue has observed "the weight of the said [IIFFMM] reports cannot be ignored."[187] This resonates with the finding of the Court in the Bosnia case, that the probative value of report of an official body:

> [d]epends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).[188]

Thus, it seems that the IIFFMM report would easily pass the first of the three criteria. The third criteria may be inapplicable, as it is not necessarily a relevant position to either of the parties for the case at hand.

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185. *See* WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW 250 (Cambridge Univ. Press, 2d ed., 2009) (observing that, "[t]he existence of a plan or policy has also proven decisive when the analysis shifts from individual criminal liability to State responsibility. Rather than seriously inquire as to whether a single individual, whose acts could be imputed to the State in question, had killed members of the group or committed one of the other acts with genocidal intent at the personal level a' la Jelisic´, the analysis has focused on evidence of State policy. For example, the International Commission of Inquiry on Darfur concluded that 'the Government of Sudan has not pursued a policy of genocide' in answering the Security Council's question whether genocide had been committed.").

186. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), 2015 I.C.J. 3, ¶ 174 (Feb. 3).

187. Gambia v. Myanmar, Separate Opinion of Vice-President Xue, 2020 I.C.J. 1, 3, ¶ 9 (Jan. 23) https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-01-EN.pdf (hereinafter Separate Opinion of Vice-President Xue).

188. Bosn. & Herz. v. Serb. & Montenegro, Judgment, 2007 I.C.J. at 135, ¶ 227 (Feb. 2).

Furthermore, should the I.C.J. follow its holding in the Congo case, Gambia may find it easier to establish the factual elements of its case. As in the Congo case, the I.C.J. started with the premise that it "will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge."[189] There, the I.C.J. applied "credible evidence sufficient to conclude" (clearly a less stringent standard than "high level of certainty" as applied in the Genocide Case), to hold that Ugandan state forces committed killing, torture and inhumane treatment of the civilian population, destroyed villages and civilian buildings, did not distinguish between civilian and military targets, failed to protect the civilian population in fighting with other combatants, and incited ethnic conflict.[190] Thus, if the Court takes a similar approach, this less stringent standard of evidence may make it easier for Gambia to prove its case.[191]

A potentially interesting twist could be the use of satellite images as evidence before the I.C.J. should Gambia decide to do so. This new technology could expand the scope of looking back in time and pinpoint activities geospatially, which could detect changes which may easily escape the naked eye.[192] There is a significant advantage in using this technology in the investigation and trial of atrocious crimes.[193] Although satellite information may not prove the commission or omission of certain events, it may serve as a powerful tool in corroborating evidence which is not easily malleable.[194] Indeed, there

189. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Provisional Measures, 2000 I.C.J. 30, ¶ 61 (July 1).

190. *Id*. ¶ 211.

191. IIFFMM has followed the "'reasonable grounds to conclude' standard of proof." Human Rights Council, *supra* note 82, at ¶ 19.

192. Micah Farfour, *The Role and Use of Satellite Imagery for Human Rights Investigations*, *in* DIGITAL WITNESS: USING OPEN SOURCE INFORMATION FOR HUMAN RIGHTS INVESTIGATION, DOCUMENTATION, AND ACCOUNTABILITY (Sam Dubberley et. al. eds., Oxford Univ. Press, 2019).

193. *Id*. at 233.

194. *Id*. at 233.

is satellite imagery showing Rohingya villages being razed in 2017.[195] In some areas where the Rohingya people used to live, new constructions belonging to security force bases, repatriation camps, and other unconfirmed structures were visible.[196] Since some of the satellite images are available free of cost, it will be intriguing to see how the I.C.J. would treat their probative value if they are presented.

D. Genocide or Ethnic Cleansing or War Crime?

In *Croatia v. Serbia*, the I.C.J. observed "[t]he intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such' is the essential characteristic of genocide, which distinguishes it from other serious crimes."[197] This may pose particular evidentiary challenges for Gambia. The I.C.J. in *Bosnia* recognized a distinction between ethnic cleansing and genocide. [198] It observed ethnic cleansing is used in practice, "by reference to a specific region or area, to mean 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.'"[199] Ethnic cleansing would clearly fall within the definition of crimes against humanity, but would remain beyond the definition of genocide and may thus go beyond the jurisdiction of the I.C.J.[200] The I.C.J. referred to the drafting history of the Genocide Convention and found the idea of importing the ethnic cleansing within the definition of genocide was raised for discussion but abandoned. It clarified that only *in very limited cases*, an ethnic cleansing may be covered by the definition of genocide by holding that:[201]

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195. Rangoon, *Burma: Scores of Rohingya Villages Bulldozed*, HUMAN RIGHTS WATCH (Feb. 23, 2018, 12:00AM), https://www.hrw.org/news/2018/02/23/burma-scores-rohingya-villages-bulldozed.

196. Farfour, *supra* note 192, at 242.

197. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 122, ¶ 132 (Feb. 26).

198. *Id*. ¶ 190 (referring to the Interim Rep. by the Commission of Experts Established Pursuant to S. C. Resolution 780 1992, U.N. Doc. S/25374 ¶ 55 (1993)).

199. *Id*.

200. Schabas, *supra* note 176, at 102.

201. It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Application of the Convention on the Prevention and Punishment

> Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph *(c)*, of the Convention, provided such action is carried out with the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, as distinct from its removal from the region.[202]

Thus, in the I.C.J.'s view, even a design to free a particular region of people belonging to a certain group by using force, unless accompanied by design to destroy the group, would merely be ethnic cleansing. In *Bosnia*, the I.C.J. referred to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ("I.C.T.Y.") in elaborating the distinction between ethnic cleansing and genocide.[203]

A similar approach was maintained in *Croatia v. Serbia* decided eight years after *Bosnia*. In *Croatia*, the I.C.J. held the distinction

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of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 122, ¶ 190 (Feb. 26).

202. *Id*.

203. *Id*. *But see* Prosecutor v. Krstić, Case No. IT-98-33, Partial Dissenting Opinion of Judge Shahabuddeen, ¶¶ 45–57, (Apr. 19, 2004), https://www.icty.org/x/cases/krstic/acjug/en/krs-doshaa040419e.htm (taking a different approach to the definition of genocide); Douglas Singleterry, *'Ethnic Cleansing' and Genocidal Intent: A Failure of Judicial Interpretation?*, 5 GENOCIDE STUD. & PREVENTION: AN INT'L. J. 1, A4, 39 (2010); Micol Sirkin, *Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations*, 33 SEATTLE U. L. REV. 489 (2010); Claus Kreb, *The International Court of Justice and the Elements of the Crime of Genocide*, 18 EUR. J. INT'L. L. 4 (2007).

between ethnic cleansing and genocide is now firmly "rooted in its jurisprudence."[204] It observed:

> . .. what is generally called "ethnic cleansing" does not in itself constitute a form of genocide. Genocide presupposes the intent physically to destroy, in whole or in part, a human group as such, and not merely a desire to expel it from a specific territory. Acts of "ethnic cleansing" can indeed be elements in the implementation of a genocidal plan, but on condition that there exists an intention physically to destroy the targeted group and not merely to secure its forced displacement … Secondly, for a pattern of conduct, that is to say, a consistent series of acts carried out over a specific period of time, to be accepted as evidence of genocidal intent, it would have to be such that it could *only point to the existence of such intent*, that is to say, that it can only reasonably be understood as reflecting that intent.[205]

From the record of oral hearings in this case, it is apparent Myanmar argued that the acts in Rakhine may, at the most, amount to ethnic cleansing but not genocide.[206] Such an argument's success depends on the I.C.J.'s interpretation of the genocidal intent of the acts perpetrated on the Rohingya group. However, even the order on the provisional measure would imply that at least Judge Xue could likely be sympathetic in terms of arguments along this line that although there may be ethnic cleansing or some other crimes, there has been no genocide.[207] Judge Xue denoted her reservations with respect to the plausibility of the case under the Genocide Convention.[208] According to Judge Xue, genocidal intent constitutes a decisive element to distinguish a genocidal offense from other most serious international

204. Application of Convention on Prevention and Punishment of Crime of Genocide, (Croat. v. Serb.) 2015 I.C.J. 10, ¶ 510 (Feb. 3).

205. *Id*. (emphasis added).

206. Application on the Convention on the Prevention and Punishment of the Crime in Genocide (Gam.v. Myan.), Public Sitting Verbatim Record, 2019 I.C.J. 1, 36, ¶ 35 (Dec. 10).

207. Gambia v. Myanmar, Separate Opinion of Vice-President Xue, 2020 I.C.J. 1, ¶ 2 (Jan. 23), https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-01-EN.pdf.

208. *Id*.

crimes.[209] She observed "[t]he evidence and documents submitted to the Court in the present case, while displaying an appalling situation of human rights violations, present a case of a protracted problem of ill-treatment of ethnic minorities in Myanmar rather than of genocide."[210]

Interestingly, in explaining her finding, Judge Xue refers to the Government of Bangladesh's Ministry of Foreign Affairs' professed willingness to solve the problem in close cooperation with its Myanmar counterparts. [211] Judge Xue contended this cooperation could not imply that genocide had taken place.[212] However, Judge Xue's reliance on the Bangladeshi position is problematic. The position of states on a matter may imply common state practice, which can create customary international law.[213] Here, Bangladesh's so-called position relates to a factual matter. If Judge Xue's observation was to be followed to make a factual determination based on Bangladesh's position, that would be untenable because it would virtually mean that Bangladesh alone could be an arbiter on the facts or create a legal position binding on other states.[214] The Permanent Court of International Justice and the I.C.J. indicated unilateral promise can create international legal obligations.[215] If Bangladesh's unilateral position adhered to the legal nature of the occurrences or any binding promises, rather than the factual matters, its position might be considered differently.

Another potential argument for Myanmar would be to label its actions as potential war crimes, which it already asserted during oral hearings.[216] Myanmar conceded that during events in the Rakhine State its forces might have failed to distinguish between civilian and armed

209. *Id*.

210. *Id*. ¶ 3.

211. *Id*.

212. *Id*.

213. Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L. L. J. 457, 458 (1985).

214. *Supra* notes 211-212 and the accompanying text.

215. Legal Status of Eastern Greenland (Den. v Nor.) 1933 P.C.I.J., (Ser. A/B), No. 43 (Apr. 5); Nuclear Tests (Austl. v. Fr.), Interim Measures, 1973 I.C.J. at 99, ¶ 13 (June 22); Nuclear Tests (N.Z. v. Fr.), Interim Measures, 1973 I.C.J. at 135, ¶ 14 (June 22).

216. Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), Public Sitting Verbatim Record, 2019 I.C.J. 1, 18 (Dec. 11).

forces.[217] Consequently, it may have disproportionately used force or failed to protect private property, and therefore, human rights or humanitarian law violations may have occurred, which fell short of genocide.[218] However, this argument suggests a ploy by Myanmar to avoid the I.C.J. maintaining jurisdiction over these claims since its jurisdiction is based on the alleged violations of the Geneva Convention. It would be interesting to observe how this implicit admission of responsibility for the killings or injuries to the Rohingyas to avoid the jurisdictional reach of the I.C.J. would succeed.

E. The Issue of Rohingya Citizenship and Statelessness

One important remedy that Gambia has sought is for the I.C.J. to order Myanmar to declare full citizenry for the Rohingya population.[219] While citizenship is predominantly a matter of national law,[220] the issue of citizenship or nationality[221] can be relevant in international law as well. International rights and obligations that result from the link between the state and its citizens or nationals in matters such as diplomatic protection or investor right protection, make citizenship a significant consideration in international law.[222] Consequently, international courts and tribunals, now appreciate the connection between the state and the natural or legal person invoking its

217. *Id*.

218. *Id*.

219. Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), Order, 2020 I.C.J. 1, ¶ 2 (Jan. 23), https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf.

220. Advisory Opinion, 1923 P.C.I.J. (Ser. B) No. 4, at 24 (Feb. 7) (conveying an early judicial pronouncement of this principle note) ("Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.").

221. This Article uses the terms citizenship and nationality interchangeably. However, there is a general trend of moving from the use of the term nationality to denote a formal tie between individuals and the state to using the term citizenship to denote a more legalistic, individual-right centric notion. *See* Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694, 695 (2011). For an account of the varied use of the terms, *see* Kristin Henrard, *The Shifting Parameters of Nationality*, 65 NET. INT'L. L. REV. 269, 271-72 (2018).

222. Eileen Denza, *Nationality and Diplomatic Protection*. 65 NETH. INT'L L REV. 463, 464 (2018).

nationality, particularly dealing with the nationality of natural persons in two sectors—diplomatic protection and investor-State arbitrations.[223]

In *Nottebohm*, the I.C.J. held that according to international practice, nationality is "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[224] Therefore, nationality is a legal bond between a natural person and a State which, according to the Court, is based on the "social fact of attachment."[225] The term "denaturalization" is used to denote all deprivations of nationality by unilateral acts of a state, whether by decisions of administrative authorities or by the operation of law.[226] Further, denaturalization may occur as collective or mass denaturalization, in which a specified group of individuals are deprived of nationality by a State.[227] According to these definitions of nationality and denaturalization, Myanmar's Rohingya population's lack of citizenship makes its people stateless. [228]

Some argue that denaturalization, like nationality, is an issue that falls exclusively within domestic jurisdictions, and are not subject to international law.[229] However, it is imperative to note that Article 8(1) of the Convention on the Reduction of Statelessness of 1961[230] provides: "[a] Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless." [231] The issue

223. *See generally* U.N. CONFERENCE ON TRADE AND DEVELOPMENT, INVESTOR–STATE DISPUTE SETTLEMENT AND IMPACT ON INVESTMENT RULEMAKING, Sales No. E.07.II.D.10 (2007) (discussing the ways in which tribunals use a party's nationality to determine the governing law and its applicability); *see also* Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT'L L. J. 1 (2009) (discussing the role nationality plays in arbitration and human rights).

224. Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6).

225. *Id*.

226. RAINER HOFMANN, DENATURALIZATION AND FORCED EXILE 2 (Oxford Pub. Int'l L. 2020).

227. *Id*.

228. *See Id*.

229. *Id*.

230. Convention on the Reduction of Statelessness, Aug. 20, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975).

231. *Id*.

is Myanmar is not a party to this multilateral treaty.[232] Therefore, Myanmar could only be bound by this obligation to declare the nationality of the Rohingya if the rule reflected *jus cogens* norms or customary international law. There is no authority demonstrating that deprivation of nationality constitutes a violation of *jus cogens* norms.[233] Thus, Article 8(1) is only applicable to Myanmar if it reflects a codified customary international law.[234]

Other international treaties provide similar rules to encourage nationality and equality in citizenship rights. Article 5(1) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965[235] proclaims the right of everyone to enjoy human rights and fundamental freedoms without being discriminated against based on race, color, or ethnic origin.[236] This Convention is aimed at eradicating racial discrimination internationally to ensure cohesion and harmony in international relations and government.[237] While the Rohingyas would benefit from a government that abides by the rules and guidelines to a convention like this, Myanmar is not a

232. *Id*.; *see also* United Nations Treaty Collection, '*Convention on the Reduction of Statelessness,*' https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5 (last visited Aug. 8, 2020).

233. Citizenship deprivation leading to statelessness is not *per se* arbitrary and contrary to international law and *jus cogens* norms. *See generally* Eritrea-Ethiopia Claims Commission - Partial Award: Civilian Claims - Eritrea's Claims 15, 16, 23 and 27-32, 26 R.I.A.A. 195-247 (Dec. 17, 2004); *see also* Sandra Mantu, '*Terrorist' citizens and the human right to nationality'*, 26 J. CONTEMPORARY EUR. STUD. 1, 30 (2018).

234. *Supra* notes 231 to 233 and the accompanying text. Also note Article 38 of the Vienna Convention on the Law of Treaties stating that "Nothing . . . precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

235. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). In a similar vein, Article 9 of the Convention on the Reduction of Statelessness, 1961 states that a "[c]ontracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds." Convention on the Reduction of Statelessness, Aug. 20, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975).

236. *Id*.

237. *Id*.

signatory to this treaty.[238] Consequently, it is less likely the force of law in international treaties can effectively support the claim that Myanmar should be ordered to grant the Rohingyas full citizenship rights.

It is a "little difficult to argue" a right exists not to be subjectively "deprived of one's nationality under current [] customary international law."[239] "Therefore, it seems [] the only [unequivocal] limit imposed by customary international law on states' powers to withdraw nationality is the one banning measures of denaturalization based solely on racial or religious reasons since such acts would infringe the customary law rule on non-discrimination on grounds of race or religion."[240] Due to many progressive changes in protecting human rights within international law, nationality is no longer relevant to the individual's status.[241] Under human rights law, the individual is addressed and protected as a human being, not as a national of a particular state.[242] Since the right to nationality cannot be authorized by international law, it can be assumed that, under customary international law, states are obliged to avoid statelessness.[243] It is commonly understood that statelessness results from the freedom of states to decide on the criteria for acquisition and loss of a citizen's nationality.[244] However, the deprivation of nationality, which results from statelessness, would only lead to depriving many rights and may encourage a mass influx of people to move from one state to another. Consequently, there should be a clear incentive among states to prevent statelessness since this mass exodus would pose a massive challenge to the states.[245] Hersch Lauterpacht argued "if States[‘] claim the right to be the only link between the individual and international law, then they must not be permitted to render that link non-existent."[246] Therefore,

238. *Id*.
239. *See* HOFMANN, *supra* note 226, at 6.
240. *Id*.
241. OLIVER DÖRR, NATIONALITY, 9 (Oxford Pub. Int'l. L. 2019).
242. *Id*. at 2.
243. *Id*. at 4.
244. *See id*.
245. Guy Goodwin-Gill, *Statelessness is back (not that it ever went away…)*, EJIL:TALK! (Sept. 12, 2019), https://www.ejiltalk.org/statelessness-is-back-not-that-it-ever-went-away/.
246. *Id*. at 4.

there should be a duty imposed on states not to act in a way that renders people stateless in their whims.

Because states have limited freedom to transform its nationality laws, the loss of nationality is prevalent within their domestic jurisdiction.[247] However, the principle of non-discrimination, set by international law, also applies to states' rules and practices pertaining to the loss of nationality.[248] International human rights courts and tribunals have also equated being stateless to the deprivation of human rights.[249] Article 15(2) of the Universal Declaration of Human Rights declared that "no one shall be arbitrarily deprived of his nationality[] can today be considered a rule of customary international law."[250]

It may be pertinent to recall in the *Brazilian Loans* case that the Permanent Court of International Justice observed:

> Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.[251]

One could contend that the nationality of the Rohingyas should be settled similarly to how it would be settled in a Myanmar domestic court. However, it is highly improbable for the I.C.J. to follow the same approach used by a Myanmar domestic court. Christian Joppke, a leading scholar on citizenship and immigration, suggests that there are

247. Dörr, *supra* note 241, at 11.

248. *Id*.

249. *See*, *e.g*., Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 130, at 66-67, ¶¶ 178-179 (Sept. 8, 2005) ("A stateless person, *ex definitione*, does not have recognized juridical personality, because he has not established a juridical and political connection with any State; thus nationality is a prerequisite for recognition of juridical personality […] The Court considers that the failure to recognize juridical personality harms human dignity, because it denies absolutely an individual's condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals.").

250. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 15 (Dec. 10, 1948).

251. Payment in Gold of Brazilian Federal Loans Contracted in France (Fr. V. Braz.) Judgment, 1929 P.C.I.J. (ser. A) No. 21, at 124 (July 12).

at least three aspects of citizenship: status, rights, and identity.[252] Citizenship as status pertains to formal state membership and its access.[253] Citizenship as rights pertains to the formal capacities and immunities connected with such status.[254] Lastly, citizenship as identity pertains to the behavioral aspects of a person embedding themselves as members of the nation or the normative conceptions of such behavior imputed by the state.[255]

Many scholars argue that an extended time of habitual residence should give rise to access to citizenship and that the rights of states to treat people within its borders is not unfettered by international law.[256] Scholars also argue citizenship law cannot be oblivious to the rights of individuals in complete deference to states' discretion.[257] These arguments are applicable to the Rohingya group because they resided in Myanmar for decades. Previously, the I.C.J. found Nottebohm's "actual connections with Liechtenstein were extremely tenuous. No settled abode, no prolonged residence in that country at the time of his application for naturalization."[258] In contrast, the Rohingya group has strong connections to Myanmar, while Myanmar strengthens their case for their right to the citizenship of Myanmar.

In November 2014, the UNHCR launched the #IBelongCampaign to end statelessness by 2024.[259] Based on this campaign, the I.C.J.'s pronouncement on the duty of states to prevent statelessness, which is desirable from a normative standpoint as a judgment proclaiming that capriciously stripping people of citizenship is illegal, may somewhat help to reduce statelessness.[260] In the *Anglo-Norwegian Fisheries* case, the I.C.J. also propounded the rule of the "persistent objector," which declared that states who are a persistent objector to a customary international law rule would not be bound by it. However, if there is

252. Christian Joppke, *Transformation of Citizenship: Status, Rights, Identity*, 11 CITIZENSHIP STUD. 37, 38 (2007).

253. *Id*. at 38.

254. *Id*.

255. *Id*.

256. Spiro, *supra* note 221, at 717.

257. *See id*.

258. Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 25 (Apr. 6).

259. U.N. High Comm'r for Refugees, *#IBELONG*, https://www.unhcr.org/ibelong/ (last visited Aug. 9, 2020).

260. Goodwin-Gill, *supra* note 245.

no unequivocal objection, then the lack of express denouncement presumes consent.[261] In the Rohingya group's case, there is no stated position that Myanmar objected to the customary international law on statelessness. Hence, it would be remiss if the Court refuses to make a pronouncement on this critical issue.

F. The Payment of Compensation to Victims

Gambia has asked the I.C.J. to have Myanmar compensate the Rohingya victims.[262] Traditionally, international law states to pay compensation for violations of legal obligations owed to aliens. The payment of compensation by a state for breach of duty owed to another state is relatively scarce. However, the I.C.J. in the *Gabčíkovo-Nagymaros* case observed that "it is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it."[263] Assuming in arguendo, the I.C.J. declares the Rohingya are citizens of Myanmar, the dilemma that arises in this case is that it would be difficult to hold that Myanmar should pay compensation to the Rohingya through a third state, Gambia. However, a possible solution to that problem could be that compensation could be paid through an international organization such as the UNHCR.

The I.C.J.'s jurisprudence on the compensation for genocide is also not very promising. In the *Bosnia* case, the Court dismissed Bosnia's claim for compensation by observing that "financial compensation is not the appropriate form of reparation for the breach of the obligation

261. Fisheries Jurisdiction Case (U.K. v. Ice.), Provisional Measures, 1972 I.C.J. 12, 131 (Aug. 17).

262. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Verbatim Record, 2019 I.C.J. 19, 68 (Dec. 19) ("Secondly, the displaced Muslim residents of Rakhine have made their return conditional on a number of demands including the grant of full citizenship, their recognition as a distinct ethnic group, return of land and compensation for past injustices.").

263. The Gabčíkovo-Nagymaros Project (Hung./Slovk.) 1997 I.C.J. 7, 81, ¶ 152 (Sept. 25).

to prevent genocide."[264] The I.C.J. arrived at this conclusion because it failed to find "a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica."[265] Again, despite finding that "Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995,"[266] the Court did not order any compensation. However, it is possible the I.C.J.'s finding on this point might have been influenced by the Bosnian counsel's assertion that Bosnia's injury occurred due to Serbia's conspiracy to commit genocide or breach of the obligation to prevent and punish genocide did not lend itself to pecuniary appraisal, rather "the most natural mode of satisfaction . . . is . . . a formal declaration by this Court that Serbia and Montenegro has breached its obligations under . . . the Convention."[267] Thus, it is not entirely clear whether the I.C.J. will follow previous precedent on payment of compensation for genocide in this current case.

G. The Possibility of Domestic or International Criminal Trial of Individuals

There is already a legal proceeding pending at the I.C.C. against Myanmar authorities for crimes against humanity, specifically deportation, persecution on grounds of ethnicity and/or religion, and other atrocious acts covered by Articles 7(1)(d), (k) and (h) of the Rome Statute.[268] However, because Myanmar is not a party to the Rome Statute, the I.C.C. has limited jurisdiction over the case, and thus, it can only try the matters if at least one element of a crime is within the

264. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 42, 233, ¶ 462 (Feb. 26).

265. *Id*.

266. *Id*. ¶ 471(5).

267. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Oral Proceedings, Verbatim Record, 2006 I.C.J. 1, 15, ¶¶ 18-20 (Mar. 7), https://www.icj-cij.org/files/case-related/91/091-20060307-ORA-01-01-BI.pdf.

268. For an academic commentary on the case, *see* Payam Akhavan, *The Radically Routine Rohingya Case Territorial Jurisdiction and the Crime of Deportation under the ICC Statute*, 17 J. INT'L. CRIM. J. 325 (2019).

jurisdiction of the court, or a part of such a crime, has been committed on a party to the Rome Statute. [269] In this case, Bangladesh would meet that threshold given that it is both a party to the Rome Statute and many Rohingya have taken shelter in Bangladesh.[270] A finding by the Court that genocide has been committed may in turn allow some states the ability to exercise universal criminal jurisdiction on accused individuals either upon cases being filed by any Rohingya victim or *suo motu*.[271] While some scholars take an unfavorable view about the exercise of universal criminal jurisdiction by individual states because it could create anarchy and hamper international stability,[272] scholarly work cogently demonstrates this does not bear out in practice.[273] Generally, trials have only taken place where there has been: (1) some nearly universal condemnation of the perpetrators' actions; (2) the perpetrators have been physically present in the jurisdiction of the individual state; or (3) the perpetrators have not strongly opposed the trial of its nationals.[274] While bringing the accused persons to trial would require cooperation between states which may not be forthcoming, at a bare minimum, this could curtail the freedoms of some perpetrators to roam the world freely. An example of this would be the case of Indonesian cleric and terrorist, Abu Bakar Al Bashir, who did not take the risk of

269. Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC-RoC46(3)-01/18, ¶ 72 (Sept. 6, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF.

270. *Id*.; *see also*, The State Parties to the Rome Statute, Int'l Crim. Ct., https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/bangladesh.aspx (last visited Nov. 18, 2020); *Rohingya Emergency*, UNHCR USA (July 31, 2019), https://www.unhcr.org/en-us/rohingya-emergency.html.

271. For a thorough account of the exercise of universal criminal jurisdiction, *see* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2001).

272. Jennifer R. Breedon, *Why the Combination of Universal Jurisdiction and Political Lawfare Will Destroy the Sacred Sovereignty of States*, 2 J. GLOB. JUST. & PUB. POL'Y 389 (2016); Gene Bykhovsky, *An Argument against Assertion of Universal Jurisdiction by Individual States*, 21 WIS. INT'L L.J. 161 (2003).

273. Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L. L. 1 (2011).

274. *Id*. at 2, 41, 45.

traveling to many states when there was an arrest warrant issued against him.[275]

VI. A (POTENTIAL) FAVORABLE JUDGMENT ON THE MERITS AND PRACTICAL CHANGE FOR ROHINGYA

The Ministry of Foreign Affairs' initial response to the I.C.J.'s provisional order does not indicate potential compliance with the Court's final judgment if it is adverse.[276] The statement relies on Myanmar's government's "Independent Commission of Inquiry" and contends war crimes occurred in Rakhine but no genocide occurred.[277] The statement also claims Myanmar's government investigated and prosecuted the war crimes within its domestic legal system.[278] It claimed the uncorroborated accusations of human rights actors did not present the true situation of Rakhine and corroded Myanmar's ability for engendering sustainable improvement therein.[279] Even after the I.C.J.'s provisional order, physical attacks on the Rohingya seem to have taken place unabated.[280]

The I.C.J. does not deliberate on issues of post-adjudicative compliance of its judgments, and the principal duty of compliance lies with the losing party and the U.N. Security Council.[281] Thus, if the I.C.J. gave Myanmar an adverse judgment based on the merits of the

275. Ben Otto, *Indonesia to Grant Early Release to Radical Islamic Cleric Abu Bakar Bashir*, WALL ST. J. (Jan. 18, 2019), https://www.wsj.com/articles/indonesia-to-grant-early-release-to-radical-islamic-cleric-abu-bakar-bashir-11547822941.

276. See *infra*, notes, 277-279 and the accompanying text.

277. @ZinMyatThu5, TWITTER (Jan. 23, 2020, 10:08 AM), https://twitter.com/ZinMyatThu5/status/1220362790948372480.

278. *Id*.

279. *Id*.

280. Eleanor Albert and Lindsay Maizland, *The Rohingya Crisis*, Council on Foreign Relations (Jan. 23, 2020), https://www.cfr.org/backgrounder/rohingya-crisis (last visited Aug. 9, 2020)..

281. *See* Article 94 of the U.N. Charter (U.N. Charter art. 94) which states: "(1) Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. (2) If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

case, a crucial factor in Myanmar's response to an adverse judgment on merit could be the reaction of the government; and the government would likely be influenced by the position of its powerful foreign allies, particularly China and Russia. While there has been considerable tacit support for Myanmar by its key allies, such as China,[282] it is unclear whether Myanmar will receive the same support if the I.C.J. rules against it. However, China's response to Myanmar's I.C.J. case filing suggests that Myanmar may not receive principled response by its key backers.[283]

In November of 2019, the I.C.J. charged Myanmar with genocide.[284] In January 2020, China's "President Xi Jinping ended a two-day state visit to Myanmar."[285] The two countries exchanged memoranda of understanding, letters, and protocols, which covered thirty-three agreements and projects of information, "industry, agriculture, security, and the resettlement of internally displaced people in Myanmar's war-torn Kachin State."[286] As a top investor and trade partner with Myanmar, China continues to offer a safety net despite possible sanctions from the U.N. Security Council and western states.[287]

More curiously, the "two countries historically had a somewhat fraught relationship but became allies in 2017, when Myanmar was internationally condemned for its treatment of the Rohingya in Rakhine State."[288] However, China's support of Myanmar may arguably be attributed to its traditional viewpoint that foreign nations should not

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282. *See, e.g.*, U.S. INSTITUTE OF PEACE, Senior Study Group Final Report, *China's Role in Myanmar's Internal Conflicts* No. 1, 32 (Sept. 2018), https://www.usip.org/sites/default/files/2018-09/ssg-report-chinas-role-in-myanmars-internal-conflicts.pdf (noting that China has either opposed or watered down U.N. resolutions designed to punish or pressurize the Tatmadaw, the Armed Forces of Myanmar to desist from its violent oppression of the Rohingya).

283. See *infra*, notes, 284-288 and the accompanying text.

284. *China's Xi ends Myanmar visit with flurry of agreements*, AP NEWS (Jan. 18, 2020), https://apnews.com/fc7e96f184e58e3876173910178b135a.

285. *Id*.

286. *Id*.

287. *Id*.

288. Thu Thu Aung & Poppy McPherson, *Myanmar, China ink deals to accelerate Belt and Road as Xi courts an isolated Suu Kyi*, REUTERS (Jan. 18, 2020), https://www.reuters.com/article/us-myanmar-china/myanmar-china-ink-deals-to-accelerate-belt-and-road-as-xi-courts-an-isolated-suu-kyi-idUSKBN1ZH054.

interfere in the sovereign affairs of other countries.[289] If China is supporting Myanmar merely to support its goal to end foreign interference, then it may be even more difficult to discourage its support for Myanmar.

If the I.C.J. finds that Myanmar committed genocide against the Rohingya, it would be interesting to see if China and Myanmar's other allies continue to maintain close commercial engagement and unequivocal public support for Myanmar's authorities. However, if the other permanent members of the U.N. Security Council take any concerted action against Myanmar, it may be morally and strategically challenging for China or Russia to veto the resolution because it would run counter to the spirit, if not the letters, of the I.C.J.'s judgment.[290] It is not easy to insulate from the global moral pressure which may impinge on their soft power.[291] As the U.N. Security Council resolutions may be viewed as an embodiment of the States' political will and they are typically easily vetoed; resolutions created pursuant to a judgment of the I.C.J.may be more difficult to veto. Permanent members of the United Nations, who exercise veto power, may not violate international law.[292] Since the veto power is a creature of the U.N. Charter, which is a treaty, it must give way to the superior norm, i.e., the *jus cogens* norms of the prohibition of genocide, war crimes, and crimes against humanity.[293] It is also argued that exercise of veto without regard to a states' atrocity crimes contradicts the U.N. Charter's object and purpose and thus, runs counter to Article 24(2).[294] The argument extends the use of the veto in the face of atrocity crimes to violate the foundational treaties relating to these crimes.[295] Some states

289. Andrew Garwood-Gowers, *China and China and the "Responsibility to Protect": The Implications of the Libyan Intervention*, 2 AS. J. INT'L L. 375, 380-81 (2012).

290. Wu Chengqui, Sovereignty, *Human Rights and Responsibility: Changes in China's Response to International Human Rights Crises*, 15 J. C. POL. SCI. 71, 92 (2010).

291. *Id*.

292. Jennifer Trahan, *Questioning Unlimited Veto Use in the Face of Atrocity Crimes*, 52 CASE W. RES. J. INT'L L. 73 (2020).

293. *Id*. at 91-95.

294. *Id.* at 95-96.

295. *Id*. at 97-99.

have questioned the validity of the use of the veto in these situations.[296] However, authoritative pronouncement of an international court settles this proposition, such as through an I.C.J. advisory opinion, thus it remains a scholarly opinion.

There is a theory that when parties refer a case to the I.C.J. on the basis of a compromissory clause, rather than unilaterally invoking a compulsory clause in a treaty, (as seen in the current case), the judgments show a greater propensity of compliance.[297] However, this theory is not borne out in practice.[298] I.C.J. judgments in many cases have tended to contain rather broad assertions that allow parties significant room to maneuver.[299] Parties often act without complying with the judgment or act by complying superficially with some parts of the judgment, and violating other parts so it may claim to have complied with the I.C.J.'s judgment.[300] Thus, the prospect of a state's compliance or non-compliance depends on the I.C.J.'s wordings in its final judgment because if the operative parts are created broadly, it allows the losing state party to claim compliance without really complying.[301] Should the I.C.J. adopt very specific wording, it is quite likely the government of Myanmar would find it difficult to bypass the judgment or claim to have complied with the judgment by taking simple cosmetic measures. Indeed, a state's open defiance to or complete non-compliance with the Court's judgments are extremely rare.[302]

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296. *Id*. at 96-97.

297. Shigeru Oda, *The Compulsory Jurisdiction of the International Court of Justice: a Myth?: A Statistical Analysis of Contentious Cases*, 49 INT'L & COMP. L. Q. 251, 260-65 (2000).

298. Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L., 815, 845 (2007); Colter Paulson, *Compliance with Final Judgments of the International Court of Justice since 1987*, 98 AM. J. INT'L L. 434, 457 (2004).

299. Llamzon, *supra* note 298, 845-846.

300. *Id*.

301. *Id*. at 823.

302. *See id*. The notable exceptions to this would be Albania in Corfu Channel, (U.K. v Alb.) (1949) I.C.J. 4 (Apr. 9); Fisheries Jurisdiction Case (U.K. v. Ice.), Request for the Indication of Interim Measures of Protection, 1972 I.C.J. 12, 16, ¶ 21 (Aug. 17); United States Diplomatic and Consular Staff in Tehran Case (U.S. v. Iran), Interim Measures, 1979 I.C.J. 7, 19, ¶ 36 (Dec. 15); U.S. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Provisional Measures, 1984 I.C.J. 169, 175, ¶ 14 (May 10); U.S. Military and Paramilitary Activities in and against

Another worrisome feature for the Rohingya community may be the general trend of long waiting periods before the rendering of judgment on merits at the I.C.J. In a past case, there was a delay of more than a decade between the Court issuing an order dismissing the preliminary objections of Serbia and Montenegro[303] and the final judgment.[304] However, the confluence of these various factors, namely division within the Bosnian government on continuing with the case at the I.C.J., dealing with the counterclaim by Serbia and Montenegro, and deciding on the U.N. membership of Serbia and Montenegro during the relevant period, had delayed the I.C.J.'s final judgment in that case.[305] Thus, it seems unlikely that this case would proceed to fruition at a similar snail's pace.[306]

VII. REPATRIATION OF ROHINGYA

Apart from reparations, a pressing concern for the Rohingya group could be repatriation to their home.[307] Repatriation from camps in Bangladesh is critical to the Rohingya group's future. An order for repatriation will likely issue only from the I.C.J., if it decides the Rohingya are citizens of Myanmar. Should the I.C.J. hold depriving Rohingya of their citizenship violates Myanmar's international legal

Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility 1984 I.C.J. 392 (Nov. 26,); U.S. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 (June 27).

303. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. & Montenegro), Preliminary Objections, 1996 I.C.J. 595 (July 11).

304. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 42 (Feb. 26).

305. Schabas, *supra* note 176, at 104-105.

306. However, it should be noted that due to the ongoing COVID-19 pandemic, the I.C.J. has extended the deadline for submission of the memorial to October 23, 2020 and the counter-memorial by Myanmar to July 21, 2021. *See* Application of the Convention of the Prevention of the Crime of Genocide (Gam. v. Myan.), Extension of Time-Limits Order, 2020 I.C.J. 1 (May 18), https://www.icj-cij.org/public/files/case-related/178/178-20200518-ORD-01-00-EN.pdf.

307. Nasir Uddin, *Ongoing Rohingya repatriation efforts are doomed to failure*, ALJAZEERA (Nov. 22, 2018), https://www.aljazeera.com/opinions/2018/11/22/ongoing-rohingya-repatriation-efforts-are-doomed-to-failure/.

obligation, it could order the Rohingyas repatriation to Myanmar. According to Article 36(1) of the International Law Commission's Articles on State Responsibility[308] and the famous formula of Chorzow Factory,[309] restitution is the preferred remedy to a wrongful act rather than reparation. The IIFFMM also states that if the I.C.J. orders reparations it "should include restitution, compensation[,] and satisfaction with the purpose of reversing, to the extent possible, the consequences of the State's unlawful acts and re-establishing the situation that would likely have existed if the acts had not been committed."[310] While repatriation is not explicitly enumerated, normalizing the situation requires repatriation of the Rohingya. However, actual orders of restitution, let alone reparation from the I.C.J., are rare in practice.[311]

A concern in the current case is, even if Myanmar violated rights owed under the Genocide Convention, the material damage was to the Rohingya group and not to Gambia.[312] In the International Tribunal of the Law of the Sea, it held the mere declaration of illegality constituted sufficient remedy for the loss of a ship.[313] Although the cases are distinguishable, Bangladesh—a direct victim of the massive exodus of Rohingya from the Rakhine—could arguably have a more pressing claim for seeking the repatriation of the Rohingya than Gambia. The I.C.J. ought to consider the rights of the Rohingya and not solely concentrate on the rights of Gambia, in line with the increased focus of international law in the post-World War II period on the rights of individuals.[314]

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308. G.A. Res. 56/83, Articles on the Responsibility of States for Internationally Wrongful Acts art. 36(1), U.N. Doc. A/RES/56/83 (2001). "The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution." *Id*.

309. Factory at Chorzow (Germ. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9 (July 26).

310. UN Human Rights Council, *supra* note 82, ¶ 108.

311. Christine Gray, *Selected Legal and Procedural Issues of International Adjudication, Ch.40 Remedies, in* OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION, (Cesare R. Romano et. al. eds., Oxford Univ. Press, 2013).

312. *Supra* note 3 and the accompanying text.

313. M/V Saiga (No. 2) Case (St. Vincent v. Guinea), Judgment of July 1, 1999, ITLOS Rep. 10, 67, ¶ 176.

314. *See* M. W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61 (1984).

Finally, there must be independent, international monitoring of the post-repatriation period to give the Rohingya confidence they will not suffer future persecution upon repatriation.[315] If the Rohingya's repatriation and rehabilitation within the Rakhine is not overseen by independent international observers, their confidence may not be restored for the repatriation to be meaningful.[316]

CONCLUSION

There have been many trials for genocide since the Second World War, and most of them have been against individuals for their personal involvement in specific crimes of genocide.[317] Invocation of state culpability for genocide is a much rarer and more profound issue.[318] Whatever the I.C.J. decides, Gambia's case is remarkable for several reasons. Firstly, it serves as a reminder to regimes perpetrating grave offenses against international law that, despite perhaps a lack of domestic pressure or the existence of powerful allies in the international community willing to give their tacit approval to illegal conduct, the pursuit for justice may come from unexpected quarters. If we want to give substance to the "never again" mantra, it is necessary for justice to be served in this case. If the I.C.J. holds Myanmar committed genocide against the Rohingya and orders redress for the horrors perpetrated against the Rohingya, then persistent pressure from the international community can push Myanmar's government to comply with the I.C.J.'s judgment.

Should the I.C.J. take a more conservative approach, the hopes of not only the Rohingya would be dashed, but the hopes of all who seek to establish state responsibility for grave crimes. While the I.C.C. and the judiciary of national legal systems can play a critical role in bringing offending individuals to justice, only the I.C.J. can ensure States face legal responsibility.[319] When a state government perpetrates genocide

315. Uddin, *supra* note 307.

316. *Id*.

317. *See* Langer, *supra* note 271 (noting the trial in national jurisdictions).

318. *See supra* notes 77-78 and the accompanying text.

319. This is because a state would have no jurisdiction to try to another state for genocide. *See* Jurisdictional Immunities of the State (Germ. v Italy; Greece intervening) Judgment, 2012 I.C.J. 99 (Feb. 9). The ICC also only has jurisdiction over individuals, not states. *See also* Rome Statute of the International Criminal Court

on a group of its own people, if the Good Samaritan's bid to seek justice fails on any technicality, the potential to adjudicate "the crime of crimes" through judicial process will be next to impossible since states alone have *locus standi* before the I.C.J. Even if its judgments fail to yield practical changes to ameliorate the situation, a finding from the World's Court that Myanmar perpetrated a genocide on the Rohingya people may offer at least some recognition of their suffering, if not just remedy for the massacre perpetrated against them.

art. 1, July 17, 1988, 2187 U.N.T.S. 90, stating "[a]n International Criminal Court ["the Court"] is hereby established. It [. . .] shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions." [Emphasis added].