

## CASE NOTE

# STATELESSNESS BEFORE THE ICJ: *THE GAMBIA V MYANMAR*

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### I INTRODUCTION

The ongoing proceedings in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*<sup>1</sup> have been recognised as significant for a number of reasons.<sup>2</sup> First, the proceedings concern genocide, which is regarded as the most heinous of crimes,<sup>3</sup> and due to issues of jurisdictional limitations in parallel proceedings in the International Criminal Court (‘ICC’),<sup>4</sup> the International Court of Justice (‘ICJ’ or ‘the Court’) may be the only international court capable of determining whether genocide has occurred.<sup>5</sup>

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<sup>1</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Preliminary Objections)* [2022] ICJ Rep 477 (‘*The Gambia v Myanmar (Preliminary Objections)*’); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Provisional Measures)* [2020] ICJ Rep 3 (‘*The Gambia v Myanmar (Provisional Measures)*’).

<sup>2</sup> See, eg, Michael A Becker, ‘The Plight of the Rohingya: Genocide Allegations and Provisional Measures in the Gambia v Myanmar at the International Court of Justice’ (2020) 21(2) *Melbourne Journal of International Law* 428; James Kirby and Amy Hodgson, ‘*The Gambia v Myanmar* at the International Court of Justice: A Search for National and International Values’ (2022) 111(2) *The Commonwealth Journal of International Affairs* 196.

<sup>3</sup> Also referred to as ‘the crime of crimes’: Melanie O’Brien, ‘Defining Genocide’ in Phillip Drew et al (eds), *Rwanda Revisited: Genocide, Civil War, and the Transformation of International Law* (Brill Nijhoff 2021) 141, 141.

<sup>4</sup> *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar* (International Criminal Court, Pre-Trial Chamber III, Case No ICC-01/19, 14 November 2019).

<sup>5</sup> Myanmar is not a party to the Rome Statute establishing the International Criminal Court (‘ICC’) but neighbouring Bangladesh is: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002). The decision of Pre-Trial Chamber III affirmed that the prosecutor could undertake an investigation with respect to ‘any crime within the jurisdiction of the Court committed at least in part on the territory of Bangladesh, or on the territory of any other State Party or State making a declaration under article 12(3) of the Statute, if the alleged crime is sufficiently linked to the situation as described in this decision’: *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar* (n 4) 54 [126] (emphasis in original). The issue of the jurisdiction of the ICC is further complicated by a declaration lodged on 17 July 2021 by the National Unity Government under art 12(3), accepting the jurisdiction of the ICC with respect to crimes

Second, The Gambia is bringing this case against Myanmar not as a directly injured party, but due to the obligations under the *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*' or '*the Convention*')<sup>6</sup> having an *erga omnes partes* character, meaning that all states party to the *Convention* share a common interest in ensuring the prevention of acts of genocide and accountability for their commission.<sup>7</sup> This special feature of the *Genocide Convention* was recognised by the ICJ in its *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>8</sup> but this is the first time that a case has been brought under the *Genocide Convention* on such a basis.<sup>9</sup> This is not without contention; at both the Provisional Measures and Preliminary Objections stages, Judge Xue cast doubt on the characterisation of the obligations under the *Genocide Convention* as *erga omnes partes* and thus the standing of The Gambia (as a state party without a territorial or national connection to the alleged crime) to invoke the international responsibility of Myanmar.<sup>10</sup> However, this case is significant for another, under-acknowledged reason;<sup>11</sup> it is the first time the issue of statelessness has appeared before the ICJ.<sup>12</sup>

Although a judgment on the merits is still pending, this case note examines the role of statelessness in the proceedings to date and discusses its potential significance in the final judgment. While others have explored whether the mass deprivation of nationality leading to the statelessness of the Rohingya could amount to a prohibited act under art II of the *Genocide Convention*,<sup>13</sup> I take a different

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committed within Myanmar since 1 July 2002: Michelle Foster and Jade Roberts, 'Racialized Denationalisation as Apartheid' in Manzoor Hasan, Syed Mansoob Murshed and Priya Pillai (eds), *The Rohingya Crisis: Humanitarian and Legal Approaches* (Routledge 2023) 119–20.

<sup>6</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted 9 December 1948, 78 UNTS 276 (entered into force 12 January 1951) ('*Genocide Convention*').

<sup>7</sup> *The Gambia v Myanmar (Provisional Measures)* (n 1) 17 [41].

<sup>8</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23.

<sup>9</sup> In *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* ('*Belgium v Senegal*'), Belgium brought a claim under the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment* on both the basis of a special interest and the *erga omnes partes* character of the Convention's obligations. The Court held it did not need to consider Belgium's special interest because 'any State party to the *Convention [Against Torture]* may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*': *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422, 449–50 [68]–[70].

<sup>10</sup> In her Separate Opinion to the Order on Provisional Measures, Vice-President Xue doubted the majority's reliance on *Belgium v Senegal* to support The Gambia's standing, given that, in that case, Belgium also had a special interest: *The Gambia v Myanmar (Provisional Measures)* (n 1) 33 [4] (Separate Opinion of Vice-President Xue). In her Dissenting Opinion to the Judgment on Preliminary Objections, Judge Xue again doubted that the *Genocide Convention* obligations are of an *erga omnes partes* character, enabling a state party without a territorial or national connection to invoke the international responsibility of another state party: *The Gambia v Myanmar (Preliminary Objections)* (n 1) 524–28 [13]–[25] (Dissenting Opinion of Judge Xue).

<sup>11</sup> With the exception of Andrea Marilyn Pragashini Immanuel, '*The Gambia v Myanmar: Can the ICJ Shy Away from the Nationality Question?*' *Opinio Juris* (Blog Post, 11 October 2022) <<https://opiniojuris.org/2022/10/11/the-gambia-v-myanmar-can-the-icj-shy-away-from-the-nationality-question>>, archived at <[perma.cc/3T5W-KCY6](https://perma.cc/3T5W-KCY6)>.

<sup>12</sup> While this case note was being finalised, South Africa instituted proceedings against Israel in the ICJ, alleging that Israel has violated its obligations under the *Genocide Convention* in respect of its actions against Palestinians in Gaza: 'Application Instituting Proceedings', *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (International Court of Justice, General List No 192, 29 December 2023). Given the statelessness of the Palestinians, the observations in this case note about a link between a lack of state protection and genocide have relevance to those proceedings.

<sup>13</sup> Immanuel (n 11).

approach by arguing that the statelessness of the Rohingya (1) is a central factor in the determination of genocidal intent and (2) is consistent with the view of genocide as a process. In Part II, I provide a brief overview of the proceedings to date. In Part III, I explain how the statelessness of the Rohingya is relevant to the element of genocidal intent.

## II BACKGROUND

The Gambia's claim is that Myanmar has violated its obligations under the *Genocide Convention* by engaging in acts amounting to genocide and other prohibited acts relating to genocide against the Rohingya, an ethnic and religious minority group living predominantly in Rakhine State in western Myanmar.<sup>14</sup> As a state party to the *Genocide Convention*, Myanmar has obligations to not commit genocide (art III(a)), to prevent and punish genocide (art I), to not conspire to commit genocide (art III(b)), to not incite genocide (art III(c)), to not attempt to commit genocide (art III(d)) and to not be complicit in genocide (art III(e)). 'Genocide' is defined in the *Convention* as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group...

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>15</sup>

The claim centres on conduct by the Myanmar military (the *Tatmadaw*) and other Myanmar security forces in October 2016 and August 2017. This conduct involved violent attacks on Rohingya villages in Rakhine State, including acts of mass murder, rape and other forms of sexual violence, and the destruction of villages by fire.<sup>16</sup> Myanmar denies that genocide has taken place, euphemistically referring to the attacks as 'clearance operations'.<sup>17</sup> Nobel Peace Prize laureate and State Counsellor, Aung San Suu Kyi, represented the country during the hearings on Provisional Measures, where she conceded that the military may have occasionally used excessive force and killed civilians.<sup>18</sup> She also suggested that the military may have failed to prevent locals from looting and destroying property in Rohingya villages.<sup>19</sup>

The Court issued its order on Provisional Measures on 23 January 2020, unanimously finding that the conditions for the grant of three of the five requested provisional measures were met. It ordered Myanmar to take all measures to prevent the commission of genocidal acts, preserve evidence related to the allegations of

<sup>14</sup> Md Jobair Alam, 'The Rohingya Minority of Myanmar: Surveying Their Status and Protection in International Law' (2018) 25(2) *International Journal on Minority & Group Rights* 157, 158.

<sup>15</sup> *Genocide Convention* (n 6) art II.

<sup>16</sup> *The Gambia v Myanmar (Provisional Measures)* (n 1) 11–2 [21].

<sup>17</sup> *ibid* 21 [53].

<sup>18</sup> Aung San Suu Kyi, Statement by the Agent, *Verbatim Record of Public Sitting* (International Court of Justice, Doc No 178-20191211-ORA-01-00-BI, 11 December 2019) 15 [14]–[15].

<sup>19</sup> *ibid* 15 [15].

genocide, and provide periodic reports on its compliance with these orders. On 22 July 2022, the Court delivered its Judgment on Preliminary Objections, rejecting all four of Myanmar's objections to the Court's jurisdiction.<sup>20</sup> The next step will be a public hearing and a judgment on the merits.

III 'A LONG TIME IN THE MAKING':<sup>21</sup> THE STATELESSNESS OF THE ROHINGYA  
AND GENOCIDAL INTENT

As The Gambia's oral pleadings suggest,<sup>22</sup> the conduct of the Myanmar military and other security forces at the centre of the claim did not occur in a vacuum. Rather, the attacks in 2016 and 2017 took place in the context of a long history of systematic discrimination and persecution of the Rohingya people by the State of Myanmar. The United Nations ('UN') Office of the High Commissioner for Human Rights has observed that 'discrimination against the Rohingya has been endemic for decades'.<sup>23</sup> A commonly held view of the Buddhist Bamar majority (propagated by politicians, religious leaders and the media)<sup>24</sup> is that the Rohingya are illegal immigrants from Bangladesh; are a threat to the nation, national security and to Buddhism; and 'must be removed or destroyed'.<sup>25</sup> This perception manifested in a state-sanctioned regime of 'institutionalized oppression' of the Rohingya,<sup>26</sup> placing the minority group in a position of 'extreme vulnerability'<sup>27</sup> and resulting in a 'continuing situation of severe, systemic and institutionalized oppression from birth to death'.<sup>28</sup>

It is arguable that the deliberate deprivation of the nationality of the Rohingya is the foundation of this systemic discrimination and persecution. Indeed, the Independent International Fact-Finding Mission on Myanmar ('IIFMM' or 'the Mission') — one of the multiple mechanisms established by the UN to investigate the situation in the country — described the 'cornerstone' of this oppressive regime as the stripping of the Rohingya's nationality.<sup>29</sup> The Rohingya assert a 'long-standing

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<sup>20</sup> Myanmar unsuccessfully argued that The Gambia was not the 'real applicant' in the proceedings, that there was no 'dispute' between the parties, that Myanmar's reservation to art VIII of the *Genocide Convention* denied the Court jurisdiction and that The Gambia did not have standing because it was not directly affected by the alleged genocide: *The Gambia v Myanmar (Preliminary Objections)* (n 1).

<sup>21</sup> Mr Tambaou, Agent's Speech, *Verbatim Record of Public Sitting* (International Court of Justice, Doc No 178-20191210-ORA-01-00-BI, December 2019) 22 [9].

<sup>22</sup> '[T]he Genocidal acts against [the Rohingya] have been a long time in the making': *ibid.*

<sup>23</sup> United Nations Office of the High Commissioner for Human Rights, 'Report of OHCHR Mission to Bangladesh' (Report, 3 February 2017) 41.

<sup>24</sup> Kristina Kironka and Ni-Ni Peng, 'How State-Run Media Shape Perceptions: An Analysis of the Projection of the Rohingya in the Global New Light of Myanmar' (2021) 29(1) *South East Asia Research* 16.

<sup>25</sup> Melanie O'Brien, *From Discrimination to Death: Genocide Process Through a Human Rights Lens* (1st edn, Routledge 2022) 274.

<sup>26</sup> *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/64 (12 September 2018) 6 [20].

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid* 6 [21].

connection to Rakhine State'<sup>30</sup> and were once citizens of the country.<sup>31</sup> In 1977, the Government commenced a violent campaign (Operation Naga Min) to identify 'foreigners' in Rakhine State prior to a national census.<sup>32</sup> In 1982, a new citizenship law was passed, which specified the list of ethnic minority groups in Myanmar that were officially considered to be Burmese citizens.<sup>33</sup> The Rohingya were omitted from that list,<sup>34</sup> leaving most stateless.<sup>35</sup>

The statelessness of the Rohingya is itself a denial of the fundamental human right to a nationality,<sup>36</sup> and it is a condition which has led to a range of other severe human rights violations, such that the Rohingya have attracted the undesirable epithet of 'the most persecuted minority in the world'.<sup>37</sup> As a consequence of being stateless, the Rohingya are denied political rights: the right to vote, the right to stand for political office and the right to work in the public service.<sup>38</sup> The Rohingya are also denied fair trial rights and are subject to arbitrary arrest and physical assaults.<sup>39</sup> They are subject to restrictions on movement, and face extortion, beatings, arrests and imprisonment if they are unable to produce travel documents to patrolling security forces and at checkpoints.<sup>40</sup> The Rohingya are denied access to healthcare, education and livelihoods, including being prevented from cultivating their lands,<sup>41</sup> and are subject to forced labour.<sup>42</sup> The Rohingya have been the subject of a virulent campaign of dehumanising hate speech, disseminated through State media and social media.<sup>43</sup> Internally displaced Rohingya are trapped in 'appalling conditions' in camps within the country,<sup>44</sup> while more than one million have fled across the border to Bangladesh.<sup>45</sup> In 2019, the Myanmar authorities forced Rohingya returning from Bangladesh to accept 'National Verification Cards', which effectively identify the Rohingya as foreigners and cement their stateless status.<sup>46</sup>

The crime of genocide includes a specific mental element: the 'intent to destroy, in whole or part', the targeted group. This intent can be 'inferred from relevant

<sup>30</sup> *Situation of Human Rights of Rohingya and Other Minorities in Myanmar*, UN Doc A/HRC/32/18 (29 June 2016) 2 [3].

<sup>31</sup> Iqthyer Uddin Md Zahed, 'The State against the Rohingya: Root Causes of the Expulsion of Rohingya from Myanmar' (2021) 22(3–4) *Politics, Religion & Ideology* 436, 444; Nyi Nyi Kyaw, 'Unpacking the Presumed Statelessness of Rohingyas' (2017) 15(3) *Journal of Immigrant & Refugee Studies* 269, 271.

<sup>32</sup> Zahed (n 31) 443.

<sup>33</sup> *ibid* 444.

<sup>34</sup> *ibid*.

<sup>35</sup> *Situation of Human Rights of Rohingya and Other Minorities in Myanmar*, UN Doc A/HRC/32/18 (n 30) 2 [3].

<sup>36</sup> *Universal Declaration of Human Rights*, UN Doc A/810 (10 December 1984) art 15.

<sup>37</sup> See, eg, 'Who are the Rohingya?' *Al Jazeera* (online, 18 April 2018) <<https://www.aljazeera.com/features/2018/4/18/who-are-the-rohingya>>, archived at <[perma.cc/2PGS-Q2WW](https://perma.cc/2PGS-Q2WW)>.

<sup>38</sup> O'Brien (n 25) 275.

<sup>39</sup> *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/42/50 (8 August 2019) 12 [76].

<sup>40</sup> *ibid* 13 [77]–[78].

<sup>41</sup> *ibid* 13 [80].

<sup>42</sup> *ibid* 14 [88].

<sup>43</sup> Ronan Lee, 'Extreme Speech in Myanmar: The Role of State Media in the Rohingya Forced Migration Crisis' (2019) 13 *International Journal of Communication* 22.

<sup>44</sup> *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/42/50 (n 39) 13 [82].

<sup>45</sup> *ibid* 15 [91].

<sup>46</sup> 'Myanmar: New Evidence of Denial of Rohingya Citizenship' *Fortify Rights* (online, 16 January 2020) <<https://www.fortifyrights.org/mya-inv-2020-01-16>>, archived at <[perma.cc/ST6M-A44Q](https://perma.cc/ST6M-A44Q)>.

facts and circumstances'<sup>47</sup> and may be indicated by a 'persistent pattern of conduct'.<sup>48</sup> It can be argued that the deliberate deprivation of citizenship from the Rohingya and the 'severe, systemic and institutionalized oppression'<sup>49</sup> which followed forms part of this 'pattern of conduct'. As Hannah Arendt has observed, 'the first essential step on the road to total domination is to kill the juridical person in man';<sup>50</sup> an outcome that can be achieved through denationalisation. This pattern has manifested in past genocides. The denationalisation of Jews was a critical step in the 'lengthy process' of the Holocaust.<sup>51</sup> The *Reich Citizenship Law*, passed by the Nazi Regime as part of the *Nuremberg Laws* of 1935, defined a German citizen as 'of German or related blood', meaning that Jews — regarded as racially inferior — were no longer protected citizens of Germany.<sup>52</sup> The Nazis took 'extreme care' in ensuring that non-German Jews were also 'deprived of their citizenship either prior to, or, at the latest, on the day of deportation' to concentration camps.<sup>53</sup> In Arendt's assessment, denationalisation leading to statelessness is so detrimental because it not only removes those targeted from the protection of their former state, but it also places them beyond the protection (and often the concern) of any state, creating a 'superfluous' population that is more easily targeted and killed.<sup>54</sup>

#### IV GENOCIDE AS A PROCESS

The argument that Myanmar's genocidal intent can be inferred from a 'pattern of conduct' against the Rohingya accords with the view of genocide as not a single event, but 'a complex and dynamic process'<sup>55</sup> involving 'human rights violations occurring over a substantial time period'.<sup>56</sup> Indeed, in its application instituting proceedings, The Gambia described genocide as 'invariably part of a continuum', noting the importance of placing genocidal acts 'in their broader context'.<sup>57</sup> Scholars proposing the process model of genocide identify different 'stages' of genocide.<sup>58</sup> Genocide often begins with an identification and discrimination stage,

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<sup>47</sup> *Prosecutor v Clément Kayishema (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-95-01-1354, 1 June 2001) 62 [159].

<sup>48</sup> *ibid* 63 [163].

<sup>49</sup> *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/42/50 (n 39) 6 [20].

<sup>50</sup> Hannah Arendt, *The Origins of Totalitarianism* (2nd edn, Meridian Books 1958) 447.

<sup>51</sup> *ibid* 296.

<sup>52</sup> *Reichsbürgergesetz* [Reich Citizenship Law] (1935) 1 Reichsgesetzblatt [Reich Law Gazette] 1146, art 2(1) (German Reich).

<sup>53</sup> Arendt (n 50) 280, quoting Hauptsturmführer Theodor Dannecker, 'Deportation of 5,000 Jews from France, Quota 1942' (Order, 10 March 1943).

<sup>54</sup> *ibid* 296. In starker language, '[d]enationalised people, and refugees, who are effectively stateless, are vulnerable and easier to deport and kill': Brad K Blitz, 'The State and the Stateless: The Legacy of Hannah Arendt Reconsidered' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017) 70, 73.

<sup>55</sup> Sheri P Rosenberg, 'Genocide is a Process, Not an Event' (2012) 7(1) *Genocide Studies and Prevention* 16, 18.

<sup>56</sup> O'Brien (n 25) 3.

<sup>57</sup> 'Application Instituting Proceedings', *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (International Court of Justice, General List No 178, 11 November 2019) 6 [4] ('*The Gambia v Myanmar (Application Instituting Proceedings)*').

<sup>58</sup> See Gregory Stanton, 'The Ten Stages of Genocide', *Genocide Watch* (Web Page, 2023) <<https://www.genocidewatch.com/tenstages>>, archived at <[perma.cc/3H4Z-AB4X](https://perma.cc/3H4Z-AB4X)>; Helen Fein, *Accounting for Genocide: National Responses and Jewish Victimization during the Holocaust* (Free Press 1979).

in which a group is distinguished from the rest of the population (often on the grounds of religion, race or ethnicity)<sup>59</sup> and the group's legal status and rights are removed.<sup>60</sup> Identification and discrimination can be achieved through denationalisation of the group.<sup>61</sup>

As *The Gambia* noted, the process model of genocide is consistent with the original conceptualisation of the crime by Raphael Lemkin.<sup>62</sup> Lemkin conceived of genocide as a wide-ranging crime: 'a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves'.<sup>63</sup> For Lemkin, this involved 'the disintegration of political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups'.<sup>64</sup> This expansive and multifaceted view of genocide is not well captured by the focus of the codified crime on a set of particular and discrete acts.

A broader temporal assessment of genocide was undertaken by the Independent International Fact-Finding Mission on Myanmar, which found that the extreme violence against the Rohingya in 2016 and 2017 resulted from their 'systemic oppression and persecution', including their denial of legal status, identity and citizenship, and the instigation of hatred against the Rohingya on ethnic, religious or racial grounds.<sup>65</sup> In its 2019 Report, as evidence of the genocide against the Rohingya, the IIFFMM pointed to the 'continued discrimination with respect to citizenship laws and forcing Rohingya to accept national verification cards through threat and intimidation'.<sup>66</sup> In its presentation of its Detailed Findings to the UN Human Rights Council, the IIFFMM identified seven indicators of genocidal intent, with one indicator being 'the existence of discriminatory plans and policies, such as the Citizenship Law and the NVC process'.<sup>67</sup>

These reports, and other findings by the Independent Investigative Mechanism for Myanmar and the Special Rapporteur on the situation of human rights in Myanmar, were summarised by Judge Cançado-Trindade in his Separate Opinion to the Order on Provisional Measures,<sup>68</sup> but otherwise the statelessness of the Rohingya has been little acknowledged in the Provisional Measures and Preliminary Objections stages of the proceedings.<sup>69</sup> As the case proceeds to the

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<sup>59</sup> Stanton (n 58).

<sup>60</sup> Fein (n 58) 60.

<sup>61</sup> Stanton (n 58).

<sup>62</sup> *The Gambia v Myanmar (Application Instituting Proceedings)* (n 57) 6 [4].

<sup>63</sup> Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) 79.

<sup>64</sup> *ibid.*

<sup>65</sup> UNHCR, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/CRP.2 (17 September 2018) 111–49 [458]–[623].

<sup>66</sup> *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/64 (n 26) [86]–[87].

<sup>67</sup> UNHCR, *Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/42/CRP.5 (16 September 2019) 73 [224].

<sup>68</sup> *The Gambia v Myanmar (Provisional Measures)* (n 1) 15–52 (Separate Opinion of Judge Cançado-Trindade).

<sup>69</sup> One exception is in the dissenting opinion of Judge Xue to the Judgment on Preliminary Objections, in which she notes that 'while all communities [in Myanmar] have suffered from violence and abuse, protracted statelessness and profound discrimination have made the Muslim community particularly vulnerable to human rights violations': *The Gambia v Myanmar (Preliminary Objections)* (n 1) 537 [41].

merits stage, the denationalisation and statelessness of the Rohingya arguably represents a central factor in the ‘pattern of conduct’ which The Gambia alleges establishes Myanmar’s genocidal intent.<sup>70</sup>

## V ACCOUNTABILITY FOR STATELESSNESS

This case represents an opportunity for the Court to approach genocide as a process, beginning with the denationalisation and statelessness of the Rohingya. It also offers a pathway to accountability for discriminatory mass denationalisation resulting in statelessness. Even where statelessness resulting from the deprivation of nationality does not lead to genocide or other atrocities, as explained in this case note, it still constitutes a violation of a fundamental human right — the right to a nationality — and often leads to other severe human rights violations. Notwithstanding the prohibition of the arbitrary deprivation of nationality<sup>71</sup> and the recognition that the majority of the world’s stateless population belong to minority groups,<sup>72</sup> there has been little accountability for the deliberate and discriminatory creation of statelessness to date.<sup>73</sup> The ICJ has before it an opportunity to begin to remedy this gap.

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<sup>70</sup> Note that the process conception of genocide is also significant in the context of the parallel proceedings in the ICC. Making the argument that the alleged genocide against the Rohingya can be understood as a process which culminated in their forced deportation to Bangladesh, thus bringing genocide within the scope of the ICC’s jurisdiction, see O’Brien (n 25) 281–83.

<sup>71</sup> *Universal Declaration of Human Rights* (n 36) art 15(2).

<sup>72</sup> ‘About Statelessness’, *UNCHR* (Web Page) <<https://www.unhcr.org/ibelong/about-statelessness>>, archived at <[perma.cc/JT5A-XR7F](https://perma.cc/JT5A-XR7F)>.

<sup>73</sup> Making this point and arguing that the mass arbitrary deprivation of nationality resulting in statelessness amounts to an international crime, see Corman Kenny, ‘Legislated out of Existence: Mass Arbitrary Deprivation of Nationality Resulting in Statelessness as an International Crime’ (2020) 20(6) *International Criminal Law Review* 1026. See also Foster and Roberts (n 5).