



The “provisional measures” hearing

The Gambia v Myanmar at the International Court of Justice

Introduction

This briefing note focusses on the upcoming hearing between The Gambia and Myanmar on the narrow issue of “*provisional measures*,” set down for 10-12 December 2019 at the International Court of Justice (ICJ)¹ and does not seek to address the wider, substantive, proceedings.

What allegations does The Gambia make against Myanmar?

On 11 November 2019, the Republic of The Gambia filed an “[Application Instituting Proceedings and Request for Provisional Measures](#)” at the ICJ against the Republic of the Union of Myanmar.

The Gambia submitted they have a “*dispute*” with Myanmar concerning Myanmar’s compliance with the Convention on the Prevention and Punishment of the Crime of Genocide (“Convention”).

The definition of genocide found in Article II of the Convention is set out in **Annex 1**.

The Gambia submits Myanmar has violated its obligations under the Convention, including by:

- committing genocide;
- conspiracy to commit genocide;
- direct and public incitement to commit genocide;
- attempting to commit genocide;
- complicity in genocide;
- failing to prevent genocide;
- failing to punish genocide; and
- failing to enact the necessary legislation to give effect to the provisions of the Convention.

Specifically, The Gambia alleges at paragraph 6 of its Application that “...*against the backdrop of longstanding persecution and discrimination, from around October 2016 the Myanmar military (the “Tatmadaw”) and other Myanmar security forces began widespread and systematic “clearance operations” – the term that Myanmar itself uses – against the Rohingya group. The genocidal acts committed during these operations were intended to destroy the Rohingya as a group, in whole or in part, by the use of mass murder, rape and other forms of sexual violence, as well as the systematic destruction by fire of their villages, often with inhabitants locked inside burning houses. From August 2017 onwards, such genocidal acts continued with Myanmar’s resumption of “clearance operations” on a more massive and wider geographical scale.*”

¹ The International Court of Justice and the International Commission of Jurists share the same acronym (ICJ), however they are unrelated. The International Court of Justice is the principal judicial organ of the United Nations established by the Charter of the United Nations and is based in The Hague, Netherlands. The International Commission of Jurists is an international non-governmental organization that works to promote and protect human rights through the rule of law. It was founded in 1952 and is based in Geneva, Switzerland with regional offices around the world including in Asia.

The Gambia submits that these facts are extensively documented by independent investigative efforts conducted under the auspices of the United Nations and corroborated by international human rights organizations and other credible sources. In particular, The Gambia relies extensively on the reports of the [Independent International Fact-Finding Mission on Myanmar](#) (FFM).

At paragraph 112 of its Application, and with reference to specific articles of the Convention, The Gambia requests the ICJ to “*adjudge and declare*” that Myanmar:

- has breached and continues to breach its obligations under the Convention;
- must cease forthwith any such ongoing internationally wrongful act and fully respect its obligations under the Convention;
- must ensure that persons committing genocide are punished by a competent tribunal, including before an international penal tribunal;
- must perform the obligations of reparation in the interest of the victims of the genocidal acts who are members of the Rohingya group, including but not limited to allowing the safe and dignified return of forcibly displaced Rohingya and respect for their full citizenship and human rights and protection against discrimination, persecution, and other related acts, consistent with the obligation to prevent genocide; and
- must offer assurance and guarantees of non-repetition of violations of the Convention.

This is what is known as the “*merits*” part of the case.

If the case proceeds, a significant amount of time may pass before final judgment of the merits.

What provisional measures has The Gambia requested?

In the Gambia’s Application, it also requested the Court to indicate provisional measures “*in light of the nature of the rights at issue, as well as the ongoing, severe and irreparable harm being suffered by members of the Rohingya group.*”

At paragraph 132 of The Gambia’s filing, it requested the Court to indicate five provisional measures - see **Annex 2** for the full text.

It also reserved the right to request additional provisional measures during the proceedings, and as the Court has the power to indicate different provisional measures to those requested, any provisional measures finally indicated by the Court in the form of an order may differ from those listed in the Application.

Of significance is that The Gambia requested the Court to indicate a provisional measure whereby the parties shall each provide a report to the Court on all measures taken to give effect to the order for provisional measures, no later than four months from its issuance.

Finally, The Gambia requested the Court to address the issue of provisional measures as a “*matter of extreme urgency.*”

When will the hearing on provisional measures take place?

On 18 November, the ICJ [announced](#) it would hold public hearings between 10 and 12 December 2019, which will be “*devoted to the request for the indication of provisional measures*”.

According to the website of the ICJ, the hearing will proceed as follows:

- Tuesday 10 December 2019: 10 a.m.-1 p.m.: Republic of The Gambia
- Wednesday 11 December 2019: 10 a.m.-1 p.m.: Republic of the Union of Myanmar
- Thursday 12 December 2019: 10 a.m.-11.30 a.m.: Republic of The Gambia
- Thursday 12 December 2019: 3 p.m.-4.30 p.m.: Republic of the Union of Myanmar

This hearing will only focus on the issue of provisional measures, not the merits of the case as a whole.

Indeed, the ICJ has [issued a practice direction](#) on the appropriate boundaries of oral pleadings at a provisional measures hearing, noting that they should not stray into the merits of the case beyond what is strictly necessary:

Practice Direction XI

In the oral pleadings on requests for the indication of provisional measures parties should limit themselves to what is relevant to the criteria for the indication of provisional measures as stipulated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose.

What are provisional measures?

Provisional measures are certain orders the Court can make aimed at preserving the rights of the Parties to a case pending the final decision of the court in order to avoid irreparable damage to the rights which are the subject of the dispute.

Article 41 of the [Statute of the ICJ](#) confers power on the ICJ to indicate provisional measures in certain circumstances:

Article 41

- 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.*
- 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.*

What is the process for requesting provisional measures?

The [Rules of the ICJ](#) clarify the relevant procedure, including:

- Any party may make a written request for the indication of provisional measures at any time during the course of proceedings (Article 73(1));
- A request for the indication of provisional measures shall have priority over all other cases (Article 74(1));
- The Court may at any time, on its own initiative, decide to examine whether the circumstances of the case require the indication of provisional measures (Article 75(1));
- When a request for provisional measures has been made, the Court may indicate measures that are different to those that were requested (Article 75(2));
- If a request for provisional measures is rejected, the party which made the request may make a fresh request based on “new facts” (Article 75(3));
- The Court may revoke or change any decision concerning provisional measures at any time before the final judgment if a change in circumstances warrants it (Article 76(1));
- Any measures indicated by the Court shall be communicated to the Secretary General of the United Nations for transmission to the UN Security Council (Article 77); and
- The Court may request information from the parties on any matter concerning the implementation of the provisional measures (Article 78).

The Court’s decision granting or rejecting a request for provisional measures is taken in the form of an order which is read in open court.

What factors are taken into account on a request for provisional measures?

Over time, the ICJ has established, including in the 19 May 2017 Order for provisional measures in the case of [Jadhav](#), that it will take into account four requirements when deciding whether to indicate provisional measures:

(i) prima facie jurisdiction

The Court may indicate provisional measures only if the provisions relied on by the applicant appear, *prima facie*, to provide a basis on which the Court's jurisdiction could be founded – but the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards to the merits of the case.

In its filing, The Gambia submitted that the Court has jurisdiction based on the UN Charter and Article IX of the Convention which states that disputes between Contracting Parties relating to the Convention shall be submitted to the ICJ.

The Court will want to be satisfied, *prima facie*, that the Convention confers jurisdiction on the Court, including whether a “*dispute*” exists between the parties.

(ii) plausibility

The object of the Court's power to indicate provisional measures is the preservation of the respective rights claimed by the parties in a case pending final judgment on the merits.

The Court must therefore preserve the rights which may subsequently be adjudged by it to belong to either party – but only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible.

In the present case, The Gambia submitted it seeks to protect the rights of all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Convention, noting that at this state of the proceedings “*the Court does not need to establish definitively the existence of such rights; it is sufficient...that such rights are plausible, i.e., “grounded in a possible interpretation of the Convention.”*”

It also argues that, in addition to the rights of the Rohingya, The Gambia also seeks to protect the *erga omnes partes* rights (rights owned by all) it has under the Convention, which it submits mirror the *erga omnes* obligations Myanmar owes under the Convention (obligations owed to all) with which it is entitled to seek compliance.

(iii) real and imminent risk of irreparable prejudice

The Court has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings.

But the Court will only indicate provisional measures if there is urgency, in the sense that there is real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision.

The Gambia argues there is no doubt these requirements are satisfied in this case.

It submits, among other things, that “*all members of the Rohingya group in Myanmar are presently in grave danger of further genocidal acts because of Myanmar's deliberate and intentional efforts to destroy them as a group, and the remaining Rohingya communities and individuals in Myanmar continue to face daily threats of death, torture, rape, starvation and other deliberate actions aimed at their collective destruction, in whole or in part.*”

(iv) the link between the rights claimed on the merits and the provisional measures requested

A link must exist between the rights whose protection is sought, and the provisional measures being requested.

If the Court indicates provisional measures, are they binding on the parties?

[Article 94 of the UN Charter](#) provides that judgments of the ICJ are binding on the parties to the dispute and that, if they are not implemented, then recourse is to be had to the Security Council, which may make recommendations or decide upon measures to be taken to give effect to the judgment:

Article 94

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.*

It was once controversial whether an indication of provisional measures had the same binding effect upon the parties.

However, that issue was resolved in 2001 in the [LaGrand case](#) when the Court found that the object and purpose of the ICJ Statute, as well as the terms of Article 41 when read in their context, entail that indications of provisional measures are legally binding on the parties to the case (paragraphs 102-103).

Even though any provisional measures indicated by the Court must be transmitted to the Security Council (Article 77 of the [Rules of the ICJ](#)), this does not imply automatic action will be taken by the Security Council.

The Security Council will act according to its own [rules of procedure](#), namely, that it will take action if international peace or security is threatened or if a State brings a dispute to the attention of the Security Council.

If a resolution is tabled before the Security Council making recommendations or setting out measures to be taken to give effect to an ICJ ruling, it must be passed in the usual way, including without incurring a veto from one of the permanent five members of the Security Council (United States, United Kingdom, China, France, Russia).

What is Daw Aung San Suu Kyi's role in the proceedings?

A state that is a party to a case before the ICJ nominates an agent who serves as the head of the diplomatic mission with power to legally commit a sovereign state.

They receive communications from the ICJ's Registrar concerning the case and forwards all correspondence and pleadings, duly signed or certified, to them.

In public hearings before the ICJ, the agent opens the argument on behalf of the government and lodges the submissions.

In general, when any formal act is to be done by the government represented, it is done by the agent.

They are always assisted by counsel or advocates appointed by the government to act on their behalf.

On 24 November 2019, the State Counsellor Office issued a [statement](#) concerning the fact "A high-level briefing on recent developments on international arena with regard to Myanmar was held at the President Office."

That statement notes that the “*case concerns the high national interest of the entire country. Accordingly, State Counsellor Daw Aung San Suu Kyi, in her capacity as Union Minister, Ministry of Foreign Affairs, will act as the Agent.*”

The Agent for The Gambia is The Honorable Abubacarr Marie Tambaou, Attorney General and Minister of Justice.

Annex 1

Definition of genocide in the Genocide Convention

Article II

In the present 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.

For more detailed information on the crime of genocide see this [Question & Answer](#) published by the International Commission of Jurists in August 2018.

Annex 2

Provisional measures requested by The Gambia

- (a) Myanmar shall immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent all acts that amount to or contribute to the crime of genocide, including taking all measures within its power to prevent the following acts from being committed against member of the Rohingya group: extrajudicial killings or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part;
- (b) Myanmar shall, in particular, ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any act of genocide, of conspiracy to commit genocide, or direct and public incitement to commit genocide, or of complicity in genocide, against the Rohingya group, including: extrajudicial killing or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part;
- (c) Myanmar shall not destroy or render inaccessible any evidence related to the events described in the Application, including without limitation by destroying or rendering inaccessible the remains of any member of the Rohingya group who is a victim of alleged genocidal acts, or altering the physical locations where such acts are alleged to have occurred in such a manner as to render the evidence of such acts, if any, inaccessible;
- (d) Myanmar and The Gambia shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of this Application, or render it more difficult of resolution; and
- (e) Myanmar and The Gambia shall each provide a report to the Court on all measures taken to give effect to this Order for provisional measures, no later than four months from its issuance.