ESSAY

Ordering the Repatriation of the Rohingya

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The Gambia has applied for the International Court of Justice (ICJ) to hold Myanmar responsible for violating the Genocide Convention and to order Myanmar to return displaced Rohingyas to their homes. This essay argues that if Rohingyas have indeed been wronged under the Genocide Convention, an order for repatriation by the ICJ may naturally follow. The World Court has at times contributed to the progressive development of international law through its innovative interpretive exercises and in this case, too, the Court can take a similar course if it so chooses. Such an order would ameliorate the situation of thousands of persecuted Rohingyas presently living in desperate conditions.

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I. INTRODUCTION

In its application to the International Court of Justice ("ICJ"), The Gambia claims that Myanmar, a state party to the *Genocide Convention*, has violated its provisions.[1] The Gambia has, inter alia, applied for the ICJ to declare that Myanmar is legally obliged to ensure "the safe and dignified return of forcibly displaced Rohingya."[2] Any potential authoritative pronouncement by the Court holding Myanmar accountable for violating the *Genocide Convention* would be a symbolic victory for those seeking justice for the atrocities perpetrated against the Rohingya. However, in and of itself, that would practically be too little, too late for the many Rohingyas who had to flee their homes as well as for those who still remain detained in Rakhine, separated from their family members.[3]

Indeed, a judgment holding Myanmar responsible for violating the *Genocide Convention* would do more for the progressive development of international law than for saving the Rohingya from their state of despair. This essay argues that should the Court choose to exercise jurisdiction and hold Myanmar responsible for violating the *Genocide Convention*, the Court is also within jurisdiction to uphold the remedy of a safe and dignified return as sought by The Gambia.

II. THE NEXUS BETWEEN STRIPPING CITIZENSHIP AND GENOCIDE

The issue of returning the Rohingya to Myanmar is likely to be directly linked with determining the legality of the elimination of their citizenship by Myanmar in violation of the *Genocide Convention*. As early as in *Nottebohm*, the Court has held that while nationality is predominantly a matter for the state to determine, an international court or tribunal need not always be completely deferential to such determination particularly when it impinges on another state.[4] Some influential scholarly work has incisively argued that habitual residence for a considerable period of time should give rise to access to citizenship, and we are in an era in which the right of states to treat people within its borders is somewhat circumscribed by the dictates of

1. Application Instituting Proceedings and Request for Provisional Measures (Republic of the Gam. v. Republic of the Union of Myan.), Application, 2019 I.C.J. (Nov. 11), https://www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf.

2. *Id.*

3. HUMAN RIGHTS WATCH, AN OPEN PRISON WITHOUT END: MYANMAR'S MASS DETENTION OF ROHINGYA IN RAKHINE STATE (2020), https://www.hrw.org/sites/default/files/media_2020/09/myanmar1020_web.pdf.

4. Nottebohm (Liecht. v. Guatemala), 1955 I.C.J. Rep. 4 (Apr. 6), at 23.

international law.[5] Scholars have also argued that it would be an anomaly if the contemporary law of citizenship altogether ignores the rights of individuals in a water-tight deference to the discretion of states.

Indeed, the stripping of nationality of the Rohingya under the 1982 Citizenship Law of Myanmar, through their exclusion from the list of 135 national ethnic groups without any cogent reason, may itself serve as evidence of the Myanmar authorities' persecutory intent.[6] The fact that Myanmar authorities address them as Bengali, rather than Rohingya, also suggests that there is a conscious and concerted effort to alienate and persecute them as outsiders in Myanmar.[7] To be sure, stripping the nationality of people belonging to a protected group would not, in and of itself, amount to genocide but within the territories of any state, such an action would expose the members of the group to various forms of persecution which may amount to genocide. Hence, it seems cogent to argue that any determination of Myanmar's intent to persecute the Rohingya is intrinsically connected with the nationality of the Rohingya or rather the stripping of it. Thus, the issue of nationality may not be as distinct from the issue of genocide as it may appear on its face.

It would be fitting for the Court to examine the legality of stripping a group of people's citizenship without any cogent basis, albeit indirectly as the Court's jurisdiction is premised on the Genocide Convention, not statelessness per se.[8] States have generally been circumspect in castigating others for depriving people of citizenship due to their self-interest, but if the Court takes on the issue of the deprivation of citizenship, that may potentially help in addressing the intractable problem of burgeoning numbers of asylum seekers in many parts of the world.[9] Unless international law addresses the systemic deprivation of citizenship, it is difficult to imagine a resolution to the travails of millions of people who are languishing in sheer despair of statelessness.[10]

Despite the nearly ubiquitous invocation of the Latin maxim *ubi jus ibi remedium*, i.e., where there is a right, there is a remedy, there may be instances where no court is willing to order a remedy for the victims. However, the maxim may be extended to the domain of international law.[11]

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5. *See* Christian Joppke, *Transformation of Citizenship: Status, Rights, Identity*, 11 CITIZENSHIP STUD. 37, 38 (2007).

6. *See* Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar's Rohingya*, 23 PAC. RIM L. & POL'Y J. 683, 707 (2014).

7. Application, *supra* note 1, ¶ 32 (referring to the U.N. Fact-Finding Mission).

8. Application, *supra* note 1, ¶¶ 16-19.

9. Guy Goodwin-Gill, *Statelessness is back (not that it ever went away…)*, EJIL:TALK! (Sep. 12, 2019), https://www.ejiltalk.org/statelessness-is-back-not-that-it-ever-went-away/ (last visited Aug. 9, 2020).

10. *Id.*

11. Sean D. Murphy, Does *International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?* in David Sloss (ed.) THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT 61, 64 (Cambridge: Cambridge University Press, 2009).

Ordering repatriation for the Rohingya is by no means unenforceable or considered judicial overreach by the ICJ. In the instant case, an order from the Court would provide effective relief to tens of thousands of victims.

III. THE AVAILABILITY OF REPATRIATION AS A REMEDY FOR VIOLATING THE GENOCIDE CONVENTION

Assuming that the ICJ finds that Rohingyas have been wronged under the *Genocide Convention*, it may be argued that restitution is the preferred remedy for the wrongful act instead of reparation or mere declaration. One may contend that the *Genocide Convention* does not include any provision authorizing the Court to order a state party to repatriate people back to their territory. However, such a narrow reading of the *Convention* is simplistic. There is no rule in international law that the remedy ordered by the ICJ needs to be strictly based on the treaty on which the Court's jurisdiction is based. While restitution, *in toto,* may not be possible for the hundreds of thousands of Rohingya, ordering Myanmar to arrange the safe return of the Rohingya is still a form of restitution.

Principle 19 of 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* would also endorse the obligation of restitution as a remedy for the Rohingya.[12] This 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 place of residence."[13] It is pertinent to note that no state voted against this General Assembly resolution which would arguably lend credence to it as evidence of state practice. Article 36 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001* also deems 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."[14]

Moreover, it is not uncommon for the World Court to go beyond mere interpretation of the law. In the ICJ's and its predecessor's jurisprudence, one may find ample instances of the Court not only applying the law but

12. 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).

13. *Id* (emphasis added).

14. U.N. GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001).

also shaping it. In the *Reparations Case*, for example, the Court for the first time found the United Nations to be a subject of international law,[15] arguably leading to a sea change in international law. The *Anglo-Norwegian Fisheries Case* is yet another instance of the Court shaping the law with its pronouncement regarding the drawing of straight baselines.[16] Since there are no legislatures constraining the domain of international law, exercises of this sort by the Court do not implicate concerns regarding separation of powers. Any jurisdictional overreach or an outcome not palatable to states can always be undone by states. For instance, the PCIJ's ruling in the *Lotus Case* on jurisdiction pertaining to collisions in the high seas[17] was overridden by Article 97 of the *United Nations Convention on the Law of the Sea*, 1982.[18]

Of course, it is one thing for the Court to order that Myanmar is liable to return the Rohingya to their home in Rakhine and another for the Rohingyas to feel safe enough to return. However, should such a judgement be delivered by the Court, it is possible that some internationally monitored mechanism by the United Nations or the United Nations High Commissioner for Refugees with a direct international presence in Rakhine may engender the confidence in many Rohingya to return to their homes.[19] If a definitive judgement is rendered by the World Court, implementing such a mechanism should be feasible.

IV. CONCLUSION

The ICJ's jurisprudence pertaining to genocide may not be promising enough to lead one to expect that the Court will chart along the line envisaged in this essay. However, the facts of the previous cases brought before the Court by invoking the *Genocide Convention* are, of course, different and generalization based on past decisions may not be gainsaid. For instance, when Pakistan, for the first time in the Court's history, invoked Article IX of the *Convention*, its application was not seeking any remedy for any genocidal act, rather it was invoking the *Convention* to seek the repatriation of prisoners of war to Pakistan.[20] At the same time, however, it

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

16. Fisheries Case (U.K. v. Norway) 1951 I.C.J. Rep. 116 (Dec. 18). In this case, a majority of the ICJ Judges held that the method of drawing straight baselines was consistent with international law. By holding this, they somewhat deviated from the existing rules on territorial waters as agreed at the League Conference for the Codification of International Law held at Hague in 1930.

17. 1927 P.C.I.J. ANN. REP. (ser. A) No. 10, at 18.

18. U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397, 428 (entered into force Nov. 16, 1994).

19. Nasir Uddin, Opinion, *Ongoing Rohingya repatriation efforts are doomed to failure*, AL JAZEERA (Nov. 22, 2018), https://www.aljazeera.com/opinions/2018/11/22/ongoing-rohingya-repatriation-efforts-are-doomed-to-failure/.

20. Trial of Pakistani Prisoners of War (Pak. v. India), Pleadings, 1973 I.C.J. REP. (May 11, 1973).

was the ICJ which, even after finding Serbia to have violated the obligation to prevent genocide and to have failed to take the necessary measures to prevent genocide in Srebrenica–a genocide that took the lives of more than 7,000 people in 1995—decided that satisfaction in the form of the Court's declaration of the illegality and the guarantee of non-repetition could suffice.[21]

Irrespective of the Court's history, there are reasons to look beyond its past jurisprudence. If the Court finds that the stripping of Rohingya's citizenship is unlawful, the seemingly impossible remedy of repatriation may be within reach. Precedent would not dent the Gambian application on repatriating the Rohingya in the current case because restitution in the form of repatriating victims of genocide was not previously an issue before the Court. Indeed, the ICJ did not have to grapple with the displacement of so many people from their homes in any of its previous genocide cases. Thus, the past may not necessarily be indicative of the future here.

Should the Court order Myanmar to repatriate the Rohingya, it would give momentum to the #IBelong Campaign launched by the UNHCR, which strives to end statelessness by 2024.[22] At stake before the Court is not only the perennial issue of the responsibility of states for "the crime of crimes" but also the obligation of states to the scourge of people who may be wantonly stripped of their citizenship rights and derailed of global peace and security. A teleological interpretation by the ICJ, rather than a narrow textual interpretation, would ensure functional justice, not merely a symbolic one.

21. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Mont.), Judgment, 2007 I.C.J. REP. (Feb. 26) operative clause, ¶ 471(5).

22. U.N. HIGH COMM'R FOR REFUGEES, *#IBELONG*, https://www.unhcr.org/ibelong/ (last visited Oct. 31, 2020).

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