

The World is Watching: The International Court of Justice Orders Provisional Measures to Protect the Rohingya from Genocide

January 27, 2020

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By: Fannie Lafontaine, Catherine Savard and Olivier Lacombe

On January 23, 2020, in the case of *The Gambia v. Myanmar*, the International Court of Justice (ICJ or Court) unanimously ordered provisional measures on the basis of the Genocide Convention to protect the Rohingya from acts of genocide and safeguard the evidence. This order arrives in the midst of a heated sociopolitical context in Myanmar: whereas the Rohingya have been victims of

appalling human rights violations for decades and have been repeatedly described as the "most persecuted minority in the world," the Myanmar government has consistently denied the allegations (here, here and here). A few days before the ICJ order, Myanmar released the report of its Independent Commission of Inquiry, which found "no genocidal intent." Its official reaction to the ICJ order came as no surprise, further denying the existence of a genocide.

This post discusses some of the key aspects of the order, including, where relevant, the separate opinions of judges Xue and Cançado Trindade, and the declaration made by *ad hoc* judge Kress, appointed by Myanmar. For discussions on the context surrounding the case, readers are guided to previous posts (here and here).

General considerations on provisional measures

The ICJ has the power to order provisional measures pursuant to article 41 of its Statute. As recalled by the Court, the decision on provisional measures "in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case" and leaves unaffected the rights of the Parties to submit arguments and evidence in respect of these questions (para. 85). This reminder was seemingly Judge Xue's favourite part of the Court's order for provisional measures. She concurred with the order, but not without expressing serious reservations about the "plausibility" of the case under the Genocide Convention, pointing to profound disagreements at the merits stage.

Through its extensive jurisprudence on the matter, the ICJ has developed a certain practice to determine whether the requirements for the indication of provisional measures are met (see e.g. *Ukraine v. Russia*, *Qatar v. UAE*). It first evaluates whether it has prima facie jurisdiction; second, it examines the "plausibility of the rights" for which protection is sought and their link with the provisional measures requested; and third, it assesses whether there is "urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision" (para. 65). In the present case, the Court also devoted a section to the question of the standing of The Gambia to bring such a case before the Court.

If the Court determines that the requirements to order provisional measures are met, it then determines what provisional measures are to be granted. Pursuant to Article 75, paragraph 2, of the Rules of the Court, the Court can order different measures than those requested by the Applicant State.

The ICJ's reasoning regarding provisional measures

i) Prima Facie Jurisdiction

The Court found that it had prima facie jurisdiction pursuant to article 36, paragraph 1 of its Statute, and article IX of the Genocide Convention. Both States are parties to the latter treaty and have made

no reservations to article IX, which provides that disputes related to the interpretation, application or fulfilment of the Convention shall be submitted to the ICJ at the request of any of the parties to the dispute.

The Court found that a dispute existed between The Gambia and Myanmar at the time of the application. To make such a determination, it considered, in line with its own jurisprudence, “any statements or documents exchanged between the Parties [...], as well as any exchanges made in multilateral settings” (para. 26). Concerning Myanmar’s odd and somewhat irrelevant argument that The Gambia had acted as a “proxy” for the Organization of Islamic Cooperation, the Court considered that the fact The Gambia might have sought and obtained the support of other States and international organizations does not preclude the existence of a dispute between the two States. The dispute concerns whether the acts attributed to Myanmar fall within the provisions of the Genocide Convention. At the stage of making an order for provisional measures, the Court does not need to decide whether they do, but must only establish whether they are “capable of falling within” such provisions, which the Court answered in the affirmative (para. 30).

The Court also found that the reservation made by Myanmar to article VIII of the Genocide Convention did not prevent it from adjudicating on the matter. Article VIII, which allows States parties to the Genocide Convention to call upon competent organs of the United Nations to prevent and stop acts of genocide, and article IX, which provides for the jurisdiction of the ICJ to resolve disputes between states, have distinct areas of application (para. 35).

ii) Standing of The Gambia

Myanmar, while recognizing the *erga omnes* character of the prohibition of genocide and admitting that The Gambia indeed had an interest in Myanmar’s compliance with its obligations under the Genocide Convention, had argued that the case could only be filed by an injured state. In other words, The Gambia could not bring the case forward before the ICJ as it was not “specifically affected” by the alleged violations (para. 39).

The Court concurred with The Gambia, which contended that the erga omnes character of the obligations enshrined in the Genocide Convention meant that any State willing to invoke the responsibility of another State under the Convention did not have to prove its special interest (para. 40). The Court recalled its 1951 Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* and made reference to its interpretation of the erga omnes obligations also found in the Convention against Torture, and unequivocally and rightfully, in our view, confirmed that “any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end” (para 41). Vice-President Xue, in her separate opinion, strongly disagreed with the majority on this point (para. 4-5), which points to serious debates on this issue as well at the merits stage.

Interestingly, the Court defined the "common interest" of all States party to the Genocide Convention as encompassing the prevention of acts of genocide, but also, once they occur, that their authors do not enjoy impunity. The obligation to investigate and prosecute those suspected of genocide is thus clearly affirmed as an obligation erga omnes, the failure of which can be invoked by any State party to the Convention and trigger state responsibility under international law (para. 41).

ii) The Rights Whose Protection Is Sought and the Link with the Measures Requested

At the provisional measures stage, the Court must not determine definitively whether the rights for which The Gambia is seeking protection exist, but rather if they are plausible. Additionally, a link must exist between these rights and the provisional measures requested (para. 44).

The plausibility criteria was first applied by the ICJ in 2009, in its order on provisional measures in the *Belgium v. Senegal* case. The criterion was applied again in the *Ukraine v Russia* and *Qatar v. United Arab Emirates* orders on provisional measures, respectively in 2017 and 2019. The Court, however, remained silent regarding the required threshold for rights to be deemed "plausible."

In the present case, Myanmar had submitted that "a 'plausible claim' under the Genocide Convention must include evidence of the required specific genocidal intent," as it "is the critical element distinguishing genocide from other violations of international law such as crimes against humanity and war crimes" (para. 47). In particular, it argued that it should be "plausible that the existence of a genocidal intent is the only inference that can be drawn from the acts alleged and the evidence submitted by the Applicant." The Gambia submitted that "based on the evidence and material placed before the Court, the acts of which it complains are capable of being characterized at least plausibly as genocidal." With respect to the specific genocidal intent, The Gambia insisted that the Court at this stage should not be required to ascertain its existence as the "only plausible inference" from the material submitted. That the material allowed for a plausible inference of genocidal intent, despite other plausible inferences, should be sufficient at the provisional measures stage (para. 46).

Without elaborating on the meaning of "plausibility," the Court seems to have adopted a fairly low threshold to grant provisional measures. It agreed with The Gambia that the rights it claimed under the Genocide Convention and for which it sought protection were plausible. Interestingly, on the two critical constitutive elements of genocide – namely the existence of a protected group and the specific intent – the Court was remarkably succinct. Without analysis or discussion, it briefly stated that, in its view, "the Rohingya in Myanmar appear to constitute a protected group within the meaning of Article II of the Genocide Convention" (para. 52). It also refused to enter into the determination of the existence of a genocidal intent, rejecting Myanmar's argument that the exceptional gravity of the allegations warranted such a determination at this stage of the proceedings (para. 56).

We agree that Myanmar's formulation of the plausibility standard would be too stringent at the provisional measures stage of the proceedings. It closely resembles the standard of "evidence that is

fully conclusive," which is required for a finding of state responsibility at the merits stage (see Croatia v. Serbia, para. 178, and Bosnia v. Serbia, para. 209). Although we agree that a definite determination of the constitutive elements of genocide was not required at this stage of proceedings, it seems that the Court shied away from any analysis whatsoever of the plausibility of the existence of genocidal intent based on the material submitted. At paragraphs 53-55, the Court referred to reports of the UN Independent International Fact-Finding Mission on Myanmar (FFM) and resolutions of the UN General Assembly, which document serious crimes committed against the Rohingya and which conclude that "on reasonable grounds...the factors allowing the inference of genocidal intent [were] present" (para. 55). This seemed sufficient for the Court to come to the conclusion that the right of the Rohingya to be protected from acts of genocide and the right of The Gambia to seek compliance by Myanmar with its obligation not to commit, and to prevent and punish genocide, are "plausible" (para. 56).

As The Gambia had relied heavily on the reports of the FFM in its submission, their probative value in deciding whether to order provisional measures was expected to be a point of interest. The Court did not explicitly discuss the probative value of the FFM reports, but, despite Myanmar's attempts to attack their credibility, it heavily relied on them in its assessment of the plausibility of The Gambia's claims. It can be expected that the probative value of the FFM reports will be further addressed at the merits stage, where the standard to be met is higher. The establishment of facts supporting The Gambia's claims regarding the commission of acts of genocide and the specific intent to destroy will certainly require more than reliance on evidence that has not been obtained or tested through an adversarial, court-like process. But investigative reports by bodies such as the FFM were just given – rightfully in our view – a strong accolade by the Court in this order.

The discomfort surrounding the undetermined contours of the plausibility criteria is illustrated by *ad hoc* Judge Kress' declaration, as well as Vice-President Xue and Judge Cançado Trindade's separate opinions (here and here). Kress expressed the view that the Court had applied a low plausibility standard with respect to the question of genocidal intent, noting that "the Court, in the present case, has not proceeded to anything close to a detailed examination of the question of genocidal intent" (para. 5). As noted above, it is difficult not to agree with this criticism of the Court's analysis. Vice-President Xue echoed Myanmar's position, pointing out that since genocide is distinct from other crimes due to genocidal intent, "there should be a minimum standard to be applied at this early stage" to "demonstrate that the nature and extent of the alleged acts have reached the level where a pattern of conduct might be considered as genocidal conduct" (para. 2). Despite this affirmation, it is worth noting that she also gave a significant nod to the FFM reports on the question of genocidal intent, mentioning that "the weight of the said reports cannot be ignored" (para. 9). Regardless of the legal debate on the contours of "plausibility," in particular, in this case, with respect to genocidal intent, it is noteworthy that all judges agreed to order provisional measures. The "plausibility" of at least numerous conduct falling within the genocide definition and the necessity to protect the vulnerable group was seemingly more important than disagreements about the specific intent.

Finally, the link between the rights claimed and the provisional measures requested was not particularly problematic. Myanmar did not dispute it, except with regard to the fifth and sixth provisional measures requested, which, as will be discussed later, were not ordered.

iii) Risk of Irreparable Prejudice and Urgency

The Court's power to order provisional measures can only be exercised in the face of urgency. This condition is met if "acts susceptible of causing irreparable prejudice can 'occur at any moment' before the Court makes a final decision on the case." The Court powerfully recognized "that the rights in question in these proceedings, in particular the right of the Rohingya group in Myanmar and of its members to be protected from killings and other acts threatening their existence as a group, are of such a nature that prejudice to them is capable of causing irreparable harm" (para 70).

As to the second element of the urgency criterion, namely the reality and the imminence of the risk, the Court once more turned its attention to the FFM reports and UN GA Resolution 74/246 of 27 December 2019. Relying on these documents, the Court concluded that the 600,000 Rohingya people still under Myanmar's jurisdiction "remain extremely vulnerable" (para 72). This conclusion is of the utmost importance to the matter at hand as it rejects Myanmar's affirmation that it is taking sufficient action in order to respect its obligation under the Convention (para 73). Moreover, the Court dismissed Myanmar's claim that it faced extreme circumstances in the context of an ongoing internal armed conflict and reaffirmed that State parties undertook to prevent and punish genocide "independently of the context 'of peace' or 'of war' in which it takes place" (para 74).

Provisional Measures Ordered

Out of the six measures sought by The Gambia, the Court ordered all but two of them. As some have already noted, the first two measures did not impose any new duties than those already incumbent upon Myanmar under the Genocide Convention, that is, respectively, to "take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention" (and particularly those listed under alineas (a) to (d)), and to ensure that its military or other units or persons whose acts could be attributable to it do not commit genocidal acts, nor engage in other modes of perpetration listed in article III of the Genocide Convention (para. 86). While the essence of these measures correspond to those requested, the Court did not replicate The Gambia's references to specific conduct that could constitute genocide, likely to avoid giving the impression that any of these acts had definitively been proven (here).

The third provisional measure requires that Myanmar shall "take effective measures to prevent the destruction and ensure the preservation of evidence" (para. 86). This is slightly narrower than what The Gambia had sought, which had asked that "Myanmar shall not destroy *or render inaccessible* any evidence related to the events described in the Application" (emphasis added). The little consideration given by the Court to the question of access is also illustrated by the fact that it did not grant the sixth provisional measure sought by The Gambia, that is, that Myanmar should be ordered to "grant access

to, and cooperate with, all United Nations fact-finding bodies that are engaged in investigating alleged genocidal acts against the Rohingya, including the conditions to which the Rohingya are subjected." The Court laconically dismissed this rather innovative claim, stating that it did not consider it "necessary in the circumstances of the case" (para. 62). In the context of Myanmar's reticence, even abhorrence, to allow external actors access to the region (here, here and here), it remains to be seen whether the refusal by the Court to go so far as to require access to evidence becomes the fatal omission that ultimately neutralizes the hopeful results that are expected of the other provisional measures.

While the fifth provisional measure sought was far from unusual, in this case, the Court did not deem appropriate to order the parties not to take any action nor to assure that no action is taken to aggravate the dispute. Given the other provisional measures ordered and the *erga omnes* nature of the obligations, this omission may have limited impact.

Finally, the fourth provisional measure is undoubtedly the most promising and it embodies the possible "watchdog" role that the Court, as well as the Applicant State and all observers, can play in ensuring respect of the Genocide Convention. The Court, pursuant to Article 78 of its Rules, ordered Myanmar to "submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court" (para. 82). It also ordered that a copy of these reports be communicated to The Gambia, which will have the opportunity to provide its comments to the Court.

This measure is particularly notable. Whereas the Court has often ordered parties to provide it with information regarding the implementation of provisional measures, it is to our knowledge the first time that the Court orders such an important duty to report with such clear frames and timetables. That said, although provisional measures are legally binding, it is not infrequent for States not to comply with provisional measures (Eva Rieter, *Preventing Irreparable Harm. Provisional Measures in International Human Rights Adjudication* (Antwerp: Intersentia, 2010) at 90.) The spectre of the Srebrenica genocide, which happened just two years after the Court ordered provisional measures in its first genocide case, is still present. Furthermore, the lack of access to Rakhine State, combined with Myanmar's reluctance to cooperate with UN investigators (see e.g. here, para. 4), likely constitute serious obstacles that might hinder the effective monitoring of the implementation of this order.

In this context, one can only deplore that provisional measures related to access and cooperation were considered unnecessary by the Court. The effectiveness of orders by judicial bodies is closely linked to the presence of appropriate monitoring mechanisms and precise indicators of compliance (Chiara Giorgetti, "What Happens after a Judgment is Given? Judgment Compliance and the Performance of International Courts and Tribunals" in Theresa Squatrito et al, eds, *The Performance of International Courts and Tribunals, Studies on International Courts and Tribunals* (Cambridge: Cambridge University Press, 2018) 324 at 344.). It may be that eventual non-compliance by Myanmar with the provisional measures order could be used against it in the judgment on the merits, notably regarding its duty to prevent genocide.

Conclusion

The order of January 23, 2020 marked a good day for the Rohingya community, The Gambia, and international justice in general. It is significant that the order is unanimous, including *ad hoc* judge Claus Kress, appointed by Myanmar. While heated debates among judges are to be expected at the merits stage, which will take years, the provisional measures are powerful new tools to protect the Rohingya in the meantime. This order gave hope to the Rohingya community after decades of enduring atrocities. The order also significantly complicates Myanmar's attempts at hoodwinking the international community through distorted interpretations of the atrocities via official statements and the work of its "independent" commission of inquiry.

The Court's order for provisional measures will hopefully trigger further action by other organs of the UN and by other States, something Canada should push for. The Security Council, plagued by political divisions, has been outrageously inactive with respect to the Rohingya, failing in its role in the maintenance of international peace and security. Now that it has been put on notice of the Court's order, it is to be hoped that it will not fail in the important role bestowed upon it by the UN Charter (articles 39 and 94) to ensure States' compliance with ICJ decisions. The unanimous and unequivocal call by another principal organ of the United Nations – a legally binding decision – to protect the Rohingya from genocide should leave no doubt as to the crucial importance of coherent and decisive action at all levels of the multilateral system. As new losses of life have already been reported, the need for global support to enforce the provisional measures cannot be overstated. The prevention of genocide demands no less. Failure to do so in the past led to the Srebrenica genocide (here and here). This conscious but unconscionable failure is perhaps one of the most painful testaments of the dangers of putting politics in the way of the law. The world is watching. Then let it not be again a passive witness to unspeakable horrors.

Please cite this article as Fannie Lafontaine, Catherine Savard and Olivier Lacombe, "The World is Watching: The International Court of Justice Orders Provisional Measures to Protect the Rohingya from Genocide" (2020), 4 PKI Global Justice Journal 4.

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