

# PREVENTING THE ROHINGYA GENOCIDE IN RAKHINE: THE ICJ PROVISIONAL MEASURES IN *THE GAMBIA V. MYANMAR*

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The order issued by the International Court of Justice (ICJ or “the Court”) on 23 January 2020 (“the Order”), indicating provisional measures in the dispute between The Gambia and Myanmar on the application of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (also “the Genocide Convention”), represents an important step in the efforts of the international community to put an end to the humanitarian emergency in Myanmar/Bangladesh and related grave crimes against the Rohingya population.

In its operative paragraphs (paragraphs 79–82) the Court has ordered the Republic of Myanmar: a) to take all measures to prevent the commission, against members of the Rohingya, of all acts listed in the Genocide Convention; b) to ensure that its military, irregular armed units or any organisations or persons subject to its control, do not commit genocidal acts; c) to take effective measures to prevent the destruction and ensure the preservation of evidence related to the allegations of acts of genocide; d) to submit a report to the Court on all measures taken to give effect to the Order within four months, and thereafter every six months until the final decision of the case.

While it is early to foresee the impact of the Order on the conduct of Myanmar (the Burmese Government has so far plainly rejected the ICJ’s ruling), the decision suggests a few remarks, one of a general nature, and the others related to specific aspects of the Court’s reasoning.

The four measures specified in the Order were decided unanimously by the ICJ. All seventeen judges were in favour of the operative part, although in one case (Vice-President Xue) doubts were expressed in a separate opinion on the validity of some of the arguments developed in the Order. The *ad hoc* judge for Myanmar, Judge Kress, also voted for the operative paragraphs, and declared that he concurred “with the essence of the Court’s reasoning”. As a result, there was general agreement on key aspects such as the existence of a *prima facie* evidence of serious violations of human rights and international humanitarian law against the Rohingya, the need to ensure that Myanmar observes its obligations under the Genocide Convention and the risk of irreparable harm for the rights of the Rohingya. Apart from the elements peculiar to the case, the Court’s

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The recent order by the ICJ in *The Gambia v. Myanmar* provides a concrete contribution to the efforts of the international institutions aimed at addressing the humanitarian emergency in Myanmar/Bangladesh and preventing the commission of acts of genocide against the Rohingya. In the picture: A view of the Martyrs’ Monument in Yangon, Myanmar. Source: Giuseppe Gabusi



attitude continues to reflect a special deference to the importance of, and respect for, the Genocide Convention in the world legal order and system of human rights protection (*Application of the Genocide Convention, Bosnia and Herzegovina v. Serbia and Montenegro, Judgment of 26 February 2007*, in particular paragraph 471).

After having established its *prima facie* jurisdiction, including the existence of a dispute between the Parties concerning the interpretation or application of the Genocide Convention (Art. 41 of the *ICJ Statute* and Art. IX of the Genocide Convention), the Order addresses two main questions: the standing of The Gambia in the proceedings, and the plausibility of the rights involved, including their link to the measures requested.

On The Gambia's standing, the Court relies essentially on its 2012 judgment relating to the *Obligation to Prosecute or Extradite (Belgium v. Senegal, Judgment of 20 July 2012*, paragraph 68), where the obligations in the *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (described as similar to those in the Genocide Convention) are defined as "obligations *erga omnes partes*", stemming from a common interest to ensure compliance, and thus entitling every State Party, and not only a specially affected state, to invoke the responsibility of another State Party for failure to fulfil its obligations. Not surprisingly, this part of the reasoning was criticised by Vice-President Xue, both in terms of the interpretation of the Torture Convention in *Belgium v. Senegal* (see her *dissenting opinion* in this latter case, in particular paragraphs 14-23) and of the "sweeping conclusion" drawn by the ICJ with regard to the Genocide Convention. However, the notion of a common interest of contracting states in the Genocide Convention is firmly based in the ICJ jurisprudence since its *Advisory Opinion of 1951*; and the argument that Belgium had a special interest does not seem to affect the value of the 2012 precedent excluding any relevance of such type of interest in case of obligations *erga omnes partes*. In addition, requiring proof of a special interest for crimes against the Rohingya would have entailed the concrete risk that no state could have brought a claim against Myanmar (another perspective claimant, Bangladesh, having entered a *declaration/reservation* to Art. IX of the Genocide Convention). More generally, following such strict interpretation, no recourse to the ICJ would result available in case of acts of genocide committed by a State Party exclusively against its citizens on its territory.

The plausibility of the rights invoked on the merits is the other element which the ICJ has based its decision on. The Court has accepted the submission by The Gambia that the rights it asserted were plausible according to facts and circumstances demonstrating grave human rights violations and atrocities committed against the

Rohingya, and allowing the inference of genocidal intent (Order, paragraphs 46, 56). The Court dismissed the argument by Myanmar (partially based on the *2017 ICJ Order in Ukraine v. Russian Federation*, paragraph 75) that on the contrary the exceptional gravity of the allegations should have been a decisive factor warranting the determination of the existence of a genocidal intent. Here, the opinions and the declaration appended to the Order show a variety of positions on "plausibility": they range from rejecting the notion as an "unfortunate invention" of the majority of the ICJ, inapplicable "to continuing situations of vulnerability" (see the *separate opinion* of Judge Caçado Trindade); to the claim that a "minimum standard" should apply and the Court should determine *prima facie* that the subject-matter of the dispute could concern genocide (Vice-President Xue); to the acceptance of the plausibility standard set by the Court, in no way prejudicial to the merits, and having a limited value even as "*fumus boni juris*" of genocidal intent (Judge *ad hoc* Kress).

Arguably, the ICJ has taken a stance echoing that of the International Criminal Court (ICC) Appeals Chamber in the arrest warrant for genocide *against Omar Hassan Ahmad Al Bashir*. In 2010 the Chamber *stated* that the standard of "reasonable grounds to believe" for issuing the warrant did not require proof that a genocidal intent was the only plausible inference to be drawn from relevant facts and circumstances. Correspondingly, the Order indicates that in view of the function of provisional measures pending the final decision, the determination of the existence of a genocidal intent was not warranted, which appears tantamount to say that the plausibility of such intent may equally be drawn from crimes not immediately qualifiable as genocide.

One last observation concerns the relations between the Order and the ongoing *ICC investigation* over the crimes of deportation and persecution committed in Myanmar/Bangladesh against the Rohingya. The investigation was authorised by Pre-Trial Chamber III for "any crimes" within ICC jurisdiction and committed, at least in part, in Bangladesh. While the ICJ decision, due to its merely protective nature, does not appear sufficient to trigger an ICC investigation on the crime of genocide, it may nonetheless contribute to providing elements for any prosecutorial process aimed at assessing whether acts of genocide have resulted from deportation and persecution, and have been committed in part in Bangladesh.

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