

## THE SETTLEMENT OF THE ROHINGYA DISPUTE: IMPLICATING PROVISIONAL MEASURES

Dr. Ravindra Pratap\*

### ABSTRACT

*Perhaps the most important practical significance of the provisional measures indicated by the International Court of Justice (ICJ/the Court) is that it has facilitated The Gambia, a West African country, to prevent genocide and protect the Rohingya people who reside in a South Asian country. Whether the Rohingya people were the inhabitants of Myanmar was not a determining factor for the Court in this case. Instead, what mattered to the Court was that The Gambia had a dispute with Myanmar under the Genocide Convention, 1948. However, the nature of provisional measures is less specific in this case as it does not point to issues such as rape or the burning of homes. After all, the Court could not admit and evaluate evidence at the provisional measures stage of the proceedings before it. This lack of specificity was coupled with the absence of any provisional measures by the Court which would have prevented Myanmar from aggravating its dispute with The Gambia. The Court somewhat balanced these two discernibly missing elements from the Order of the Court by obligating Myanmar to report its steps to implement the Court's Order. Myanmar was ordered to report not only to the Court but also to The Gambia but such order seems to have a confidential nature of this reporting obligation. Indeed, it would have been better if the reports had been authorized by the court to be made public. Overall, the effectiveness of the Court's Order is uncertain simply because, unlike domestic courts, the ICJ is without the means to enforce its Order against Myanmar. However, the Court may justifiably modify the provisional measures if there is a change in the situation that had existed when the provisional measures were indicated.*

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\* **Ravindra Pratap**, Ph.D (Jawaharlal Nehru University, India), is a senior Associate Professor and Associate Dean, Faculty of Legal Studies, South Asian University, New Delhi, India.

## I. INTRODUCTION

The Rohingya dispute is an international dispute and is currently subject to judicial settlement. Judicial settlement of international disputes has grown in recent decades while being only one of the peaceful means of settling international disputes under Article 33 of the Charter of the United Nations. Judicial settlement of international disputes involves several stages, including intervention by other countries, and therefore takes time which may extend to several years and during which the ground situation may irreversibly change and affect the outcome of the case adversely to either of the disputants. Provisional measures have therefore become an increased activity in the judicial settlement of international disputes to judicially preserve the situation during the pendency of the dispute before an international court or tribunal.<sup>1</sup> The indication of provisional measures by the ICJ in the Rohingya case/Rohingya Genocide case<sup>2</sup> is significant in a number of ways, such as to protect a non-derogated human right of human existence, ensure due process of law and enforce international responsibility (given a continuing absence of a human rights court at the international level and unlike regionally, such as the African Court on Human and Peoples' Rights, Inter-American Court of Human Rights and the European Court of Human rights) and integrate judicial and non-judicial means of settling international disputes, such as international fact-finding which had preceded the commencement of judicial proceedings before the ICJ and were critically relied on by the ICJ before reaching its decision on the indication of provisional

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<sup>1</sup> On provisional measures, see generally Elkind, J. B., *Interim Protection: A Functional Approach*, The Hague, 1981; Mani, V. S., "Interim Measures of Protection: Article 41 of the ICJ Statute and Article 94 of the UN Charter", 10 (1970) *Indian Journal of International Law*, at p. 359; Collins, L., "Provisional and Protective Measures in International Litigation", 234 (1992) *Recueil Des Cours*, Collected Courses of the Hague Academy of International Law, at p. 9; Vicuña, F. O., "The Evolving Nature of Provisional Measures", in Cremades, B.M., Fernández-Ballesteros, M. Á., Arias, D., (eds), *Liber Amicorum Bernardo Cremades*, Madrid, 2010, at p. 939; Gemalmaz, M. S., *Provisional Measures of Protection in International Law: 1907–2010*, Istanbul, 2011.

<sup>2</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia vs. Myanmar*), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, available at: <<https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>> (Last visited on June 10, 2021).

measures. While the provisional measures Order of the ICJ may well generate high hopes for the protection of the Rohingya people, it would be premature to take its details for its more realistic assessment, particularly because the ICJ does not itself have means to enforce its decisions and the final outcome of the case depends critically on the presentation and evaluation of evidence at the merits stage. This provisional measures case comment seeks to assess the provisional measures Order of the ICJ in the Rohingya dispute and to draw its implications for the protection of the Rohingya people. Accordingly, the next part will assess the provisional measures, its implications for the case and eventually for upholding the rights of the Rohingya people.

## II. MEASURES OF THE COURT'S ORDER

In the Rohingya genocide case, the Court has taken several measures to come to its conclusion on the matter. For the purpose of this article, a detailed analysis of the measures is given below. The Court took into account the question of the Gambia's link to the Rohingya. Moreover, in order to clarify the Gambia's position in the Case, the Court also took the measures to evaluate whether the Gambia is relatively a specially affected state. The formulation and scope of provisional measures, the significance of the reporting obligation by the parties, access to UN investigators in Myanmar, and the uncertainty, implementation, and monitoring of provisional measures- were also the key factors of Court's order.

### A. The Gambia's "link" to the Rohingya

The Gambia is a West African country and the Rohingya reside in a South Asian country. The question of The Gambia's link to the Rohingya, therefore, became obvious. The traditional public international law requires certain measures and nature of the link between a state and a person or entity, and before the latter may accord its protection from the former. The development of this link theory is briefly recounted below.

In *Mavrommatis*,<sup>3</sup> the Permanent Court of International Justice found that the Jaffa Concessions were without connection with Article 11 of the Mandate and were therefore not a dispute in respect of which the mandatory Britain had accepted the jurisdiction of the Court.<sup>4</sup> But it was

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<sup>3</sup> *The Mavrommatis Palestine Concessions (Greece vs. U.K.)*, Permanent Court of International Justice (PCIJ), Series A, No. 2, 30 August 1924.

<sup>4</sup> *ibid.*