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CASE AND COMMENT

EXPANDING THE SCOPE OF PROVISIONAL MEASURES UNDER THE GENOCIDE CONVENTION

IN *The Gambia v Myanmar*, Order of 23 January 2020, not yet reported, the International Court of Justice ("ICJ" or "Court") has taken bold steps to enhance the effectiveness of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), by adopting a liberal notion of standing hitherto untested and by ordering robust measures of protection unlike any previously ordered by this court.

In August 2017, the Myanmar army attacked predominantly Rohingya villages across Rakhine state, in response to attacks by a non-state armed group active in the region, the Arakan Rohingya Salvation Army (ARSA). Approximately 800,000 Rohingya fled to Bangladesh over the course of a few weeks, due to mass atrocities including the killing of civilians, rape and displacement. This assault is but the latest in decades of marginalisation of and atrocities committed against the Rohingya.

On 11 November 2019, The Gambia filed an application at the ICJ, instituting proceedings against Myanmar, alleging violation of legal obligations emanating from the Genocide Convention, in relation to the Rohingya. The application contained a request for provisional measures which included ordering Myanmar to prevent and stop the commission of genocidal acts, to permit access to the UN and other investigative bodies, to preserve evidence and to monitor compliance with the Court's order. The ICJ held hearings on 10–12 December 2019 and, on 23 January 2020, it issued its order indicating provisional measures (Order). The Order is unanimous (including the judge ad hoc for Myanmar), and in favour of The Gambia.

While there have been a greater number of provisional measures orders recently – at least five in as many years – the jurisprudence of the Court is still evolving as to the applicable thresholds. The Order renews focus on the standards and implications of provisional measures, and in particular, as

relates to the Genocide Convention, which has not been the subject of a provisional measure order since 1993.

In order to indicate provisional measures, certain criteria must be satisfied. The Court must have prima facie jurisdiction, the party must have standing, there must be "plausible rights" in need of protection and a link to the provisional measures requested, and finally, a risk of irreparable prejudice and urgency that necessitates the order. The fulfilment of these criteria does not have to be "definitive", as they will mostly be litigated at subsequent stages of the case.

The application here was filed pursuant to Article 36(1) of the Statute of the ICJ and Article IX of the Genocide Convention. In holding that prima facie jurisdiction existed, the Court found there to be a "dispute" between The Gambia and Myanmar under Article IX of the Genocide Convention. This was inferred from statements made at multilateral forums, with particular focus on United Nations General Assembly (UNGA) statements, and more circuitously, on The Gambia's reliance upon reports of the United Nations Independent International Fact-Finding Mission on Myanmar (FFM) which were in turn disputed by Myanmar. The Courts assessment of the "dispute" included a *note verbale* sent by The Gambia in October 2019 to Myanmar, and to which no response was received. The Court also dismissed as irrelevant the reservation by Myanmar to Article VIII, which was determined to have a distinct area of operation from Article IX.

Addressing standing, relying on the *1951 Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) I.C.J. Rep. 15, the Court held that the "common interest" of all state parties in upholding the ideals of the Genocide Convention meant that a state need not be "specially affected" to institute proceedings. Relying on *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, (2012) I.C.J. Rep. 422, where the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) was the basis of the finding, the ICJ in the Order stated, "It follows 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" (at [41]).

That The Gambia – a state with no geographic connection and, unlike Bangladesh or Malaysia, not directly impacted by the atrocities – may undertake legal action in effect on behalf of the Rohingya, on the basis of the Genocide Convention and pursuant to obligations *erga omnes partes*, is a first in the history of the court. Within the Court, there is disagreement on this point. Judge Xue in her Separate Opinion raised concerns regarding the reliance on *Belgium v Senegal*, indicating Belgium had special interests, and the decision marked a departure from the 2001 Articles on the

Responsibility of States for Internationally Wrongful Acts (ARS). However, in *Belgium v Senegal*, while true that Belgium had an interest in the prosecution of Mr. Habré by virtue of its universal jurisdiction law, this did not factor into the Court's reasoning, in which it relied solely upon *erga omnes partes* obligations – and in fact, declined to address the question of special interest (at [448]–[450]).

Another step in the assessment of provisional measures relates to the protection of underlying "plausible" rights, and the link to the measures requested. While Myanmar admitted to the possibility of crimes having been committed, it argued that there was insufficient evidence of genocidal intent and therefore that Gambia had not made out a "plausible claim". The Court rejected this argument. The Court relied extensively on FFM reports and related UNGA resolutions, as indicative of the commission of serious crimes. The assessment undoubtedly varies based on context as well as the underlying convention. It does however beg the question to what extent the Court weighs evidence at this stage, and the manner of determination of plausible rights. A key observation by the Court related to the status of the Rohingya as a "protected group" within the meaning of Article II of the Genocide Convention (at [52]). This is noteworthy in light of the refusal to use the term "Rohingya" by Myanmar in submissions, and by the State Counsellor Aung San Suu Kyi at the ICJ hearings.

Regarding the requirements of irreparable injury and prejudice, and the urgency of the request, the extreme vulnerability of the Rohingya including their stateless status, as well as FFM reports indicating the existence of serious risks, were sufficient basis for the satisfaction of the Court, and to indicate provisional measures.

The Court relied on Article 75(2) of the Statute of the ICJ, which empowers the Court to issue orders other than those requested. The Court ordered continuing protection and adherence to the obligations under Articles II and III of the Genocide Convention, as requested. In a marked departure from previous practice, the Court placed an obligation on Myanmar to ensure that evidence of atrocities is preserved and not destroyed. This is particularly important given the gathering of evidence by the Independent Investigative Mechanism for Myanmar (IIMM), and the ongoing investigation by the International Criminal Court.

The Court also imposed reporting requirements on Myanmar, with the submission of a report of compliance with the Order within four months, and subsequently every six months thereafter till the conclusion of the case. In monitoring Myanmar's compliance with the Order, the ICJ has taken on a supervisory role, unlike other cases before it.

In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, (2007) I.C.J. Rep. 43, provisional measures were ordered in April 1993, mandating prevention and stopping the commission of

genocidal acts, as well as non-aggravation of the dispute. These measures were reiterated in yet another order in September 1993; both were disregarded as evidenced by the genocide in Srebrenica in 1995. In light of the failure of the provisional measures to halt an impending genocide, it would seem that a more proactive stance by the ICJ is warranted.

The Order of the ICJ is the first provisional measures order relating to the Genocide Convention since the *Bosnia v Serbia* case. However, of even greater significance in this case is the standing of The Gambia based on *erga omnes partes* obligations, which will undoubtedly open the door to other similarly situated claims. Thus far, standing on this basis has only been granted under the Torture Convention and now the Genocide Convention, given the nature of these offences and their status as crimes under international law. There is also a discernible shift in the role and engagement of the court, to a more proactive institution. This may be a slippery slope, not least due to the lack of enforcement capacity of the Court. The limits of this role will be tested, given multiple reports of an escalation of hostilities and attacks against civilians in Rakhine state, since the issuance of the Order. In the larger context, the significance of litigating the obligations of the Genocide Convention cannot be emphasised enough, further refining the interpretation of the treaty. While in *Bosnia v Serbia*, facts had already been established by judgments of the UN International Criminal Tribunal for the Former Yugoslavia (ICTY), no such reference point is available here. The interaction with other courts and institutions that have commenced investigating the crimes against the Rohingya will be a crucial element to follow. There are lengthy and complex proceedings ahead, and the first step has already set a new direction for the Court.

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COMMON-LAW CONSTITUTIONAL RIGHTS: ONE STEP FORWARD, TWO STEPS BACK?

FOLLOWING the Human Rights Act 1998 (HRA)'s enactment common-law rights became secondary to the new statutory framework. Yet, in recent years, the Supreme Court began to re-emphasise the primacy of common-law rights (see inter alia *Osborn v Parole Board* [2013] UKSC 61, [2014] A.C. 1115). The focus on common-law rights raises questions about their interaction with the HRA and how we know what the common law protects.

Such issues are examined in *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10. The appellant's son, Mr. El Sheikh, is alleged to have joined the Islamic State of Iraq and the Levant ("Daesh") in Syria. Whilst there, Mr. El Sheikh is alleged to have been party to a