Repatriation of the Persecuted Rohingya Through an ICJ Verdict: Utopia or an Equitable Remedy?

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ABSTRACT

The mass exodus of the persecuted Rohingya has attracted the attention of the international community, and many countries around the world have condemned the atrocities perpetrated by Myanmar. This paper examines a judgment of the International Court of Justice ("ICJ" or "the Court") and explores why and how the safe and dignified repatriation of the Rohingya to their homeland in Myanmar, would be a feasible solution to ameliorate the mistreatment of the Rohingya. By examining jurisprudence of the ICJ and relevant international legal provisions, the article demonstrates that this remedy could play a significant role in rendering justice that goes beyond mere symbolism.

INTRODUCTION

The Rohingya people living in the Rakhine province of Myanmar, labelled as 'the world's most persecuted minority', have been systemically subjected to statelessness and human rights violations.[1] Since the mass exodus of the Rohingya from their homeland in July and August 2017, the Rohingya have tried to escape persecution by taking shelter in Bangladesh. While most of the international community has unequivocally condemned the atrocities, some states have remained silent.[2] However, Gambia has filed a case at the International Court of Justice (ICJ) against Myanmar accusing the latter of violating provisions of the Genocide Convention. In January 2020, the Court issued an order asking Myanmar to prevent all genocidal acts against the Rohingya, to ensure that its military and other security forces do not commit acts of genocide, and to take steps to preserve evidence related to the case to protect the Rohingyas.[3] By itself, the interim order of the Court was no guarantee that the Court would ultimately decide that it has jurisdiction, let alone hold that Myanmar until its decision holding that it had jurisdiction in the case at hand. Now, if the Court finds that Myanmar has violated its legal obligations under the Genocide Convention,[4] one critical question is whether Myanmar will be legally obliged to ensure safe and dignified repatriation of the Rohingya.

This paper concentrates on how and why the safe and dignified repatriation of the Rohingya to their homeland on the basis of an order of the ICJ is feasible for the Rohingya. Thus, this paper does not promote the idea of

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[1] *Who Are the Rohingya?,* AL JAZEERA (Apr. 18, 2018), https://www.aljazeera.com/features/2018/4/18/who-are-the-rohingya [https://perma.cc/BEN7-H9S5]; Gabriella Canal, *Meet the Most Persecuted Minority in the World: Rohingya Muslims*, GLOB. CITIZEN (Feb. 10, 2017), https://www.globalcitizen.org/es/content/recognizing-the-rohingya-and-their-horrifying-pers/ [https://perma.cc/2CLU-RDZD].

[2] U.S. Secretary of State, Anthony J. Blinken has unequivocally stated that based on the US State Department's detailed analysis of the relevant facts and laws, the US concluded that the Rohingyas in the Rakhine Province of Myanmar have been subject to crimes against humanity and genocide. *See* Press Release, Anthony J. Blinken, Sec'y of the DEP'T OF STATE, *Secretary Antony J. Blinken on the Genocide and Crimes Against Humanity in Burma* (Mar. 21, 2022), https://www.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum/ [https://perma.cc/5DVF-VZC2]. The British authorities stated that they are committed to justice for the atrocities on the Rohingya. Ahmet Gurhan Kartal, *UK 'Committed' To Justice for Myanmar Atrocities*, ANADOLU AJANSI (May 9, 2018), https://www.aa.com.tr/en/asia-pacific/uk-committed-to-justice-for-myanmar-atrocities-/1246360 [https://perma.cc/DJ38-5RSK]. *See also infra* note 147 (pointing to the intention of the Netherlands and Canada that they would intervene in the case and seek justice for the atrocities perpetrated on the Rohingya).

[3] For a thorough review of the interim order and what it may or may not imply regarding a potential judgement on merit, *see* Md. Rizwanul Islam & Naimul Muquim, *The Gambia v. Myanmar at the ICJ: Good Samaritans Testing State Responsibility for Atrocities on the Rohingya*, 51 CAL. W. INT'L L. J. 1 (2020).

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

'lawless judging' by the ICJ,[5] rather, it posits that the ICJ's actions would fit within the established boundaries of existing international law. Though the idea of the Court passing an order requiring Myanmar to legally repatriate persecuted Rohingya to their homeland in Rakhine may seem radical - given that the ICJ has never issued such a remedy - this article will demonstrate that, it is, in reality, legally and practically possible, plausible, and desirable. A finding unaccompanied by any express holding on the legal obligation of Myanmar would offer little for the Rohingyas to celebrate and would likely disenchant many who pin their hope of remedying the effective statelessness of the Rohingya on the ICJ offering a tangible solution to a pressing problem of the contemporary world. This holding alone may not convince all Rohingyas that their safe and dignified return to their homes is guaranteed due to their fear of persecution in the near future, but a discussion of the potential mechanisms by which their faith in this process might be secured is beyond the scope of this paper.[6]

Section I of the article briefly chronicles the background of the Rohingya's presence in Myanmar and their current plights. Section II explores why it is implausible for Bangladesh to shelter them for a long period of time. Section III demonstrates the bleak prospect of their resettlement in third countries or a voluntary repatriation by Myanmar. Section IV analyzes the diverse remedies that the ICJ has typically ordered in similar cases and demonstrates why it and other international courts are uniquely positioned to provide relief to the Rohingya. Section V describes the jural foundations of the Court that enable it to proscribe repatriation of the Rohingya and explores how Myanmar may be compelled to enforce a potential judgment of the Court.

THE ROHINGYA'S PRESENCE IN MYANMAR AND ATROCITIES COMMITTED AGAINST THEM

Records of independent kingdoms since antiquity denote that the final Rakhine kingdom was established in the year 1430, with Mrauk U as its capital.[7] In the year 1660, Shah Shuja, the governor of Bengal and Odisha, sought refuge with King Sanda Thudama, the King of Arakan.[8] After leaving Dhaka, which he had fled as the long-time ruler, he sailed to Chittagong,

[5] The authors owe the phrase 'lawless judging' to the work of JEFFREY BRAND-BALLARD, LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING (2010). Lawless judging in that context is judgment without being deferential to the legal provisions, which is not something this article advocates.

[6] Such mechanism may include the presence of an impartial international observer or the declaration of a safe zone in Rakhine, which would be internationally monitored.

[7] Jacques Leider, *Rohingya: The History of a Muslim Identity in Myanmar*, OXFORD RSCH. ENCYC. ASIAN HIS 33 (2018).

[8] Tim Steel, *The Treasure of Shah Shuja*, DHAKA TRIBUNE (Nov. 21, 2013, 6:12 PM), https://www.dhakatribune.com/uncategorized/2013/11/21/the-treasure-of-shah-shuja [https://perma.cc/7CKV-KL94].

then held by the Arakanese.[9] From there, he set out overland to reach Mrohaung, the court of the King.[10] He was given refuge by King Candasudhammaraja after Shuja fled the fratricidal succession to the Mughal throne, foreshadowing today's ethno-religious rupture in Rakhine.[11] The Rohingya Muslim community has been in Rakhine prior to the Burmese invasion of 1785 despite the Myanmar government's expressions to the contrary.[12] This stance is evident from the branding of Myanmar's military chief Rohingyas as Bengali interlopers.[13] While this cannot be a justification for their persecution, the division between 'them' and 'us' may have slowly made the rest of the community less sensitive to the persecution of the Rohingya.

The size of the community quickly increased during colonial times. Many workers came on a recurring basis, and some settled down permanently, thereby shifting the demographic composition of the area. Furthermore, during this time, many Rohingyas who left Arakan following the Burmese conquest of 1785 returned there under protection of the British authorities.[14] It may be suggested that the political destiny of the Rohingya since the first Burmese conquest of 1785 was directly connected to that of the British colonial power.[15]

Bordered by both Buddhist and Muslim Asia, the kingdom had strong economic and trade relations with the Sultanate of Bengal.[16] For the next 350 years, Mrauk U thrived as a prosperous trading hub, until it came under Burmese control in 1784-1785. However, the capture of Rakhine was short-lived, as the First Anglo-Burmese War (1824-1826) brought the area under British control and incorporated into British India.[17] The Burmese defeat in two more Anglo-Burma Wars in 1852 and 1885 resulted in complete British control over all the territories of Burma.[18] In 1886, Burma formally became a province of British India when it was proclaimed as a part of Her Majesty's dominions.[19]

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Leider, *supra* note 7, at 6.
[13] Lindsay Murdoch*, Myanmar Chief Labels Rohingya Muslims Intruders, Warns Against UN Investigation*, THE SYDNEY MORNING HERALD (Mar. 28, 2017), https://www.smh.com.au/world/myanmar-chief-labels-rohingya-muslim-intruders-warns-against-un-investigation-20170328-gv7xe3.html [https://perma.cc/E2KV-QVBN].
[14] Akm Ahsan Ullah, *Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalisation*, 9 J. IMMIGRANT & REFUGEE STUD. 139, 143 (2019).
[15] Mohammad Shahabuddin, *Postcolonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar*, 9 ASIAN J. INT'L L. 334, 354 (2019).
[16] *Id*.
[17] Leider, *supra* note 7.
[18] THANT MYINT-U*,* THE RIVER OF LOST FOOTSTEPS: A PERSONAL HISTORY OF BURMA 161-62 (2008).
[19] Michael Aung-Thwin, *The British "Pacification" of Burma: Order without Meaning*, 16 J. SE ASIAN STUD. 245, 249 (1985).

Many censuses of British Burma reveal, from the 1880s to the 1930s, that the size of the Rohingya community in Arakan doubled from about thirteen to twenty-five percent of the Arakan population.[20] Although the Arakan kingdom remained independent for hundreds of years before the British occupation of Arakan in 1825, the right to self-determination for the people of Arakan and the Arakanese Muslims (the Rohingya) in particular was absent from the agenda during the decolonization process.[21] As a result, in post-independence Myanmar, the Rohingya have been referred to as "Bengali foreigners", and consequently denied citizenship.[22]

While precise and independently verifiable numbers are hard to come by, one report suggests that about 25,000 Rohingyas have been murdered, and 19,000 Rohingya women and adolescents have been raped during the military crackdown in Myanmar's Rakhine state since late August 2018;[23] another report by a renowned, medical charity Médecins Sans Frontières states that 6,700 Rohingya, including at least 730 children under the age of five, were killed in the months since the violence started.[24] Approximately 43,000 Rohingyas suffered bullet wounds, 36,000 were thrown into fires, and 116,000 were beaten by Myanmar authorities.[25] While precise numbers seem hard to come by, widespread persecution of the Rohingya appears to be evident. It is unsurprising that the systematic persecution has culminated in this recent wave of atrocities. At present, the persecution of the Rohingya in Myanmar has been described by the United Nations Human Rights Council (UNHRC) as a "textbook example of ethnic cleansing".[26] In August 2018, a report of the Independent Fact-Finding Mission on Myanmar established by the UNHRC concluded that the Myanmar army has committed war crimes and crimes against humanity in Rakhine State, and that "there is sufficient information to warrant the investigation and prosecution of senior officials in the Tatmadaw [Myanmar military] chain of command, so that a competent court can determine their liability for genocide in

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[20] ADVISORY COMM'N ON RAKHINE STATE, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine* 18 (2017), https://www.kofiannanfoundation.org/app/uploads/2017/08/FinalReport_Eng.pdf [https://perma.cc/6WKA-46QH].

[21] Shahabuddin, *supra* note 15, at 356.

[22] *Id.* at 357.

[23] Kutupalong Reuters, *Killing of Rohingyas: Death Toll Could Be Up to 25,000*, THE DAILY STAR (Aug. 18, 2018), https://www.thedailystar.net/news/frontpage/killing-rohingyas-death-toll-could-be-over-10000-1622392 [https://perma.cc/5MUG-JE93].

[24] *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/3C8V-X984].

[25] Mostafa Yousuf, *Atrocities in Rakhine: Rohingyas Call For Justice*, THE DAILY STAR, (Aug. 26, 2019) https://www.thedailystar.net/frontpage/news/atrocities-rakhine-rohingyas-call-justice-1790581 [https://perma.cc/AN8Y-S4GL].

[26] *UN Human Rights Chief Points To 'TextBook Example of Ethnic Cleansing' in Myanmar*, UN NEWS (Sept. 11, 2017), https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar [https://perma.cc/S3A2-4ZQP].

relation to the situation in Rakhine State".[27] Naturally, no official information or explanation can be obtained justifying these atrocities, but it seems to credibly signify an intent to eliminate the Rohingya as an ethnic group in Myanmar.

International legal norms devised to protect victims of atrocities and individuals from statelessness, along with the recently developed doctrine of Responsibility to Protect,[28] would imply that international law offers a solution to the sufferings of the Rohingya.[29] However, the existence of these legal principles and their enforcement are different propositions altogether.[30] It is perhaps precisely on this point that the Court may play a decisive role in ameliorating the situation of the Rohingya by offering them an opportunity for a dignified return to their homes in the Rakhine state of Myanmar.[31]

THE IMPLAUSIBILITY OF SETTLEMENT IN BANGLADESH

By allowing Rohingyas to take shelter within their borders, Bangladesh has received widespread international commendation. The Special Rapporteur on the Situation in Myanmar, Professor Yanghee Lee, observed that, "[t]he people of Bangladesh … have shown the world the definition of humanity as they continue, despite their own hardships to host the Rohingya people."[32] However, while sheltering the Rohingya may have been possible for Bangladesh, permanent resettlement is nearly impossible. Long-term settlement in Bangladesh, one of the most densely populated states in the world, is not only politically difficult to maintain, but also extremely challenging due to its resource constraints.[33] Many of its own citizens face the dim prospect of internal displacement.[34] Indeed, some residents in the

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[27] HUM. RTS. COUNCIL, Report of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/64, at 16 ¶ 87 (Sept. 12, 2018), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf.

[28] Janina Barkholdt & Ingo Winkelmann, *Responsibility to Protect,* MAX PLANCK ENCYCS. INT'L L. ¶ 31 (2019) (discussing how it failed to work in the situation in Syria). *See also* Alex J. Bellamy, *The Responsibility to Protect and the Problem of Military Intervention*, 84 INT'L AFFS. 615 (2008).

[29] Shahabuddin, *supra* note 15, at 335.

[30] *Id.*

[31] Of course, the Responsibility to Protect deals with the duty states owe to each other and serves as a possible justification for their intervention. It does not deal with institutional duties. However, it is indicative of the need for a more aggressive posture of international law when it comes to ensuring that states do not abuse their citizens. And it is in this context that this article refers to it.

[32] HUM. RTS. COUNCIL, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, U.N. Doc. A/HRC/WG.6/30/BGD/1, at 2, ¶ 3 (Feb. 26, 2018), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/050/26/PDF/G1805026.pdf.

[33] Peter Kim Streatfield & Zunaid Ahsan Karar, *Population Challenges for Bangladesh in the Coming Decades*, 26 J. HEALTH, POPULATION & NUTRITION 261-272 (2008).

[34] COMPREHENSIVE DISASTER MGMT. PROGRAMME (CDMP II) MINISTRY OF DISASTER MANAGEMENT & RELIEF, *Trend and Impact Analysis of Internal Displacement Due to the Impacts of Disaster and Climate Change* 10 (2014), https://www.undp.org/bangladesh/publications/trend-and-impact-analysis-internal-displacement-due-impacts-disaster-and-climate-change.

Southern coastal areas of Bangladesh are already facing internal displacement due to the challenges posed by climate change.[35]

An overwhelming majority of the Rohingya in Bangladesh live in crowded camps.[36] Naturally, due to the lack of resources, the facilities within camps are rudimentary, with restricted access to safe water, sanitation and hygiene facilities.[37] While Bangladesh has not kept all Rohingya in crowded camps in the mainland, it has also sought to shelter some Rohingyas away from the crowded shelters of the mainland by relocating them to a remote island, Bhasan Char. This move has been met with skepticism from some NGOs and western states who are concerned that such a shelter is inherently unsustainable.[38] For example, Bangladesh's emergency management system is a major point of concern. Their system relies mainly on effective mass evacuation, which would be impossible from Bhasan Char, especially during rough weather when evacuation would be most life-threatening and critical.[39] However over time, other critics, such as the UN, have adopted a more positive stance on Bhasan Char after a delegation visit in March 2020.[40] However, the physical capacity of Bhasan Char remains inadequate to shelter all the Rohingyas currently living in Bangladeshi camps. The Bangladesh government is unwilling to shelter them in other parts of Bangladesh.[41] The policies of the Bangladeshi Government will likely be eroded by compassion fatigue,[42] which tends to occur during protracted crises. Thus, in Bangladesh, it would be nearly impossible to provide the Rohingya with all the necessities of a dignified life, including education,

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[35] *Id.* at 11.

[36] Joe English, *Half a Million Rohingya Refugee Children at Risk in Overcrowded Camps in Bangladesh with Cyclone and Monsoon Season on Horizon*, UNICEF (Jan. 16, 2018), https://www.unicef.org/rosa/press-releases/half-million-rohingya-refugee-children-risk-overcrowded-camps-bangladesh-cyclone-and.

[37] *Id.*

[38] *An Island Jail in the Middle of the Sea: Bangladesh's Relocation of Rohingya Refugees to Bhasan Char*, HUM. RTS. WATCH, (June 7, 2021), https://www.hrw.org/report/2021/06/07/island-jail-middle-sea/bangladeshs-relocation-rohingya-refugees-bhasan-char.

[39] *Id.*

[40] *Rohingya Relocation: UN Positive About Bhasan Char* (Apr. 16, 2021), THE DAILY STAR, https://www.thedailystar.net/rohingya-crisis/news/rohingya-relocation-un-positive-about-bhasan-char-2078465. Their visit and witnessing the facilities seem to trigger this somewhat shifted perception.

[41] *Id*.

[42] C R Abrar, *Overcoming Compassion Fatigue,* THE DAILY STAR (June 20, 2015), https://www.thedailystar.net/op-ed/politics/overcoming-compassion-fatigue-99784; Jennifer Chowdhury, *Bangladesh, Growing Tired of Hosting Rohingya Refugees, Puts New Squeeze on the Teeming Camps*, THE WASH. POST (Sep. 11, 2019), https://www.washingtonpost.com/world/asia_pacific/bangladesh-growing-tired-of-hosting-rohingya-refugees-puts-new-squeeze-on-a-displaced-minority/2019/09/10/4488cfb4-cfd5-11e9-a620-0a91656d7db6_story.html [https://perma.cc/N7TJ-94CA]; *Rohingya Crisis: It's Becoming a Regional Threat*, THE DAILY STAR (Sep. 29, 2019), https://www.thedailystar.net/frontpage/rohingya-crisis/pm-sheikh-hasina-says-rohingya-crisis-is-becoming-regional-threat-1806724. Of course, compassion fatigue is not unique to this saga of the Rohingyas, it may be an issue in any case where an unfortunate situation drags on for too long; S*ee* for example, Luke T. Lee, *The UN Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees*, 78 AM. J. INT'L L. 480 (1984) (talking about the compassion fatigue with regard to the plight of refugees).

decent employment, and health care.[43] Accordingly, this future appears to be untenable for both Bangladesh and the Rohingyas alike.[44]

THE BLEAK PROSPECT OF RESETTLEMENT AND VOLUNTARY REPATRIATION

Another option for a lasting solution is the resettlement of the Rohingya in third countries willing to accept them. However, other than Bangladesh, very few States have been receptive to the idea of having the Rohingya resettle within their borders.[45] This reluctancy is likely due to the fear of terrorism and economic challenges that pervades many nations and animates hostility towards Muslim immigrants.[46] Naturally, in democracies, politicians cannot be oblivious to such public perceptions. With the increasingly hostile public attitude and concomitant response from the governments of many OECD countries, it is improbable that any future third-party resettlement of the Rohingya would be possible soon. This is evident in the form of determining the refugee status (in foreign countries like Australia and recently Denmark); thus the prospect appears to be bleak. Through the offshore refugee applications have been accepted by refugees and citizens in Denmark with a more welcoming approach to bringing in refugees. Denmark has passed legislation allowing it to relocate asylum seekers to third countries outside the European Union while their cases are reviewed. Therefore, under the new law, Denmark would be able to repatriate asylum seekers to centre in a 'partner country' outside Europe.[47] The UK government is planning to resettle many asylum seekers to Rwanda, shutting the door of the UK for them forever.[48] Recently, the US has stated that it would take Rohingyas, to which the government of Bangladesh has responded that

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[43] *Transforming Our World: The 2030 Agenda for Sustainable Development*, UNITED NATIONS, https://sdgs.un.org/2030agenda (last visited Jan. 3, 2024).

[44] Human Rights Watch states that, "Refugees who have spoken to Human Rights Watch overwhelmingly express a desire to return to their homes in Myanmar once it is safe." *Myanmar: Rohingya Await Justice, Safe Return 3 Years On*, HUM. RTS. WATCH (Aug. 24, 2020), https://www.hrw.org/news/2020/08/24/myanmar-rohingya-await-justice-safe-return-3-years.

[45] From 2006 to 2010, the programme under UNHCR saw 920 Rohingyas resettled in countries such as Australia, Canada and the United States. *See* Ruma Paul & Krishna N. Das, *As Other Doors Close, Some Rohingya Cling To Hope of Resettlement*, REUTERS (Aug. 21, 2020), https://www.reuters.com/article/myanmar-rohingya-bangladesh-idINKBN25H0DL/.

[46] Cory Eybergen & Martin A. Andresen, *Refugees of Conflict, Casualties of Conjecture: The Trojan Horse Theory of Terrorism and its Implications for Asylum,* 34 TERRORISM & POL. VIOLENCE 1144, (2020); Abdeslam Marfouk, *I'm Neither Racist nor Xenophobic, But: Dissecting European Attitudes Towards a Ban on Muslims' Immigration*, 41 ETHNIC & RACIAL STUD. REV. 1747 (2018); Lucassen, L., *Peeling an Onion: The "Refugee Crisis" from a Historical Perspective*, 41 ETHNIC & RACIAL STUD. REV. 383 (2018).

[47] James Kristoffer Miles, *Kindness… or Madness? Could Denmark's Controversial New Scheme to Send Europe's Asylum Seekers to Camps in Africa Stop the Evil Traffickers?*, THE DAILY MAIL (July 16, 2021), https://www.dailymail.co.uk/debate/article-9793189/Denmark-set-trial-plans-send-refugees-migrants-asylum-seekers-African-offshore-hubs.html.

[48] *One-Way tTcket to Rwanda for Some UK Asylum Seekers*, BBC NEWS (Apr. 14, 2022), https://www.bbc.com/news/uk-politics-61097114.

whichever state takes them should take in a significant number,[49] suggesting that taking in asylum seekers should be more than a symbolic act.

Host countries are more receptive to refugees culturally similar to them (e.g., the movement of people from war-torn Ukraine to other European countries).[50] It does not seem that these factors favor the Rohingya, making it harder for them to resettle in third countries. The prevalent xenophobia or Islamophobic sentiment in parts of the globe may further limit the resettlement of the Rohingya in many other countries. The increasing disinclination to allow people to resettle in the developed world is evident from the events following the Taliban's ascension to power in Afghanistan in 2021. After the takeover, the United States asked Bangladesh if they could temporarily shelter some Rohingya. Bangladesh rejected the request from the United States to give temporary shelter to some people from Afghanistan, stating that Bangladesh already has a big problem by giving shelter to over 1.1 million Rohingyas.[51] Thus, it is quite unlikely that any third country would be willing to host the Rohingyas who have taken shelter in Bangladesh, which means that they will have to stay in sub-optimal conditions in Bangladesh.

The Bangladeshi government has tried to negotiate between the parties involved for facilitating repatriation of the Rohingyas.[52] There are essentially three parties: Bangladesh, Myanmar, and the Rohingya. The Rohingya would like to go back, Myanmar has ostensibly expressed its intention to facilitate the repatriation, and Bangladesh is eager to go to any length to help with the process.[53] However, there has been virtually no progress so far.[54] Myanmar seems to be using this as a tactical ploy to fend off pressure and criticism.[55] Thus, it seems highly improbable that any negotiated or voluntary repatriation will take place.[56]

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[49] *Take Large Number of Rohingyas: Home Minister to Countries Interested in Resettlement*, THE DAILY STAR (Aug. 28, 2022), https://www.thedailystar.net/news/bangladesh/news/take-large-number-rohingyas-home-minister-countries-interested-resettlement-3105006.

[50] Kieran Oberman, *Refugee Discrimination – The Good, the Bad, and the Pragmatic*, 37 J. Applied Phil. 695, 709-10 (2020).

[51] *Dhaka's No to US Request for Sheltering Afghans*, THE BUS. STANDARD (Aug. 16, 2021), https://www.tbsnews.net/bangladesh/dhaka-turns-down-washingtons-request-temporarily-shelter-people-afghanistan-289201.

[52] Abdullah Shibli, *Rohingya Negotiations Through the Lens of 'Game Theory'*, THE DAILY STAR (June 18, 2019), https://www.thedailystar.net/opinion/open-dialogue/news/rohingya-negotiations-through-the-lens-game-theory-1758352.

[53] *Id*.

[54] Asif Muztaba Hassan, *Why Is the World Ignoring Repatriation of Rohingya Refugees?*, THE DIPLOMAT (Oct. 25, 2021), https://thediplomat.com/2021/10/why-is-the-world-ignoring-repatriation-of-rohingya-refugees/. Jahidul Islam, *Four Years On, No Progress in Rohingya Repatriation*, THE BUS. STANDARD (Aug. 25, 2020), https://www.tbsnews.net/rohingya-crisis/four-years-no-progress-rohingya-repatriation-123793.

[55] *Myanmar Lacks Sincerity in Taking Back Rohingyas: Momen*, THE DAILY STAR (Jan. 26, 2023), https://www.thedailystar.net/rohingya-influx/news/myanmar-lacks-sincerity-taking-back-rohingyas-momen-3231181.

[56] Shafi Md. Mostofa, *Bangladesh and Myanmar Resume Talks on Rohingya Repatriation*, THE DIPLOMAT (Feb. 8, 2022), https://thediplomat.com/2022/02/bangladesh-and-myanmar-resume-talks-on-rohingya-repatriation/.

THE DIVERSE PRACTICE AND APPROACHES OF THE ICJ ON REMEDIES

This section analyses the various remedies that the ICJ provides in contentious cases. It also analyses the Court's various approaches to ordering remedies. This section finds that in various cases, the Court's approach has been quite diverse, which offers both cause for optimism and pessimism in the case at hand.

Remedies Provided by the ICJ

This section covers the remedies that the ICJ as well as its predecessor, the PCIJ, has typically provided in contentious cases. The remedies sought by states from the ICJ include mere declarations of a breach, the statement of a principle,[57] restitution,[58] and the award of damages,[59] among others. In principle, the ICJ enjoys an all-encompassing authority to order a State to redress injurious consequences towards another State according to Article 36(2) of the ICJ Statute.[60] All-encompassing, in this context, means that the Court has inherent jurisdiction to award any remedy, regardless of its character.[61] The term 'remedy' possesses two distinct meanings. It is generally understood in its procedural dimension as access to a judicial body competent to decide a legal dispute. Alternatively, the word 'remedy' in its substantive dimension connotes the indemnification of present or past wrongdoing.[62]

The declaratory judgment is the most common remedy awarded by the ICJ.[63] While a declaratory judgment is a mere declaration, it differs from an 'executory' judgment "only in the fact that it does not carry as an appendix a decree of execution."[64] A judicial declaration resolves the dispute with finality and the force of *res judicata* vis-à-vis the engaged parties.[65] It is a "final binding determination of the rights of the parties, hence can be rendered only where there are adverse parties in litigation."[66] Thus, there must be a concrete dispute, an "existing controversy as to … rights," in which the

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[57] North Sea Continental Shelf Cases (Ger. V. Neth.), Judgment, 1969 I.C.J. Rep. 3, 40, ¶ 65 (Feb. 20) (declaring that in maritime delimitation matters equitable principles would apply).

[58] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2000 I.C.J. Rep. 3, 31, ¶ 14 (Apr. 11). *Id.*, ¶¶ 72–76.

[59] S.S. Wimbledon (U.K., Fr.,, It. & Japan v. Ger.*)*, Judgment, 1923 P.C.I.J. (ser. A) No 1, at 30 (Aug. 17); Corfu Channel (U.K. v. Alb.), Assessment of the Amount of Compensation Due from the People's Republic of Alb. to the U.K. of Gr. Brit. and N. Ir.), Judgment, 1949 I.C.J. Rep. 244, 246 (Dec. 15).

[60] Statute of the International Court of Justice, June 26, 1946, 33 U.S.T.S. 993; Marcus Schnetter, *Remedies at the International Court of Justice: A New Analytical Approach*, BUCERIUS L. J. 84 (2017).

[61] *Id*.

[62] *Id.*

[63] Juliette McIntyre, *The Declaratory Judgment in Recent Jurisprudence of the ICJ: Conflicting Approaches to State Responsibility?*, 29 LEIDEN J. INT'L L. 177, 179 (2016).

[64] Juliette McIntyre, *Declaratory Judgments of the International Court of Justice*, 25 HAGUE Y.B. INT'L L. 107, 119 (2012).

[65] *Id*. at 109.

[66] *Id*. at 119.

applicant has a "definite legal interest capable and worthy of judicial protection," and the respondent "an adverse interest."[67] Moreover, the judgment must impact existing legal relations. Judgment will only be given if it can have "a concrete effect in the relations between the parties."[68]

The Court also offers cessation and assurances of non-repetition as remedies.[69] The ICJ has used the cessation of ongoing violations mainly in incidental proceedings on provisional measures, as well as other decisions.[70] Cessation as restitution in the form of the restoration of rights and the cessation of ongoing violations as a separate form of reparations seem in fact to be two sides of the same coin. Therefore, in the *Tehran Hostages* case, releasing the US consular staff from unlawful detention was considered restitution in the form of the restoration of rights. The cessation of ongoing violations covers a large group of international legal obligations incumbent upon a State.[71] With respect to the obligation to punish under the *Genocide Convention*, in *Bosnia v. Serbia*, the Court emphasized that Serbia had a continuing obligation under the *Genocide Convention* to punish those responsible for genocide. This would include transferring Ratko Mladić to the International Criminal Tribunal for the former Yugoslavia (ICTY) to stand trial.[72]

The ICJ has equally applied the principles of restitution to individual victims, with respect to the return of property as well as to the restoration of fundamental rights. Often, and especially in cases of violations of human rights and humanitarian law, restitution might be neither easy nor feasible. An example of restitution as the restoration of rights is provided in the *Tehran Hostages Case*.[73] Whether restitution is claimed as a restoration of rights or as a cessation of ongoing violations may be a litigation strategy choice on the part of the applicant state, contingent on the desire to emphasize either the victims' rights or the respondent state's legal obligations. However, the ICJ has not resorted to repatriation of a group of people as a remedy in prior cases. But nothing should be read from the absence as it did not have to grapple with such a scenario in a prior case. Rather, an examination of the jurisprudence of the Court leads to the conclusion that in some

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[67] *Id*.

[68] *Id*.

[69] CHRISTINE GRAY, THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (2014).

[70] Military and Paramilitary Activities in and *Against*against *Nicaragua* ("Nicaragua Case"),(Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, 149, ¶ 292(12) (June 27); *Legal Consequences* o*f the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J.. Rep. 136, 201, ¶ 163(3)(B) (July 9).

[71] Gentian Zyberi, *The International Court of Justice and Applied Forms of Reparation for International Human Rights and Humanitarian Law Violations*, 7 UTRECHT L. REV. 204, 213 (2011).

[72] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. v. Serb.), Judgment, 2007 I.C.J. Rep. 43, 235, ¶¶ 465, 471(6), (8) (Feb. 26).

[73] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, 44-45, ¶ 95 (May 24).

cases, the ICJ has exercised its jurisdiction to take bold action when necessary.

An Innovative Approach

In some cases, the ICJ has not shied away from charting beyond mere interpretation of the law. In the Reparation for Injuries Suffered in the Service of the United Nations Case,[74] for example, the Court for the first time found the United Nations to be a subject of international law. This suggests that international law goes beyond the exclusive domain of just States.[75] In a similar vein, The Anglo-Norwegian Fisheries Case[76] held that the drawing of straight baselines by Norway was legal considering, inter alia, the geographical factors and the reliance of the residents on the barren area on fishing, although there has been no explicit basis for taking these factors into account. The ICJ reasoned:

[T]he line of the low-water mark can no longer be put forward as a rule requiring the coast-line to be followed in all its sinuosities; … contemplating so *rugged a coast* in detail. Such a coast, viewed as a whole, calls for the application of a different method.[77]

The ICJ has relied on *inter alia*, 'elementary considerations of humanity' in the Corfu Channel Case to hold that Albania was obliged to notify the British warships regarding the existence of mines in the former's territorial sea.[78] Interestingly, the Court in maritime delimitation cases has on occasions referred to 'equitable principles'.[79] Article 38(2) of the ICJ Statute allows the Court to invoke equitable principles but only if both parties to the dispute agree that equitable principles may be used in the case before it. However, parties before the court have never agreed to grant it this authority.

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[74] Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. Rep. 174 (Apr. 11).

[75] Md. Rizwanul Islam, *Ordering the Repatriation of the Rohingya*, 62 VA. J. INT'L L. ONLINE, at 5 (2021).

[76] Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116 (Dec. 18).

[77] *Id.* at 129.

[78] Corfu Channel Case (U.K. v Alb.), Judgment, 1949 I.C.J. Rep. 4, 22 (Apr. 9)

[79] Continental Shelf (Tunis./Libyan Arab Jamahiriya), Judgment, 1982 I.C.J. Rep. 18, ¶¶ 106-07 ("The Court is, however, of the view that these economic considerations cannot be taken into account for the delimitation of the continental shelf areas appertaining to each Party. They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. **A** country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource. As to the presence of oil-wells in an area to be delimited*, it may, depending on the facts, be an element to be taken into account in the process of weighing al1 relevant factors to achieve an equitable result.*") (emphasis added).

Thus, though the Court declined to engage in redistributive justice, it seems to have accepted that to attain equitable result by taking into account the presence of oil-wells in particular parts of the sea, which is an exercise in judging equitable factors.

The Judges Being Influenced by Humane Considerations

The jurisprudence of the Court demonstrates that in some cases predominantly humane considerations, not just legal provisions, have influenced the choices that it has made. For instance, in *Breard*, on April 3, 1989, a Paraguayan citizen faced impending execution and argued that the US had violated the *Vienna Convention on Consular Relations,* and in support, Paraguay applied for an interim order enjoining the US from executing him.[80] The Court responded by issuing a unanimous provisional order accepting Paraguay's petition and asked the US not execute him pending the final decision of the Court.[81] Rather remarkably and candidly, Judge Oda who voted in favor of the order, explained that his decision was heavily influenced by humane considerations. He stated that he "voted in favor of the Court's Order with great hesitation as [he] believed and [he] still believe[d] that the request for the indication of provisional measures of protection submitted by Paraguay to the Court should have been dismissed".[82] But he went on to justify his position by stating that he voted in its favor for "humanitarian reasons."[83] Thus, it is clear that Judge Oda did not feel himself to be restrained by any technicalities, rather he moved to do to what he felt was *humane*. The sufferings of nearly a million Rohingyas probably have an even more compelling case for the judges to consider the human sufferings in the case at hand. This is not to argue that the Court ignores the technical legal restraints and becomes starry-eyed, but rather to point out that the Court cannot be oblivious to the humanitarian factors. And by this, this article does not mean that the Court needs to go beyond any established principle or treaty provision or even a judicial precedent in declaring that Myanmar is legally obliged to repatriate the Rohingya. This point is only to show that when the Court has felt it apt, it has not always strictly adhered to technicalities and the current case and the remedy sought though novel, *neither radical, nor* affront to any established principle of international law.

Another example of the Court considering similar innovative factors is the recent provisional order in *Ukraine v Russia*.[84] In essence, Ukraine argued that Russia, by falsely claiming genocide as pretext to its aggression, has violated the Genocide Convention.[85] This effort by Ukraine has been commented upon by a scholar as "Ukraine's creative argument that it had a

[80] Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. Rep. 248 (Apr. 9).

[81] *Id*.

[82] *Id*. at 260, ¶ 1 (Apr. 9) (declaration by Judge Oda).

[83] *Id*. at ¶ 8.

[84] *Allegations of Genocide under the Convention on the Prevention and Punishment of The Crime of Genocide* (Ukr. v. Russ.), Provisional Order, 2022 I.C.J. 182 (Mar. 16), https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf, [hereinafter *Provisional Order*]; *see infra* notes 85–92 and accompanying text.

[85] *Dispute Relating to Allegations of Genocide* (Ukr. v. Russ.), Application Instituting Proceedings, 2022 I.C.J. Rep. (Feb. 26).

right under the Convention not to be subjected to a false claim of genocide which is then used as a basis for using force against it."[86] Ukraine had to do this as bringing a case against Russia at the ICJ for waging the unlawful use of force is not an option in the absence of Russia's acceptance of the compulsory jurisdiction of the Court.[87] By thirteen to two votes, the Court inter alia, ordered that "[t]he Russian Federation shall ensure that any military 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 or direction, take no steps in furtherance of the military operations."[88] This part of the provisional order's nexus to the Genocide Convention on which the jurisdiction of the Court is based, is very difficult to understand.[89] Even the majority order's following words are remarkably candid and does not imply any nexus whatsoever to the Genocide Convention on which the Ukrainian's case is based:

The Court is profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises serious issues of international law. The Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of international peace and security as well as in the peaceful settlement of disputes under the Charter and the Statute of the Court. It deems it necessary to emphasize that all States must act in conformity with their obligations under the United Nations Charter and other rules of international law, including international humanitarian law.[90]

In his separate declaration, Judge Bennouna sided with the majority because he "felt compelled by this tragic situation, in which terrible suffering is being inflicted on the Ukrainian people, to join the call by the World Court to bring an end to the war."[91] This is because he was "not convinced that the [Genocide Convention] was conceived, … to enable a State… to seise the Court of a dispute concerning allegations of genocide made against it by another State…even if those allegations were to serve as a pretext for an unlawful use of force."[92] Despite being a skeptic of the jurisdiction of the Court, Judge Bennouna was moved to issue the provisional order to attempt

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[86] Marko Milanovic, *Ukraine Files ICJ Claim Against Russia*, EJIL TALK! (Feb. 27, 2022), https://www.ejiltalk.org/ukraine-files-icj-claim-against-russia/.

[87] I.C.J., *Declarations Recognizing the Jurisdiction of the Court asCcompulsory*, https://www.icj-cij.org/en/declarations.

[88] Provisional Order, *supra* note 84, at ¶ 86.

[89] Andrew Sanger, *Case and Comment: False Claims of Genocide Have Real Effects: ICJ Indicates Provisional Measures in Ukraine's Proceedings against Russia*, 81 CAMBRIDGE L. J. 217, 219 (2022) (branding the Ukraine's claim as a 'creative' description of 'facts to fit a claim within a comprimissory clause').

[90] Provisional Order, *supra* note 84, at ¶ 18.

[91] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Provisional Measures, 2022 I.C.J. Rep. 211, ¶ 1 (Mar. 16) (Bennouna, J., declaration).

[92] *Id*. at ¶ 2.

to prevent the suffering of the Ukrainian people. These judgments would imply that the Court has some past precedents where it has considered humane and equitable factors. The Court on July 22, 2022, decided by fifteen votes to one, that it possessed jurisdiction to hear the application filed by Gambia in November 2019,[93] With the jurisdictional point is now firmly established, it is reasonable to expect that humane considerations would play a role in its final judgment. Referring to its advisory opinion in *Reservations to the Genocide Convention*,[94] the Court has indeed reiterated that the Genocide Convention had been adopted with a pure humanitarian objective.[95]

A Restrained Approach

There are, of course, other lines of cases where the ICJ has taken a very circumspect approach even though they felt that the moral factors compelled them to do otherwise. For this reason, some scholars have lamented how the Court has often promoted a gap between legality and legitimacy.[96] Judge Bedjaoui, a former ICJ President whose casting vote broke a seven-to-seven tie, observed that in the current state of international law, the ICJ could not rule on the legality of a state's threat to or actual use of nuclear weapons in an extreme circumstance of self-defense. However, in his separate declaration, he explained that he was keenly aware of the existential threat posed by nuclear weapons. He observed:

[A]t no time did the Court lose sight of the fact that nuclear weapons constitute a potential means of destruction of all mankind. Not for a moment did it fail to take into account this eminently crucial factor for the survival of mankind. The moral dilemma which confronted individual consciences finds many a reflection in this Opinion. But the Court could obviously not go beyond what the law says. It could not say what the law does not say.[97]

The similar restrained approach can also be observed by the Court in the *Marshall Island Cases*. In this case, the Court decided that there was no dispute between the Marshall Islands and the three Nuclear power states: India, Pakistan, and the United Kingdom against whom the former lodged its case. The Court's strictly formalist approach has been intensely criticized by many scholars because of the apparent primacy of legality over

[93] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Judgment, (July 22, 2022), https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf.

[94] Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, ¶ 23 (May 28).

[95] *Gam. v. Myan.*, at ¶ 113.

[96] Galindo, *infra* note 98, at 77.

[97] Advisory Opinion*, Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Rep. 226, 269-70 (July 8) (Bedjaoui, P., separate declaration).

legitimacy[98] and its unwillingness to deal with a perennially important issue such as nuclear disarmament.[99] The Court's bold and less formalistic approach could have given some impetus to the nuclear disarmament which may be an existential issue for humanity. In a similar vein, if the Court were to take a simply formalistic stance and confine itself to pronouncing that Myanmar has violated its legal obligations under the Genocide Convention but do nothing more to offer Rohingyas any real redress, it would squander an opportunity to make a real impact on the lives of so many persecuted people who have suffered for so long.

The Distinct Role of the ICJ and International Courts

One can contend that any ICJ judgment holding that Myanmar is legally obligated to take the Rohingya back to their home in Rakhine would be an unjustified remedy. While these critics argue that nationality is pre-dominantly a subject of national law, the exclusive domain of national law has been shrinking since the emergence of the idea of human rights. This section of the article further explains why holding that Myanmar is legally obligated to take the Rohingyas back is a plausible legal option. Independent UN reports and widespread findings of human rights bodies, and some state authorities suggest that the Court may find that Myanmar in violation of the Genocide Convention. In that case, it may be argued that restitution of the Rohingya is the preferred remedy for the wrongful act instead of monetary compensation or mere declaration of illegality by Myanmar.[100] One may contend that the Genocide Convention does not include any reference to order a party to repatriate victims of genocide back to their territory.[101] But reading the Convention to only allow the Court to hold that a state has violated the Genocide Convention and offer no further remedy ignores the possibility that potential remedy may not be directly spelt out in the treaty on which the jurisdiction of the Court is based.[102] The inherent authority of the Court to order remedies would appear to be recognised as the Statute of the

[98] George R. B. Galindo, *On Form, Substance, and Equality Between States*, 111 AM. J. INT'L L. UNBOUND 75, 77 (2017). Legitimacy here refers to some sort of public's perception that the Court is performing its functions justly and efficaciously. For a scholarly review of this broader debate, *see* Cesare P.R. Romano, *Legitimacy, Authority, and Performance: Contemporary Anxieties of International Courts and Tribunals*, 114 AM. J. INT'L L. 149 (2020); Karen J. Alter et. al., *How Context Shapes the Authority of International Courts* 79 LAW & CONTEMP. PROBS. 1 (2016); Erik Voeten, *Public Opinion and the Legitimacy of International Courts,* 14 THEORETICAL INQUIRIES L. 411 (2013); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMPLE L. REV. 61 (2013); Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7 (2012).

[99] Vincent-Joel Proulx, *The Marshall Islands Judgment and Multilateral Disputes at the World Court: Whither Access to International Justice*, 111 AM. J. INT'L L. UNBOUND 96, 96 (2017).

[100] Islam, *supra* note 75.

[101] *Id*. at 5

[102] *Id*.

Court and does not point to any restraint on the type of remedies it may offer.

There are cogent reasons for the ICJ and international courts to take a more assertive role than their counterparts in the domestic legal system. In the *Barcelona Traction Case*, Judge Fitzmaurice, explained that the decisions of the ICJ and other international courts can play a significant role in the development of international law. He reasoned:

[S]ince specific legislative action with direct binding effect is not at present possible in the international legal field, judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development. I agree with the late Judge Sir Hersch Lauterpacht that it is incumbent on international tribunals to bear in mind this consideration, which places them in a different position from domestic tribunals as regards dealing with-or at least commenting on-points that lie outside the strict *ratio decidendi* of the case.[103]

While the observations of Judge Fitzmaurice here related to *obiter dicta*, not *ratio decidendi*, his elucidation of the distinct role that the international courts can and should play applies to the role of the Court in the plight of the Rohingya. The Court views itself as an organ of international law in that it has a role in upholding international law. For example, in the Corfu Channel in holding that the British Navy imagined on the sovereignty of Albania observed that it held so 'to ensure respect for international law'.[104] Thus, if engendering the respect for international law is a duty of the Court, then to afford the Rohingyas an effective remedy is justified.

THE OBLIGATION TO REPATRIATE AND ITS ENFORCEMENT

This section of the article explores two questions: what are the legal foundations of Myanmar's obligation to repatriate? And to what extent may Myanmar comply with the order or how may it be compelled to comply?

The Foundation for Holding on to Myanmar's Obligation of Rohingya Repatriation

Gambia's legal team has sought inter alia, that the Rohingya be repatriated to their homeland of Rakhine state in Myanmar in a safe and dignified manner. For the Court to find otherwise would be akin to the position of many states during the pre-Second World War period where the protection of nationals was completely within the province of states. After the 1945

[103] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3 (Feb. 5) (Fitzmaurice J., separate opinion). Of course, this could be a reason for international courts to proceed with caution, but in a case like this one, the unique and horrible situation in which the Rohingyas are would arguably imply that caution is not in order here.

[104] Corfu Channel Case (U.K. v Alb.), Judgment, 1949 I.C.J. Rep. 4, 35 (Apr. 9).

Nuremberg and Tokyo Tribunals, the law for punishing mass atrocities has been developed with an increasing focus on individual criminal responsibility.[105] But it is also settled, through the Bosnian Case principles, that a state can commit genocide.[106] And when a state commits a crime, it would be appropriate that when it can ameliorate the consequences of the crime on the victims, it would be asked to do so.[107]

In any case, there are plausible legal and policy reasons for the Court to exercise jurisdiction in the case. Because, unlike in the domestic legal system, in the international legal system, if the Court does not hear a dispute simply because of any legal technicalities, the applicant may not have another court to turn to. This is not in itself a ground for the Court to exercise jurisdiction but at least in one dissenting opinion of the Court a judge has made this point.[108] This has been alluded to by Judge Weeramantry in his dissenting opinion in the *East Timor* Case that:

In the international judicial system, an applicant seeking relief from this Court has, in general, nowhere else to turn if the Court refuses to hear it, unlike in a domestic jurisdiction where despite a refusal by one tribunal, there may well be other tribunals or authorities to whom the petitioner may resort.[109]

It may be recalled that the Court itself observed that the separate opinion, concurring or dissenting has its importance:

[A]n indissoluble relationship exists between [its] decisions and any separate opinions, whether concurring or dissenting, appended to them by individual judges…Not only do the appended opinions elaborate or challenge the decision, but the reasoning of the decision itself, reviewed as it finally is with knowledge of the opinions, cannot be fully appreciated in isolation from them.[110]

There are reasons to be optimistic, because if we observe the claims of the Bosnian legal team, they did not seek monetary compensation and that could have influenced the judgment of the Court.[111] Of course, it cannot

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[105] Elies van Sliedregt, *Criminal Responsibility in International Law* 4 (2012); *Cf.* Keith Wier, *The International Court of Justice: Is It Time for a Change?*, 8 HOUS. J. INT'L L. 175, 177-78 (1985) (arguing that states do not rely on the ICJ as an effective international arbiter, and it needs radical overhaul).

[106] Bosn. v. Serb., 2007 I.C.J. at 42, ¶ 166.

[107] Factory at Chorzow (Germ. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9 (July 26; *see also* Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 152 (May 28) ("It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.").

[108] *See infra* note 111.

[109] East Timor (Port. v. Austl.), 1995 I.C.J. Rep. 90, 160 (June 30) (Weeramantry, J., dissenting opinion).

[110] U.N. Secretary-General, *Program Budget for the Biennium 1986-1987 Joint Inspection Unit*, ¶¶ 8-11, U.N. doc. A/41/591/Add.1 (Dec. 5, 1986).

[111] Islam & Muquim, *supra* note 3, at 121-22 (pointing out that in Bosn. v. Serb., the emphasis of the applicant was on satisfaction, not on compensation or any other form of redress from the judgment of the Court.).

definitively be said that this precise reason persuaded the Court, but as the focus of the claim was not on monetary compensation, it may be surmised that it played a part. Of course, a contrary argument that the Court did not do so as it found that "the case is not one in which an order for payment of compensation."[112]

The Provisional Measures also demonstrate the court's authority as they imply that the court has *prima facie* jurisdiction.[113] In the *Chorzow Factory* Case,[114] the Court held that the best remedy for a wrongful act is to restore the situation as if the wrongful act were not committed. Accordingly, it may be argued that repatriating them would be one such step in the current case.[115]

In addition, the right of repatriation of people who have been forcibly removed from their homes would appear to have some historical basis in international law. As early as in 1948, Count Bernadotte, the UN Mediator on Palestine concluded:

The right of the Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date should be affirmed by the United Nations, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations conciliation commission.[116]

Of course, cynics may argue that as there was no UN resolution or binding judgment on this, the point was not established. However, whether such an absence is the reflection of realpolitik or lack of conviction regarding the existence of any such right is a question on which reasonable minds may differ. One may argue that Count Bernadotte was drawing this conclusion on refugees, not on the victims of atrocities (not to imply that stateless Rohingya are not or cannot be treated as refugees) per se. However, to argue that refugees who may have been displaced by force not amounting to genocide would be entitled to repatriation, but victims of genocide would not be so entitled would be untenable.

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[112] Bosn. v. Serb., 2007 I.C.J. at 42, ¶ 471.

[113] Of course, that does not give any certainty that the Court would ultimately hold that it has jurisdiction in the case. This is because there are instances on the Court deviating from its stance on jurisdiction. For example, remarkably, in South West Africa, in a 1962 judgment, the Court held that it had jurisdiction, which would connote a finding that the applicants, Liberia and Ethiopia had standing to challenge South Africa's apartheid policies in Namibia; *see* South West Africa Cases (Eth. v. S. Afr.) (Liber. v. S. Afr.), Preliminary Objections, 1962 I.C.J Rep. 319 (Dec. 21). However, subsequently, in its 1966 judgment, by 7-7 vote (the judgment being decided by the President's casting vote), the Court backtracked and held that complainants did not possess any legal interest in the subject matter of their claims; *see* South West Africa Cases (Eth. v. S. Afr.) (Liber. v. S. Afr.), Second Phase, 1966 I.C.J. Rep. 6 (July 18).

[114] Factory at Chorzow (Germ. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9 (July 26).

[115] Islam & Muquim, *supra* note 3, at 129.

[116] Supplement to Part III of Progress Report of the United Nations Mediator on Palestine, 3 UN GAOR Supp. No. 11, at 18, ¶ 4(h), UN Doc. A/648 (1948).

Article 36 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001* spells out restitution as the preferred remedy of a wrong committed by a state by providing that "the State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution."[117] Thus, this too illustrates that the repatriation of the Rohingya could be an apt remedy in the case at hand given the broad mandate of the ICJ. Their mandate is not a matter of a negotiated right such as the one under international investment law where many scholars and policymakers have vigorously debated the four corners of the Courts and tribunals judgment to go beyond the specifically enumerated legal commitments in the relevant international treaties. [118] In other words, in an area like international investment law, the treaty obligation is the outcome of negotiations strictly delineating the rights and obligations of the parties and the consequences of their breach are also codified therein. This ICJ case differs from a new generation of international courts and tribunals as the latter with limited, specific jurisdiction.[119] This case pertains to matters such as atrocities universally condemned by the community of states and that should embolden the Court in awarding remedies.

The United Nations General Assembly Resolution of 2005 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Guidelines) would also lend support to the right of the Rohingya to be repatriated to Rakhine. Principle 18 of the Guidelines provides that victims of gross violations of international human rights law, would, in proportion to the gravity of the violation that they have suffered, 'be provided with full and effective reparation, as laid out in principles 19 to 23. These include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[120] The principle states that "[r]estitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate…return to one's

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[117] Islam, *supra* note 75 (quoting U.N. GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001)).

[118] For an overview of the debate on the interpretation of international investment agreements, *see* Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1 (2019); José Enrique Alvarez, *Contemporary Foreign Investment Law: An Empire of Law or the Law of Empire*, 60 ALA. L. REV. 943 (2009); N Brower & Stephan W. Schill*, Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law* 9 CHI. J. INT'L L. 471 (2009); Thomas M. Walde & Gerome Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation* 31 TEX. INT'L L. J. 215 (1996).

[119] Gary Born, *A New Generation of International Adjudication*, 61 DUKE L. J. 775, 779 (2012).

[120] G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005) (emphasis added).

place of residence."[121] On a strict, literal reading of the UN Charter, one may quibble that only the UN Security Council Resolutions are binding.[122] This is because Article 25 of the Charter states that '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.' There is no such parallel provision regarding the resolutions of the General Assembly. And the UN General Assembly Resolutions are not legally binding, but their value in clarifying state practice and norm creation is well-entrenched.[123] It is important to note that no state voted against this General Assembly resolution which speaks of a widespread endorsement of the principles promulgated in it.[124]

Assuming that the Court pronounces on Rohingya repatriation, one question would be what form of judgment the Court could pass. The Court may not state that Rohingyas be repatriated as such strict pronouncements do not appear to be norm of the Court. The Court, could, of course, hold that Myanmar is legally obliged to repatriate the Rohingya. Just by the Court order, Myanmar would feel some pressure because it is unlikely to snub the World Court's judgment completely.[125] One should question what the role of the Court is. Is it only to resolve disputes or champion the cause of justice? When the jurisdictional base is established, there can be no compelling reason to take a restrictive view on remedy that should just limit to the declaration that Myanmar has violated the Genocide Convention. To do otherwise would create a wedge between the real-life situation of hopelessness of the Rohingya and a narrow view of justice. Albie Sachs has eloquently portrayed that such a distinction between law and real-life situations is artificial.[126] The Court, by not holding onto Myanmar's legal obligation to

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[121] *Id*.

[122] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 116 (June 21) (in pronouncing upon the binding nature of the Security Council decisions in question, the Court would recall the following passage in its Advisory Opinion of 11 April 1949 on Reparation for Injuries Suffered in the Service of the United Nations: "The Charter has not been content to make the Organization created by it merely a centre 'for harmonizing the actions of nations in the attainment of these common ends' (Art. 1, ¶ 3). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Art. 2, ¶ 5), and to accept and carry out the decisions of the Security Council…").

[123] For comprehensive scholarly reviews of the General Assembly resolutions, *see* Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ,* 16 EUR. J. INT'L L. 879 (2006); Obed Asamoah, *The Legal Effect of Resolutions of the General Assembly*, 3 COLUM. J. TRANSNAT'L L. 210 (1963-1964); Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966).

[124] Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT'L L. 532, 533 (1986).

[125] For a scholarly overview on the dynamics of compliance with ICJ judgments, *see* Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434 (2004); Heather L. Jones, *Why Comply: An Analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua*, 12 CHI.-KENT J. INT'L & COMP. L. 57 (2012).

[126] ALBIE SACHS, THE STRANGE ALCHEMY OF LIFE AND LAW 1-8 (2009).

repatriate the Rohingya, would disenchant many who pin on their hope on the international rule of law.

By not holding anything on the right of safe repatriation of the Rohingya, the ICJ would indirectly send a signal that if that regime can create a reign of terror and force people to flee to a neighbouring place, it can destroy a protected group and perpetuate their absence without suffering any practical consequences either in the form of adequate compensation or repatriation. As one scholar observed in 1986, the "neglect and the insuperable obstacles to claims by refugees to compensation from their own governments, some countries have resorted to mass expulsions of their own citizens, confident that they could do so with impunity."[127] This could well be an enticement for an authoritarian or a majoritarian regime to take this route. As deplorable as it is for the victims of the atrocities, it would also be a strain for countries who would provide shelter for persecuted populations. This practicality is not at odds with the moral questions at hand and, if only reinforces the notion that a state's atrocious acts put a huge strain on neighboring state/s.

Again, assuming *arguendo* that monetary compensation would offer Rohingyas a remedy, the moral hazard with that remedy is not difficult to appreciate. On this point, an apt point of reference may be made to the Trail Smelter case.[128] In this case, there was a dispute over air pollution caused by a Canadian smelter—located in Trail, British Columbia causing agricultural and timber interests across the border in Washington, the US. The Arbitral found that "the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington".[129] Thus, it is patent even in a case of air pollution (that too during a time when climate change was not a talked about topic as it is today) which would appear to be amenable to pecuniary compensation, the Arbitral Tribunal was not convinced that just by the payment of monetary compensation a state could continue its wrongful activity.[130] This is when one considers that in its first decision, (the *Decision of 16 April 1938)* the Tribunal concluded that harm had occurred between 1932 and 1937 to the US, and ordered Canada the payment of an indemnity of $78,000 as the 'complete and final indemnity and compensation for all damage which occurred between such dates'. In the case at hand, even a payment of compensation would continue to inflict challenges of accommodating them forever within the territories of over-populated Bangladesh. And more importantly, by the same token, this could encourage

[127] Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT'L L. 532, 533 (1986).
[128] Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (1938 & 1941).
[129] *Id.* at 1966.
[130] Lee, *supra* note 127, at 540.

a practice where a State illegally force a group out of their homeland in exchange for compensation.

Myanmar's Compliance with the Court's Judgment

Some scholars tend to argue that by judicializing too much, international courts and tribunals may incite disgruntlement among many governments and may in turn push 'dejudicialization'.[131] Thus, some argue that international courts may adopt techniques to evade questions that it feels would elicit very strong reactions from states.[132] While these scholarly commentaries have some merit, inter-state disputes are too often politically sensitive and that cannot or should not be a reason for the ICJ to take a circumspect approach either in terms of exercising jurisdiction or in terms of offering remedies,[133] because political sensitivity would more often than not be intrinsically linked to inter-state disputes. Indeed, the presence of inter-state dispute resolution mechanisms may mean that more disputes should be brought to courts over time and the courts would resolve them. The reason for this is that the aim of the ICJ is to contribute to the maintenance of peace and international security. Even the simple submission of a dispute to the Court or at least the legal aspect of a broader dispute is a step forward to pacific settlement, the alternative to resorting to violence.

Some also point out that since the Court lacks any coercive power, it must be cautious, as its judgment would only be enforced if the parties *voluntarily* comply. However, it is not the ICJ or other international courts who implement their judgements. Despite the common perception that domestic courts possess the power of enforcement, it is not the court, but the executive who enforce judgements of the courts.[134] In general, there has been a remarkable rate of compliance with the judgments of the ICJ.[135] Another point from the literature is that overt defiance to the Court's judgment is much less than covert ones or in that least the parties rarely directly defy the judgments of the ICJ.[136] This may be particularly relevant for the current case as the room for maneuvering on the obligation to repatriate the Rohingya seems to be narrower than what a State could enjoy when the Court

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[131] Daniel Abebe & Tom Ginsburg, *The Dejudicialization of International Politics?*, 63 INT'L STUD. Q. 521 (2019).

[132] Arthur Dyevre, *Uncertainty and International Adjudication*, 32 LEIDEN J. INT'L L. 131, 131 (2019); Jed Odermatt, *Patterns of Avoidance: Political Questions Before International Courts*, 14 INT'L J. L. CONTEXT 221 (2018).

[133] Md. Rizwanul Islam, *The Case of Palestine against the USA at the ICJ: A Non-Starter or Precedent-Setter?*, 48 GA. J. INT'L & COMPAR. L. *1, 25-26* (2019).

[134] KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 8 (2014).

[135] Joan E. Donoghue, *The Effectiveness of the International Court of Justice*, 108 AM. SOC'Y INT'L L. 114, 114 (2014) (mentioning that compliance with ICJ judgments is quite good).

[136] Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815, 822-23 (2007).

passes a symbolic, declaratory judgment holding that an action of State X has violated international legal provisions. That being said, of course, several challenges are still there. One of them is about the delaying tactics that the Myanmar government may adopt. If the Court holds that Myanmar is legally obliged to repatriate the Rohingya, then UNHCR or some other body can oversee the process. Such a body can report to the Security Council or even the Court. Even a complete defiance by Myanmar to such a judgement could further stigmatize Myanmar.

Clearly, deference to an ICJ judgment is a treaty obligation as spelt out in Article 94(1) of the United Nations Charter that "[e]ach 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." Thus, defiance of a judgment itself is a violation of a treaty obligation and thus, an internationally wrongful act. Legally speaking, Article 94(2) of the UN Charter indicates the option is to go to the Security Council.[137] Only Nicaragua has sought recourse to the mechanism of Article 94(2) of the UN Charter to seek the compliance of the Judgment by the USA. This was blocked by the US by its veto power.[138] In the case of Myanmar, they may also have two backers in the United Nations Security Council: China and Russia. When it comes to the accountability for their atrocities on the Rohingya, the authorities in Myanmar have been backed up by China and Russia in the United Nations Security Council.[139] However, it remains to be seen whether endorsing Myanmar's actions before and after a judgment remains equally palatable for them.[140] Assuming *arguendo*, that Myanmar would not adhere to the judgment, it may be apt to recall Judge Weeramantry's dissenting opinion in the Legality of Nuclear Weapons, when he observed:

[C]ollisions with the colossal have not deterred the law on its upward course towards the concept of the rule of law. It has not flinched from the task of imposing constraints upon physical power when legal principle so demands. It has been by a determined stand against forces that seemed colossal or irresistible that the rule of law has been won. Once the Court determines what the law is, and ploughs its furrow in that direction, it cannot

[137] U.N. Charter, Art. 94, ¶ 2 (stating, "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.").

[138] *United Nations Security Council: Excerpts from Verbatim Records Discussing ICJ Judgment in* Nicar. v. U.S., 25 I.L.M. 1337, 1352-65 (1986).

[139] Michelle Nichols, *U.N. Security Council Mulls Myanmar Action; Russia, China Boycott Talks*, REUTERS (Dec. 17, 2018), https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-security-council-mulls-myanmar-action-russia-china-boycott-talks-idUSKBN1OG2CJ.

[140] Islam & Muquim, *supra* note 3, at 125.

pause to look over its shoulder at the immense global forces ranged on either side of the debate.[141]

One may question that merely holding that Myanmar is legally obligated to repatriate the Rohingyas without providing adequate safeguard for their protection upon return may expose them to further atrocities. A judgment from the Court would, no doubt, exert moral and potentially political pressure from the international community on Myanmar. Unfortunately, the pressure to restore democracy was more persistent than really to do put an end to the discrimination and atrocities on the Rohingya.[142] While some states have been accusing Myanmar of atrocities on the Rohingya and offering some lip service,[143] such support cannot be entirely sure that how moral or legal factors could play out in their behavior post-judgment of the case. But the judgment and any moral pressure would not be enough unless the Rohingya people feel safe in Rakhine. Granting Myanmar citizenship to the Rohingya is one element that may give them hope of a dignified life in Myanmar. This is because the nexus between citizenship and entitlement to civil, political, economic rights are well-established. The presence of any impartial, international force would also give some hope.

Of course, as a judicial body, the Court cannot enforce its own judgments without the necessary actions from the political actors. Should the Court pronounce a judgment that Myanmar is legally obliged to take the

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[141] Legality of the Threat of Use of Nuclear Weapons, 1996 I.C.J. Rep. 218, ¶ 2 (July 8) (Weeramantry, J., dissenting opinion).

[142] Felix Heiduk, *SWP Comment 52: Myanmar, the Rohingya Crisis, and Further EU Sanctions*, 52 STIFTUNG WISSENSCHAFT UND POLITIK 1 (2018), https://www.swp-berlin.org/publications/products/comments/2018C52_hdk.pdf; *see also*, Catherine Renshaw, *Myanmar's Transition Without Justice*, 38 J. CURRENT SE ASIAN AFFAIRS 381, 389-90, 397-98 (2020) (observing that Myanmar's transition to a limited democracy has taken place without any national efforts to address the legacy of systemic abuse of human rights).

[143] However, some recent developments are somewhat promising. For instance, on March 21, 2022, the US Secretary of State, Anthony J. Blinken, stated that based on the US State Department's detailed analysis of the relevant facts and laws, the US concluded that the Rohingya in Rakhine Province of Myanmar has been subject to crimes against humanity and genocide. The US rarely makes such determinations; it is only the 8th time that the US administration has made such a clear, official determination. *See* Press Release, Antony J. Blinken, Secretary Antony J. Blinken on the Genocide and Crimes Against Humanity in Burma, U.S. DEP'T OF STATE (Mar. 21, 2022), https://www.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum/ [https://perma.cc/945B-PNZ8]. In September 2020, Canada and the Netherlands expressed their willingness to join the ongoing Gambian case against Myanmar for settling the latter's responsibility for atrocities perpetrated on the Rohingya. *See* GOV'T OF THE NETH., *Joint Statement of Canada and the Kingdom of the Netherlands Regarding Intention to Intervene in The Gambia v. Myanmar Case at the International Court of Justice* (Sept. 2, 2020), https://www.government.nl/documents/diplomatic-statements/2020/09/02/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v.-myanmar-case-at-the-international-court-of-justice. For a brief overview of the legal issues relating to their potential intervention, *see* Md. Rizwanul Islam, *Intervening in The Gambia's Quest for Establishing Myanmar's Responsibility for Atrocities on the Rohingya: Symbolism or Substance?* FORDHAM INT'L L. J. ONLINE (17 Oct. 17, 2020), https://www.fordhamilj.org/iljonline/2020/10/17/intervening-in-the-gambias-quest-for-establishing-myanmars-responsibility-for-atrocities-on-the-rohingya-symbolism-or-substance; Brian McGarry, *Third-State Intervention in the Rohingya Genocide Case: How, When, and Why? [Part II],* OPINIO JURIS (Sept. 11, 2020), https://opiniojuris.org/2020/09/11/third-state-intervention-in-the-rohingya-genocide-case-how-when-and-why-part-ii/.

Rohingya back to their territories, then it would be up to the community of states to enforce the judgment. And if there is enough political will, the international community may have tools like different forms of sanctions at their disposal to influence Myanmar to obey the judgment.

CONCLUSION

As Judge Lauterpacht has commented, judges make choices;[144] hence, the ICJ has a stark choice in the Gambian case against Myanmar. While the choice is between legally plausible alternatives,[145] in this case, the choice needs to be informed by the missed opportunity for the Court of making a real impact on the sufferings of the Rohingya. This is because it is a case where nearly a million victims' future is at stake and a conservative judgment may indirectly send signal of effective impunity to a future rouge regime. As Bianchi puts it so emphatically: Judges of the ICJ "should be mindful that any choice has consequences, even if they are not aware of them, and even when they believe that the law does not leave them a choice. To believe not to have a choice is in and of itself a choice."[146] If the ICJ were to ultimately hold that Myanmar is guilty of genocide, then it would be cruel to take a symbolic or restrictive approach and not to hold that Myanmar is legally obliged to repatriate the Rohingya. The ICJ's restrained approach would have real malleable consequences for the Rohingya andwould be a living invitation to a future brutal regime that could inflict unbearable harm on a group of people and force them to flee. The international court may at best issue a verdict against the particular state. But the Court would not in any way legally require bringing them back. As Judge Shahabuddeen has once remarked that "cases of great political or other consequences seldom result in much jurisprudence",[147] here in this case the ICJ has an opportunity to make a meaningful role in relieving the pain of innumerable people suffering for years.

The ICJ is of course, like any other court, bound by law. However, Lord Wright has written that "[j]udging is a practical matter, and an act of will. Notwithstanding all the apparatus of authority, the judge has nearly always some degree of choice."[148] This is not to mean that the Court's judgment in this needs to go beyond the bounds of the law, it only needs to be innovative in the sense that there is no such precedent of the obligation of a state repatriating its people. And that absence may also be because there were no similar circumstances ever at issue before the Court. The World's Court in this

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[144] HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT (1958).

[145] Andrea Bianchi, *Choice and (Awareness of) Its Consequences: The ICJ's 'Structural Bias' Strikes Again in the Marshall Island Case*, 111 AM. J. INT'L L. UNBOUND 81, 83 (2017).

[146] *Id.* at 87.

[147] MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 85 (2007).

[148] LORD WRIGHT, LEGAL ESSAYS AND ADDRESSES 25 (1939).

case too has a choice to make. We argue that finding that Myanmar is legally obliged to ensure safe repatriation of the Rohingya would be a proper choice. By invoking the broader questions on the practical consequences and real-life impact of the ICJ judgment, this paper does not intend argue that the argument for doing so based on legal technicalities is at all frail. It only seeks to highlight that there are much more than jural technicalities available to the Court for use in its decision-making process. It is up to the Court to ensure that legality and practicality converge. And no legal technicality stands in the way of equitable amelioration of the plight of the Rohingya.