

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar): The International Court of Justice’s First Binding Decision to Hold Myanmar Accountable for Committing Genocidal Acts Against the Rohingya Group

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I. OVERVIEW

In response to the ongoing harm to the Rohingya community residing in the Republic of the Union of Myanmar (hereinafter “Myanmar”), the Republic of The Gambia (hereinafter “The Gambia”) filed in the Registry of the International Court of Justice (hereinafter “the court”) an application instituting proceedings against Myanmar concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the “Genocide Convention”).¹ In its application filed on November 11, 2019, The Gambia sought protection for “all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Genocide Convention.”² The Gambia asserted that in October 2016, the Myanmar military and other security forces began widespread “clearance operations” against the Rohingya group, a predominantly Muslim population who reside primarily in Myanmar’s Rakhine State.³ The Gambia claimed that during the systematic “clearance operations,” military forces committed mass murder, rape, and other forms of sexual violence, and engaged in the systematic destruction by fire of over three hundred and fifty Rohingya villages, with the intent to destroy the

1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gam. v. Myan.), Judgment, 2020 I.C.J. 2 (Jan. 23).

2. *Id.* at 6.

3. *Id.* at 7.

Rohingya population, in whole or in part.⁴ The Gambia further alleged that Myanmar forces have continued to commit genocidal acts against the Rohingya since August 2017, which has resulted in hundreds of thousands of the Rohingya fleeing to Bangladesh for safety.⁵

The Gambia asked the court, *inter alia*, to declare that Myanmar has violated and continues to violate the provisions of the Genocide Convention and must cease any wrongful acts that violate the Genocide Convention.⁶ Moreover, The Gambia further requested the court to indicate provisional measures seeking to preserve the rights of the Rohingya in Myanmar and protect the Rohingya from acts of genocide.⁷ When evaluating the provisional measures requested, the court took note of the report of the Independent International Fact-Finding Mission on Myanmar (hereinafter “the Fact-Finding Mission”), which found that the “Rohingya in Myanmar have been subjected to acts which are capable of affecting their right of existence as a protected group under the Genocide Convention . . .”⁸ The International Court of Justice *held* that Myanmar, in accordance with its obligations under the Genocide Convention, must “take all measures within its power” to prevent acts of genocide against the Rohingya group in Myanmar. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gam. v. Myan.)*, Order, 2020 I.C.J. 25 (Jan. 23).

II. BACKGROUND

The Genocide Convention was the first instrument of international law that codified the crime of genocide.⁹ The General Assembly of the United Nations (hereinafter “the United Nations”) first recognized genocide as a crime under international law in 1946.¹⁰ The adoption of the Genocide Convention was largely due to the efforts of Raphael Lemkin, a Polish Jewish lawyer who fled to the United States during the

4. *Id.*

5. *Id.* at 18.

6. *Id.* at 2.

7. *See id.* at 4-5.

8. *Id.* at 21.

9. *Legal Framework: The Genocide Convention*, UNITED NATIONS <https://www.un.org/en/genocideprevention/genocide-convention.shtml> [<https://perma.cc/WB58-ECJY>] (last visited Dec. 16, 2020) [hereinafter *The Legal Framework*].

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

Holocaust.¹¹ When World War II ended, Lemkin returned to Europe in 1945 and served as an advisor to the lead prosecutor at the Nuremberg trials.¹² At the Nuremberg trials, however, genocide was not officially recognized as a crime under international law and was not expressly considered as a ground for prosecution.¹³ Therefore, Nazi war criminals were indicted on charges such as crimes against peace, war crimes, and crimes against humanity.¹⁴ After the trials, Lemkin devoted himself to persuading the newly formed United Nations to “enter into an international treaty which would formulate genocide as an international crime, providing for its prevention and punishment in time of peace and war.”¹⁵ On December 9, 1948, the United Nations adopted the Genocide Convention and signified the international community’s commitment to, ‘never again,’ after the atrocities committed during World War II.¹⁶ As of July 2019, the Genocide Convention has been ratified by 152 State Parties, including The Gambia and Myanmar.¹⁷ The court has consistently maintained that the Genocide Convention embodies principles that are part of general customary international law.¹⁸ Therefore, whether or not States have ratified the Genocide Convention, they are all bound as a matter of law by the principle that genocide is a crime prohibited under customary international law.¹⁹

The Genocide Convention places an obligation on contracting parties to take measures to prevent and punish the crime of genocide.²⁰ Article IX of the Genocide Convention provides that any dispute between state parties relating to the “interpretation, application, or

11. MARGOT STROM & WILLIAM PARSONS, *FACING HISTORY AND OURSELVES: HOLOCAUST AND HUMAN BEHAVIOR* (1978) <https://www.facinghistory.org/holocaust-and-human-behavior/chapter-11/raphael-lemkin-and-genocide-convention>[<https://perma.cc/RKM5-6T2P>] [Hereinafter *FACING HISTORY AND OURSELVES*].

12. *Id.*

13. Judith Derenzo & Michael John Garcia, *Genocide: Legal Precedent Surrounding the Definition of the Crime*, CRS (Sept. 14, 2004), https://www.everycrsreport.com/files/20040914_RL32605_fd1578d916c3c93f5d5112a01c9f1af4fe6a6004.pdf. [<https://perma.cc/V4D9-S383>].

14. *Id.*

15. *FACING HISTORY AND OURSELVES*, *supra* note 11.

16. *The Legal Framework*, *supra* note 9.

17. *Id.*

18. Fact Sheet on The Convention on the Prevention and Punishment of the Crime of Genocide (1948), UN OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, available at <https://www.un.org/en/genocideprevention/documents/Genocide%20Convention-FactSheet-ENG.pdf> [<https://perma.cc/L5UE-N3BE>] (last visited Dec. 16, 2020).

19. *Id.*

20. *Id.*

fulfilment” of the Genocide Convention must be resolved by the court.²¹ Article II of the Genocide Convention defines the crime of genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.²²

In cases where a state believes that it will suffer ongoing harm before the court makes a ruling on the merits, the state can request the court to issue orders preventing further harm while the case is proceeding.²³ Article 41 of the Statute of the International Court of Justice (hereinafter “the Statute”) provides that the court has the authority to indicate provisional measures to “preserve the respective rights of either party.”²⁴

Pursuant to Article 41 of the Statute, the court has the power to indicate provisional measures when there is a risk that irreparable prejudice could be caused to rights, which are the subject of judicial proceedings, or when the alleged disregard of such rights may entail irreparable consequences.²⁵ Moreover, the court’s orders on provisional measures under Article 41 of the Statute have binding effect and thus create international legal obligations for any party to whom the provisional measures are addressed.²⁶ A party’s request for provisional measures asks the court to issue an order to prevent further harm while the case is proceeding.²⁷ However, the court will only exercise its power to indicate provisional measures if there is “urgency,” meaning there is a real and imminent risk that irreparable prejudice will be caused before

21. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 10.

22. *Id.*

23. D. Wes Rist, *What Does the ICJ Decision on The Gambia v. Myanmar Mean?*, AM. SOC’Y OF INT’L L. (Feb. 27, 2020), <https://www.asil.org/insights/volume/24/issue/2/what-does-icj-decision-gambia-v-myanmar-mean> [<https://perma.cc/X29L-8YFD>].

24. I.C.J. Stat., art. 41.

25. Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S), Order, 2018 I.C.J. 645 (Oct. 3).

26. *Id.* at 652.

27. Andrew Boyle, *ICJ Orders Preliminary Relief in Myanmar Genocide Case*, JUST SECURITY (Jan. 28, 2020), <https://www.justsecurity.org/68307/icj-orders-preliminary-relief-in-myanmar-genocide-case/> [<https://perma.cc/T7JS-NNTP>].

the court renders a final decision on the merits of the case.²⁸ The court has maintained that the “urgency” requirement is satisfied when the acts that cause irreparable prejudice can “occur at any moment” before the court gives its final decision.²⁹

In 2007, the court issued its first judgment interpreting the Genocide Convention in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (hereinafter “*Bosnia v. Serbia*”).³⁰ Bosnia and Herzegovina alleged that during the Bosnian War in July 1995 the Federal Republic of Yugoslavia (hereinafter “FRY”)³¹ was responsible for the mass killings of more than 7,000 Bosniak (Bosnian Muslims) men in Srebrenica, a town in northeastern Bosnia declared a “safe area” by the United Nations, in violation of the Genocide Convention.³² Bosnia alleged that FRY, “under the guise of protecting the Serb population of Bosnia and Herzegovina, in fact conceived and shared with them the vision of a ‘Greater Serbia,’” gave its support to those responsible for the genocidal acts that occurred in Srebrenica.³³ Although FRY did not deny that crimes were committed during the Bosnian War, it denied that the crimes were committed with the necessary genocidal “intent” as required by the Genocide Convention.³⁴ FRY claimed that because the crimes were carried out by the Bosnian Serb Army (VRS), it was not responsible for the alleged genocidal acts.³⁵

Nonetheless, the court in *Bosnia v. Serbia* held that the 1995 massacre of Bosniaks in Srebrenica amounted to genocide.³⁶ While the court found that there was insufficient evidence to conclude that Serbia was directly responsible or complicit in the genocide of Bosnian

28. Iran v. U.S., 2018 I.C.J. Order.

29. *Id.*

30. Susana SáCouto, *Reflections on the Judgment of the International Court of Justice in Bosnia’s Genocide Case Against Serbia and Montenegro*, 15 HUM. RTS. BRIEF 1, 1 (2007) at 2-6.

31. *What Is the Former Yugoslavia*, United Nations International Criminal Tribunal for the Former Yugoslavia, <https://www.icty.org/en/about/what-former-yugoslavia>.

32. R. Jeffrey Smith, *Srebrenica Massacre*, Britannica, <https://www.britannica.com/event/Srebrenica-massacre>; see also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro)*, Judgment, 2007 I.C.J. 116 (Feb. 26).

33. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Serb. and Montenegro)* at 101.

34. *Id.* at 117.

35. SáCouto, *supra* note 30.

36. *Id.*

Muslims, Serbia still violated its duty under the Genocide Convention by failing to prevent genocide and then failing to punish those responsible for committing genocidal acts in Srebrenica.³⁷

Before the court issued its judgment on February 26, 2007, however, the court first indicated provisional measures for the protection of Bosnian rights under the Genocide Convention.³⁸ After Bosnia and Herzegovina instituted proceedings against FRY on March 20, 1993, it immediately submitted a request for the indication of provisional measures under Article 41 of the Statute.³⁹ The court explained that it has the power to indicate provisional measures under Article 41 of the Statute in order to preserve the respective rights of the parties pending the final decision of the court.⁴⁰ In light of these circumstances, the court held that the Government of FRY should immediately take all measures within its power to prevent commission of the crime of genocide.⁴¹ Moreover, the court held that the Government of Federal Republic of Yugoslavia (Serbia and Montenegro) should ensure that any military or armed units acting under the control of the government do not commit any acts of genocide.⁴² This includes the conspiracy to commit genocide, direct and public incitement to commit genocide, and complicity in genocide, whether directed against Bosnian Muslims or against any other national, ethnical, racial, or religious group.⁴³ Lastly, the court held that Yugoslavia and Bosnia should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult a solution.⁴⁴

37. *Id.*

38. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Order, 1993 I.C.J. (Apr. 8) at 24 (Hereinafter Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro)).

39. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Serb. and Montenegro) Overview of the Case, <https://www.icj-cij.org/en/case/91>.

40. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Serb. and Montenegro) at 19-20.

41. *Id.* at 24-25.

42. *Id.*

43. *Id.*

44. *Id.*

III. COURT'S DECISION

In the noted case, the court found that the rights of the Rohingya group remained at imminent risk and therefore imposed provisional measures against Myanmar, ordering it to comply with the Genocide Convention.⁴⁵ The court did not rule on the merits of the case and determine that Myanmar committed genocide in violation of the Genocide Convention.⁴⁶ Rather, the court determined that the indication of provisional measures was necessary for the protection of the rights of the Rohingya population.⁴⁷ In reaching its decision, the court first examined whether the rights asserted by The Gambia were at least plausible.⁴⁸ The court then evaluated whether the provisional measures requested by The Gambia were necessary to prevent “irreparable prejudice.”⁴⁹ Finally, having determined that “there is a real and imminent risk of irreparable prejudice to the rights invoked by The Gambia,” the court concluded that it was necessary to indicate provisional measures in order to protect the rights of the Rohingya.⁵⁰

First, the court addressed whether the rights claimed by The Gambia on the merits, and for which it is seeking protection, were plausible.⁵¹ The court explained that a link must exist between the rights by which protection is sought and the provisional measures being requested.⁵² In its application, The Gambia stated that it sought to assert the rights of “all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Genocide Convention.”⁵³ This includes the rights of the Rohingya group to exist as a group, the right to be protected from acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide, and complicity in genocide in accordance with Article III of the Genocide Convention.⁵⁴ The court noted that the provisions of the Genocide Convention were intended to protect the

45. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Judgment, 2020 I.C.J. Rep, 2 (Jan. 23) at 22.

46. *Id.* at 10.

47. *Id.* at 23.

48. *Id.* at 14.

49. *Id.* at 19-20.

50. *Id.* at 22-23.

51. *Id.* at 14.

52. *Id.*

53. *Id.*

54. *Id.*

members of a national, ethnical, racial or religious groups from genocidal act and concluded that the Rohingya group constitutes a protected group within the meaning of Article II of the Genocide Convention.⁵⁵ When considering the plausibility of The Gambia's claims, the court referenced the United Nations' resolution adopted on December 22, 2018, which expressed its concern for the findings of the Fact-Finding Mission.⁵⁶ The court noted that the Fact-Finding Mission's investigation found sufficient information to warrant investigation and prosecution so that the court may determine liability for genocide against the Rohingya population.⁵⁷ The Fact-Finding Mission also found that crimes against humanity and war crimes have been committed in Myanmar including murder, imprisonment, enforced disappearance, torture, rape, sexual slavery and other forms of sexual violence, persecution, enslavement, and children being subjected to numerous human rights violations.⁵⁸ Moreover, the court referenced the Fact-Finding Mission's September 12, 2018 report, which stated that it had "reasonable grounds to conclude that serious crimes under international law ha[d] been committed that warranted criminal investigation and prosecution," including genocide, against the Rohingya population in Myanmar.⁵⁹ The court further noted the Fact-Finding Mission's assertion that the extreme levels of violence perpetrated by the Myanmar military and entities acting under its instruction against the Rohingya in 2016 and 2017 stemmed from the "systemic oppression and persecution of the Rohingya."⁶⁰ Following the military attacks in Rakhine State in 2016 and 2017, more than 723,000 Rohingya Muslims fled to Bangladesh for safety.⁶¹ Given these facts and circumstances, the court concluded that the rights claimed by The Gambia are plausible.⁶²

Second, the court addressed whether the provisional measures requested by The Gambia were necessary to prevent "irreparable harm."⁶³ The court noted that it will only exercise its power to indicate provisional measures if there is urgency in the sense that there is a real

55. *Id.* at 16.

56. *Id.*

57. *Id.* at 17.

58. *Id.*

59. *Id.*

60. *Id.* at 18.

61. *Id.*

62. *Id.*

63. *Id.* at 21.

and imminent risk that irreparable prejudice will “occur at any moment” before the court renders its final decision on the case.⁶⁴ The court again referenced the reports of the Fact-Finding Mission, which stated that the Rohingya in Myanmar have been subjected to acts which are “capable of affecting their right of existence as a protected group under the Genocide Convention, such as mass killings, widespread rape and other forms of sexual violence, as well as beatings, the destruction of villages and homes, denial of access to food, shelter and other essentials of life.”⁶⁵ The court further took note of the Fact-Finding Mission’s September 2019 report to the United Nations Human Rights Council, which concluded, “the Rohingya people remain at serious risk of genocide under the terms of the Genocide Convention.”⁶⁶ After reviewing the assertions from both parties and the Fact-Finding Mission’s findings, the court found that “there is a real and imminent risk of irreparable prejudice to the rights invoked by The Gambia.”⁶⁷

Finally, the court determined that it was necessary to indicate certain provisional measures in order to protect the rights of the Rohingya group.⁶⁸ However, the court found that it was not necessary to indicate all the measures requested by The Gambia.⁶⁹ The court first held that Myanmar, in accordance with its obligations under the Genocide Convention, must take all measures within its power to prevent the commission of all genocidal acts enumerated in Article II of the Genocide Convention.⁷⁰ Moreover, the court held that Myanmar must ensure that its military and armed units acting under its instruction do not commit any acts within the scope of Article II of the Genocide Convention, conspire to commit genocide, incite the public to commit genocide, attempt to commit genocide, or be complicit in genocide.⁷¹ The court also ordered Myanmar to take measures to prevent the destruction and ensure the preservation of evidence relating to allegations of wrongdoing under the Genocide Convention.⁷² Lastly, the court required

64. *Id.* at 19-20.

65. *Id.* at 21.

66. *Id.*

67. *Id.* at 22.

68. *Id.* at 23.

69. *Id.*

70. *Id.* at 25.

71. *Id.*

72. *Id.*

Myanmar to submit a report to the court within four months on the measures it is adopting to comply with the court's order.⁷³

IV. ANALYSIS

The court's decision to issue provisional measures is significant because it is the first binding decision to hold Myanmar accountable for its genocidal acts committed against the Rohingya group.⁷⁴ Although the court did not conclude that Myanmar committed genocide in its order, the court's ruling is the first step in determining whether Myanmar could be responsible for genocide.⁷⁵ The next step for the court will be to determine whether it has the jurisdiction to hold a hearing on the merits of the case.⁷⁶ If the court does have jurisdiction, it may take several years for the court to make a final determination on whether Myanmar has committed genocide in violation of the Genocide Convention.⁷⁷ Even though the court's decision is binding, the court has no means to enforce the order.⁷⁸ Thus, the impact of the court's decision in the noted case is contingent on whether Myanmar, which is led by Aung San Suu Kyi, actually implements measures in accordance with the court's order.⁷⁹ Since the court issued its order, Aung San Suu Kyi has repeatedly denied allegations of genocide against the Rohingya group, justifying the 2017 military operations as a means of removing Rohingya insurgents.⁸⁰

While the court's decision to issue provisional measures is significant, the provisional measures have had no impact on the safety and well-being of the Rohingya group.⁸¹ Myanmar has submitted two

73. *Id.*

74. Shibani Mahtani, *International Court of Justice Orders Myanmar to Prevent Genocide Against the Rohingya*, WASH. POST (Jan. 23, 2020), https://www.washingtonpost.com/world/asia_pacific/international-court-of-justice-orders-myanmar-to-prevent-genocide-against-the-rohingya/2020/01/23/ff383ff4-3d29-11ea-afe2-090eb37b60b1_story.html [<https://perma.cc/A6QK-66UN>].

75. *Id.*

76. Michael Ostrove et. al, *Genocide Case Against Myanmar in the ICJ*, DLA PIPER (Jan. 24, 2020), <https://www.dlapiper.com/en/us/insights/publications/2019/12/genocide-case-against-myanmar/> [<https://perma.cc/7R8Z-QHV5>].

77. *Id.*

78. Rist, *supra* note 23.

79. *Id.*

80. Myanmar Rohingya, *What You Need to Know About the Crisis*, BBC NEWS (Jan. 23, 2020), <https://www.bbc.com/news/world-asia-41566561> [<https://perma.cc/G8MN-SUXL>].

81. *See Myanmar's Genocide Against Rohingya Not Over, Says Rights Group*, THE GUARDIAN (Nov. 23, 2020), <https://www.theguardian.com/world/2020/nov/23/myanmar-is-still->

reports to the court in compliance with its order in the noted case, but has not taken any tangible measures to protect the Rohingya group from genocide.⁸² The reports are not available to the public at this time.⁸³ Grant Shubin, legal director of the Global Justice Center, stated that since the provisional measures were issued, Myanmar has “done nothing to address the root causes of discrimination and impunity that give rise to the ongoing risk of genocide against the Rohingya.”⁸⁴ Furthermore, according to Tun Khin, president of Burma Rohingya Organisation UK, genocide against the Rohingya group is still occurring and Myanmar believes it can ignore the provisional measures without facing any consequences.⁸⁵ Not only has Myanmar failed to comply with the court’s order, but the Myanmar government also excluded over 1.1 million Rohingya refugees from voting and running for office in its November 2020 election.⁸⁶ Although the Rohingya are from Rakhine State in Myanmar, Myanmar’s government considers the Rohingya community to be illegal immigrants from Bangladesh.⁸⁷ Even with the court’s order in effect, Myanmar continues to discriminate against the Rohingya community and erase the existence of Rohingya from the country.⁸⁸ In addition, instead of moving towards safely returning to Myanmar,⁸⁹ thousands of Rohingya refugees in Bangladesh are slowly being relocated to a small remote silt island in the Bay of Bengal, where no one

committing-genocide-against-rohingya-says-rights-group [Hereinafter *Myanmar’s Genocide Against Rohingya Not Over*].

82. John Zaw Mandalay, *Myanmar Accused of Ignoring ICJ’s Genocide Measures*, UCA NEWS (Nov. 26, 2020), https://www.ucanews.com/news/myanmar-accused-of-ignoring-icjs-genocide-measures/90452?fbclid=IwAR01YJXs8AF_sSchDK_Mxi3vCZEs4sY2jODrcKk_Vy0iAFY0ootQjzmKPk# [<https://perma.cc/R4J8-4VMG>].

83. Riyaz ul Kalik, *Myanmar Submits 2nd Rohingya Report to Top UN Court*, AA (Nov. 24, 2020), <https://www.aa.com.tr/en/asia-pacific/myanmar-submits-2nd-rohingya-report-to-top-un-court/2054175>.

84. *Id.*

85. *Myanmar’s Genocide Against Rohingya Not Over*, *supra* note 81.

86. Shehab Sumon, ‘Shame for my Country’: Rohingya Excluded from Myanmar Election, ARAB NEWS (Nov. 8, 2020), <https://www.arabnews.com/node/1760116/world> [<https://perma.cc/UY54-C7DS>].

87. ‘We Don’t Matter’: Rohingya Deprived of Vote in Myanmar Elections, AL JAZEERA (Nov. 6, 2020), <https://www.aljazeera.com/news/2020/11/6/as-though-we-are-dead-unable-to-vote-myanmar-poll-robs-rohing> [<https://perma.cc/H7JW-KQ5L>].

88. *Myanmar’s Genocide Against Rohingya Not Over*, *supra* note 81.

89. Akbar Hossain, *Far From Home, Rohingya Refugees Face a New Peril on a Remote Island*, BBC NEWS (Oct. 31, 2020), <https://www.bbc.com/news/world-asia-54717686> [<https://perma.cc/8GU8-W3HT>]; *see also* Hannah Beech, *From Crowded Camps to a Remote Island: Rohingya Refugees Move Again*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/world/asia/rohingya-bangladesh-island-camps.html>.

has ever lived before.⁹⁰ Human rights groups and journalists are currently unable to access the remote island without prior permission, which raises concerns about a lack of human rights monitoring.⁹¹

The court's order has failed to make any meaningful impact because there is no way for the court to enforce the provisional measures.⁹² While the court has no means to enforce its orders, the United Nations Security Council (hereinafter "Security Council") can compel states to follow the court's orders if the defaulting party to a case has failed to comply with the court's judgment.⁹³ However, almost a year has passed since the court issued the provisional measures, and the Security Council has failed to step in and take measures to protect the Rohingya from genocide.⁹⁴ The only formal response of the Security Council to the genocide against the Rohingya was the adoption of a Presidential Statement in November 2017, which called on the Myanmar Government to end the excessive military force and violence against the Rohingya community.⁹⁵ Moreover, a formal session of the Security Council to discuss Myanmar has not been held since February 2019 even though only nine votes are needed to do so.⁹⁶ The Security Council has the power to determine whether a threat to international peace exists and can even resort to imposing sanctions or using force to restore international peace and security.⁹⁷ However, the Security Council has been conspicuously silent since the court issued the provisional measures while the safety of the Rohingya community continues to deteriorate.⁹⁸ In addition to the lack of action by the Security Council, the international

90. Beech, *supra* note 89.

91. See Rist, *supra* note 23.

92. U.N. Charter art. 94, ¶ 2.

93. See Param-Preet Singh, *Rohingya Symposium: A Strategy for Strong Security Council Action on Myanmar*, HUM. RTS. WATCH (Aug. 28, 2020), <https://www.hrw.org/news/2020/08/28/rohingya-symposium-strategy-strong-security-council-action-myanmar> [<https://perma.cc/H6NP-X2J3>].

94. *Id.*; see also Meetings Coverage, Security Council, Security Council Presidential Statement Calls on Myanmar to End Excessive Military Force, Intercommunal Violence in Rakhine State, U.N. Meetings Coverage SC/13055 (Nov. 6, 2017).

95. Singh, *supra* note 93.

96. *Peace and Security*, U.N. SECURITY COUNCIL, <https://www.un.org/securitycouncil/#:~:text=The%20Security%20Council%20has%20primary,to%20comply%20with%20Council%20decisions> [<https://perma.cc/GT3Z-BA8Z>] (last visited Dec. 17, 2020).

97. See Singh, *supra* note 93.

98. Nadira Kourt, *The Rohingya Genocide and the ICJ: The Role of the International Community*, JUST SECURITY (July 28, 2020), <https://www.justsecurity.org/71552/the-rohingya-genocide-and-the-icj-the-role-of-the-international-community/> [<https://perma.cc/B2PT-92ZX>].

community has also failed to adequately respond to the Rohingya crisis.⁹⁹ Other countries have yet to hold Myanmar accountable for its genocidal acts or even offer substantial financial support to Bangladesh, who is housing over 723,000 Rohingya refugees.¹⁰⁰ The Gambia brought the case to the court, but now the international community must take action to ensure that Myanmar complies with the provisional measures and makes tangible changes that protect the lives and safety of the Rohingya in Myanmar.¹⁰¹ Without the support and intervention from the Security Council and international community, the court's provisional measures will have little to no impact on protecting the Rohingya against genocide.¹⁰²

Furthermore, as mentioned earlier, the court in the noted case did not rule on whether Myanmar committed genocide against the Rohingya.¹⁰³ Proving that Myanmar committed genocide requires a showing of Myanmar's intent to destroy the Rohingya population in whole or in part.¹⁰⁴ Given the Fact-Finding Mission's 2018 report, which found "reasonable grounds to conclude" that Myanmar's military had committed acts of genocide against the Rohingya, it is likely that the court will later make a determination that Myanmar did in fact commit genocide.¹⁰⁵ Moreover, because the court in *Bosnia v. Serbia* found that Serbia violated its duty under the Genocide Convention by failing to prevent genocide, it is likely that the court will hold that Myanmar violated its duty to prevent genocide as well.¹⁰⁶ When the court finds that Myanmar is guilty of genocide, Myanmar government and military officials responsible for the genocide will finally be prosecuted for their atrocious actions.¹⁰⁷ Furthermore, the Rohingya community and refugees

99. See Tim Gaynor, *More International Support Needed for Rohingya Refugees in Bangladesh, say UN and World Bank Chiefs*, UNHCR USA (July 2, 2018), <https://www.unhcr.org/en-us/news/latest/2018/7/5b3a40264/international-support-needed-rohingya-refugees-bangladesh-say-un-world.html>.

100. Kourt, *supra* note 98.

101. See Gaynor, *supra* note 99.

102. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Judgment, 2020 I.C.J. Rep., 2 (Jan. 23) at 10.

103. Oumar Ba, *This Tiny African Country Got the U.N.'s Top Court to Investigate Myanmar for Genocide*, WASH. POST (Jan. 29, 2020), <https://www.washingtonpost.com/politics/2020/01/29/this-tiny-african-country-got-uns-top-court-investigate-myanmar-genocide/> [https://perma.cc/E6ZM-TALF].

104. See *Gam v. Myan.*, 2020 I.C.J. Rep. at 17.

105. SáCouto, *supra* note 30.

106. Ba, *supra* note 103.

107. See Kourt, *supra* note 98.

will receive justice and be able to safely return to their homeland, where they will feel a sense of safety and hope that they have been lacking for years.¹⁰⁸ However, because it can take years for the court to rule on the matter of genocide, the safety of the Rohingya remains at risk.¹⁰⁹ Based on the report from the Fact-Finding Mission, it is undeniable that Myanmar committed genocide against the Rohingya, which raises the question of why the court did not determine that Myanmar is guilty of genocide even though hundreds and thousands Rohingya are suffering.¹¹⁰ The court has all the evidence it needs to hold Myanmar responsible for genocide and should have done more than just issue provisional measures that have had virtually no impact on the safety and protection of the Rohingya.¹¹¹

V. CONCLUSION

The court was sound for imposing provisional measures against Myanmar and had noble intentions for doing so.¹¹² However, the court's order has had no impact on the safety and well-being of the Rohingya community almost a year after it issued the provisional measures.¹¹³ The court's order is a critical decision under international law and should play the most significant role in protecting the Rohingya community.¹¹⁴ However, until the international community takes action to enforce the provisional measures and hold Myanmar accountable for its actions, the Rohingya will continue to remain under serious threat.¹¹⁵ Thus, the impact of the court's order in the noted case, as well as the future of the Rohingya in Myanmar, is still undetermined.¹¹⁶

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108. See Rist, *supra* note 23.

109. *Gam v. Myan.*, 2020 I.C.J. Rep. at 21.

110. See *Myanmar's Genocide Against Rohingya Not Over*, *supra* note 81.

111. See Rist, *supra* note 23.

112. See *Myanmar's Genocide Against Rohingya Not Over*, *supra* note 81.

113. See Rist, *supra* note 23.

114. See Gaynor, *supra* note 99.

115. See Rist, *supra* note 23.

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