The International Court of Justice and the Responsibility to Protect: Learning from the Case of The Gambia v. Myanmar

Martin Mennecke
University of Southern Denmark, Odense, Denmark
marme@sam.sdu.dk

Abstract
It is a commonplace in the R2P discourse to describe accountability measures as key means to implement the responsibility to protect. In particular, the International Criminal Court is regularly highlighted as a central actor, both in the literature, the annual R2P reports issued by the UN Secretary-General, and the subsequent debates in the UN General Assembly. Conspicuously absent from this conversation is the principal judicial organ of the United Nations, the International Court of Justice (ICJ). This article examines the potential role of the ‘World Court’, as The Gambia in November 2019 started a new case under the UN Genocide Convention against Myanmar before the ICJ. Analysing the limitations and prospects and existing ICJ case-law, the article concludes that the International Court of Justice can make an important and unique contribution to the responsibility to protect.

Keywords: International Court of Justice – accountability – prevention – Myanmar – Bosnia and Herzegovina – The Gambia

1. Introduction
In 2009, in the very first UN report on the responsibility to protect (R2P), UN Secretary-General Ban Ki-moon stated that ‘by seeking to end impunity the International Criminal Court and the United Nations-assisted tribunals have added an essential tool for implementing the responsibility to protect’.¹ This observation set the tone on the link between R2P and accountability. Even the Prosecutor of the International Criminal Court stated that the Court ‘should be seen as a tool in the R2P toolbox’.² Today, accountability measures form an integral part of the often-cited R2P ‘toolbox’. Whether it is Syria, South Sudan, or Yemen – all R2P situations raise questions on how to hold those responsible for the atrocities accountable.³ The recent mass atrocities against the Rohingya are no exception in this regard – the focus is once again on accountability.

The need to address accountability issues in Myanmar is undisputed, as the country is marred by a longstanding culture of impunity. In the words of the UN Fact-Finding Mission for Myanmar, ensuring accountability is ‘the key to disrupting patterns of oppression and cycles of violence’.⁴ The impunity gap has also frequently been raised during Myanmar’s Universal Periodic Review sessions at the UN Human Rights Council, by the UN Special Rapporteur

¹ UN Secretary-General, Implementing the Responsibility to Protect, A/63/677, 12 January 2009, para. 18.
³ See also Nesam McMillan and David Mickler, ‘From Sudan to Syria: Locating “Regime Change” in R2P and the ICC’, Global Responsibility to Protect, 5(3) 283–316 (2013).
on Myanmar and by civil society. The recent military coup further reinforces this point, as the military has committed many grave human rights violations without facing accountability.

Over the past couple of years, Myanmar has turned into a hot spot for new accountability measures. At the international level, states have established a quasi-prosecutorial mechanism under the UN Human Rights Council to gather and process evidence for future trials, and in Argentina universal jurisdiction proceedings have been instituted against Myanmar’s leadership. At the same time, the International Criminal Court has started an investigation into certain aspects of Myanmar’s operations against the Rohingya. At the domestic level, in an attempt to push back on the international pressure, the government has put together a body named the Independent Commission of Enquiry.

The most significant addition to this set of accountability measures, however, is the lawsuit initiated by The Gambia against Myanmar before the International Court of Justice (ICJ). This case is historic in an R2P context, as it represents the first attempt to achieve accountability under the UN Genocide Convention that has been initiated since the adoption of R2P in 2005. This also poses new questions to scholars, as there have been only few efforts to examine accountability mechanisms other than the ICC from an R2P perspective.

There is indeed a conspicuous dearth of analysis when it comes to the potential role of the International Court of Justice. This comes as a surprise: only two years after R2P was agreed on at the UN World Summit in 2005, the ICI issued a ground-breaking judgement regarding the atrocities that had been committed in Bosnia and Herzegovina in the 1990s which were partly responsible for the development of the idea of a responsibility to protect. The judgement made a seminal finding in spelling out the duty to prevent genocide as a legal obligation on all states parties to the UN Genocide Convention. This finding is directly relevant to R2P, as genocide is one of the four R2P crimes, and the judgement could be seen to strengthen R2P’s preventative core. Moreover, the International Court of Justice, as an R2P mechanism, focuses on the responsibility of states rather than that of individuals (as does


7 The work of the ICC is limited to those crimes that have a link to Bangladesh (e.g. deportation), as Myanmar has not ratified the treaty establishing the ICC. For further information see International Criminal Court, ‘Bangladesh/Myanmar’, https://www.icc-cpi.int/bangladesh-myanmar, accessed 8 February 2021.


9 There is, for example, no entry on the International Court of Justice in Alex Bellamy and Tim Dunne (eds.), Oxford Handbook of the Responsibility to Protect (Oxford: Oxford University Press, 2016), and no mentioning of the Court in the book’s index. For the only focused, but rather theoretical discussion of the ICJ and the responsibility to protect see Gentian Zyberi, ‘The International Court of Justice’ in Gentian Zyberi (ed.), An Institutional Approach to the Responsibility to Protect (Cambridge: Cambridge University Press, 2013).
the ICC). Yet the R2P literature that does deal with accountability focuses on the International Criminal Court, examining the historical relation between R2P and the ICC, conceptual similarities, and the role of the ICC under the three pillars of R2P.\(^\text{10}\) The ICC, however, has experienced serious challenges in preventing and addressing atrocities. New avenues should be explored.

It is against this background that the present article will analyse the potential relation between R2P and the International Court of Justice and put a special focus on the ongoing genocide case against Myanmar.\(^\text{11}\) Fourteen years after the ICJ’s landmark judgement in the Bosnia case, there is a renewed need to explore and reflect on the role of the International Court of Justice in atrocity prevention.

### 2. The Place of the International Court of Justice in Current R2P Discussions

As a first step, we will examine how the UN Secretary-General and UN member states view the relation between the responsibility to protect and accountability – and where they see the ICJ in this regard.

#### 2.1. Accountability and the International Court of Justice in the Annual UN Reports on R2P

Since 2009, the UN Secretary-General has issued a yearly report on a specific topic related to the responsibility to protect.\(^\text{12}\) These reports have over the years greatly contributed to clarifying the meaning of R2P and provide UN member states each year in the UN General Assembly an opportunity to share examples of best practice and address disagreements.\(^\text{13}\) In regard to accountability, the UN reports on R2P have repeatedly emphasised the importance of holding accountable those responsible for atrocity crimes, making reference to all three pillars of R2P. Indeed, the most recent report from July 2020 states that ‘combating impunity and ensuring justice and accountability for atrocity crimes are essential to advancing the responsibility to protect agenda’.\(^\text{14}\) In 2017, the Secretary-General devoted an entire R2P report to questions of accountability in regard to the implementation of the responsibility to protect.\(^\text{15}\) The document highlights the primary responsibility of states to investigate and prosecute atrocity crimes while recalling that other states are under a responsibility to support such processes.\(^\text{16}\)

---


11 At the time of writing, it remains unclear whether and how the military coup in Myanmar may impact any of aforementioned accountability efforts, including the case before the ICJ.


16 *ibid.*, paras. 24 and 28.
The first report, in 2009, already identifies the ICC as one of the ‘key instruments relating to the responsibility to protect’, as the Secretary-General called on states to assist international efforts to prosecute those responsible for atrocity crimes.\(^{17}\) The report also recommended states to join the Rome Statute of the International Criminal Court and noted the importance of fighting impunity both nationally and internationally.\(^{18}\) The ICC was seen as an instrument with relevance to all three pillars of R2P. A history of atrocity crimes and persisting impunity were emphasised as specific risk factors for new atrocities.\(^{19}\) Later reports repeatedly spoke of the key role of transitional justice and accountability in preventing the recurrence of atrocity crimes and in the building of national resilience.\(^{20}\)

All but missing from the annual reports is the International Court of Justice. Scattered over the twelve reports there is a total of two minor references. The first, in the 2012 report on pillar 3, referred to the aforementioned ICJ judgement from 2007 and its finding on the duty to prevent genocide. The Secretary-General did not speak about the ICJ as a means of accountability to implement R2P, but cited the judgement to remind states that they ‘cannot afford to be indifferent to the commission’ of the four R2P crimes.\(^{21}\) The second reference, in the most recent report of 2020, simply notes that the ICJ only has three female judges on its bench of 15 judges.\(^{22}\) Tellingly, the 2017 report, titled ‘Implementing the Responsibility to Protect: Accountability for Prevention’, does not once mention the ICJ judgement on the duty to prevent genocide. In addition, the two Special Advisers of the Secretary-General on, respectively, R2P and the Prevention of Genocide have not made any statements on the role of the Court even though they regularly speak about accountability as an important part of atrocity prevention.\(^{23}\)

2.2. Accountability and the International Court of Justice in the Annual UN Dialogues on R2P

In response to the Secretary-General’s annual reports on R2P, many UN member states have expressed agreement on accountability as an important means to implement R2P.\(^{24}\) Nigeria, for example, remarked that ‘impunity remains the greatest challenge in confronting mass atrocity crimes’.\(^{25}\) The European Union highlighted its efforts to end impunity and its support

---

\(^{17}\) UN Secretary-General, Implementing the Responsibility to Protect, para. 19.

\(^{18}\) ibid., para. 17. See also UN Secretary-General, Responsibility to Protect: From Early Warning to Early Action, A/72/884, 1 June 2018, para. 45(b).

\(^{19}\) UN Secretary-General, Responsibility to Protect: State Responsibility and Prevention, A/67/929, 9 July 2013, para. 17; UN Secretary-General, A Vital and Enduring Commitment: Implementing the Responsibility to Protect, A/69/981, 13 July 2015, para. 66.

\(^{20}\) See, for example, UN Secretary-General, State Responsibility and Prevention, para. 40; UN Secretary-General, Mobilising Collective Action: The Next Decade of the Responsibility to Protect, A/70/999, 22 July 2016, para. 56; and UN Secretary-General, From Early Warning to Early Action, para. 20(d).

\(^{21}\) UN Secretary-General, Responsibility to Protect: Timely and Decisive Response, A/66/874, 25 July 2012, para. 40.

\(^{22}\) UN Secretary-General, Women and the Responsibility to Protect, para. 32.


\(^{24}\) From 2010 to 2017, the annual UN discussion on R2P took place in the format of an informal dialogue which, inter alia, means there is no written record of the debate. Most of the individual statements are available on the website of the Global Centre for the Responsibility to Protect, https://www.globalr2p.org/un-general-assemble-try-and-r2p/, accessed 19 January 2021. Since 2018, the discussions have been held as formal debates of the General Assembly. See for example, A/74/PV.2, 20 September 2019.

\(^{25}\) Nigeria’s statement is cited in Global Centre for the Responsibility to Protect, Summary of the Informal Interactive Dialogue of the UN General Assembly on the Responsibility to Protect held on 11 September 2013, 22 October 2013, p. 3.
to the International Criminal Court when discussing the implementation of the R2P norm. 26 In 2014, the 45 member states of the cross-regional Group of Friends of the Responsibility to Protect for the first time made a joint statement at the General Assembly Dialogue, reaffirming their commitment to the fight against impunity. 27 A number of states (for example, Sierra Leone) referenced the ICC in their individual statements. 28 Estonia, Latvia, and Lithuania shared that they ‘firmly believe that R2P and the International Criminal Court can complement each other, since both contribute to ending impunity’. 29

In 2016, 29 member states referred to the fight against impunity in their contribution to the informal dialogue on R2P in the General Assembly. 30 The following year, France stated that universal membership to the International Criminal Court was a key for the implementation of R2P. 31 Brazil referred to international criminal justice ‘playing a crucial role in preventing R2P crimes’. 32 In 2019, 89 member states and the European Union emphasised that accountability for atrocity crimes was key for the prevention of their recurrence. 33

States frequently also connect these themes outside the annual exchanges in the General Assembly. For example, the Group of Friends of R2P in Geneva, composed of over 50 member states and the European Union, regularly makes statements at the UN Human Rights Council. In February 2020, the Group of Friends spoke about the contribution of the Human Rights Council to upholding the responsibility to protect and highlighted in that context the Council’s work on accountability for past gross human rights violations. 34 The Global Network of R2P Focal Points is made up of senior officials from more than 60 UN member states as well as the European Union and the Organization of American States. The annual meetings of this global network focus on how to implement R2P and have repeatedly featured

---

30 See Global Centre for the Responsibility to Protect, Summary of the Eighth Informal Interactive Dialogue of the UN General Assembly on the Responsibility to Protect, September 2016, p. 4.
33 See Global Centre for the Responsibility to Protect, Summary of the UN General Assembly Plenary Meeting on the Responsibility to Protect, July 2019, p. 3.
questions of accountability on the agenda. For example, in 2014, in Gaborone, Botswana, Focal Points discussed the significance of different transitional justice and accountability mechanisms for the recurrence of atrocity crimes. In 2017, in Doha, Qatar, the participants of the network meeting focused on the links between R2P, accountability, and the conflict in Syria.

While there is a general challenge in connecting the myriad of R2P statements to R2P practice, it is striking that yet again the conversation omits the International Court of Justice. The review of the annual UN reports on R2P and of the subsequent debates in the General Assembly has shown that there is widespread conceptual agreement on the link between accountability and R2P. The focus, however, is almost exclusively on the International Criminal Court and on holding the responsible individuals accountable under criminal law. Lacking is any reflection or elaboration of the role of the International Court of Justice in this relationship. This is the gap we will address in the following.

3. The Role of the International Court of Justice in the Responsibility to Protect

In this section we will briefly introduce the International Court of Justice’s main functions before presenting the relevant findings of the key judgement in the ICJ case-law on atrocity prevention, namely the Bosnia Genocide case. This will allow us to assess how the ICJ fits into the R2P framework as defined by its four atrocity crimes, three pillars, and its focus on prevention.

3.1. The General Relation between the International Court of Justice and the Responsibility to Protect

The International Court of Justice with its seat in The Hague, the Netherlands, is the principal judicial organ of the United Nations. It hears disputes between states and can issue advisory opinions at the request of other UN bodies. Only states can be parties to a case before the ICJ, and there is no right to initiate cases for individuals, minorities, or other parts of a population. This is one of the differences between the International Court of Justice and the International Criminal Court which deals only with the criminal responsibility of individuals and, under certain conditions, empowers individuals to make petitions to the Office of the Prosecutor and to participate in the proceedings before the ICC as victims of atrocity crimes.

The International Court of Justice can rule on issues from any area of public international law, as long as both states, the applicant and the respondent, agree to take the matter to the ICJ. This agreement is a limiting factor but essential, as the UN Charter does not provide the Court with any automatic jurisdiction. This consent can for example be expressed in a treaty that both states are parties to, and which posits that disputes concerning the treaty can be heard by the ICJ.

Regarding the four R2P crimes, the UN Genocide Convention contains in Article IX such a jurisdictional clause which makes it possible to bring legal disputes concerning genocide to the ICJ, if the state where obligations under the genocide treaty reportedly are being violated.

---

35 The Global Centre for the Responsibility to Protect acts as secretariat for the Global Network and authors summary reports from the respective annual network meetings which are available at https://www.globalr2p.org/the-global-network-of-r2p-focal-points/, accessed 19 January 2021.
36 The website of the International Court of Justice provides an overview of the ongoing cases before the ICJ at https://www.icj-cij.org/en/pending-cases, accessed 8 February 2021.
and the state that seeks to raise this matter both have ratified the Convention. When the situation concerns war crimes, the access to the International Court of Justice requires other manifestations of state consent, as the Geneva Conventions do not provide for a direct reference to the ICJ.\(^{38}\) For the remaining two atrocity crimes covered by R2P, ethnic cleansing and crimes against humanity, there are no separate international treaties which otherwise could provide access to the ICJ. The role of the Court may thus in a given situation be limited to only address genocide as one of the four R2P crimes.

Disputes on violating the responsibility to protect cannot go straight to the ICJ as R2P itself is not a legally binding norm under international law. R2P was adopted as part of the World Summit Outcome Document that was passed as a non-binding resolution in the UN General Assembly. While there have been dozens of references to R2P (and in particular its pillar 1) in subsequent resolutions by the UN Security Council and the UN Human Rights Council, responsibility to protect has not evolved into a binding norm of customary law.\(^{39}\) When states act with reference to and in accordance with the commitment made in 2005 or call on others to do so, it is a matter of political and moral responsibility. This lack of legal bindingness does not mean that R2P has no direct links to international law. In fact, especially the responsibility under pillar 1 to protect the state’s population, whether nationals or not, against the four atrocity crimes builds on existing, binding international law.\(^{40}\) More specifically, pillar 1 builds on the legal obligation to prevent genocide set forth under Article I of the Genocide Convention and the obligation to ensure respect for international humanitarian law in all circumstances under Common Article 1 of the Geneva Conventions.


In its case-law the International Court of Justice has to date seen very few proceedings that have dealt directly with the atrocity crimes that R2P seeks to prevent. States accused of committing atrocity crimes may not consent to an ICJ case, and states that could initiate such a case may fear the political costs of suing such a state. Witnessing widespread atrocities against its Bosniak population, Bosnia and Herzegovina instituted in 1993 a case under the UN Genocide Convention against the Federal Republic of Yugoslavia (which later was replaced by Serbia and Montenegro). Fourteen years later, the Court issued a seminal judgement on 26 February 2007 which has direct relevance to the responsibility to protect.\(^{41}\) The ICJ does not follow a strict doctrine of precedent, but this was the Court’s first opportunity to address in a contentious case a number of legal questions under the Genocide

\(^{38}\) See, for example, International Court of Justice, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement, 19 December 2005, paras. 181–221. Bosnia and Herzegovina referred to violations of the Geneva Conventions in their application to the ICJ, but the Court did not examine this matter due to the lack of jurisdiction. See International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Application, 20 March 1993, para. 135(b), and ibid., Preliminary Objections, Judgement, 11 July 1996, para. 39.

\(^{39}\) An up-to-date overview of the numerous UN resolutions with R2P references is available on the website of the Global Centre for the Responsibility to Protect at https://www.globalr2p.org/advocating-for-r2p-with-the-united-nations/, accessed 8 February 2021.

\(^{40}\) UN Secretary-General, Implementing the Responsibility to Protect, paras. 3 and 11(a). See also Ruben Reike and Alex J. Bellamy, ‘The Responsibility to Protect and International Law’, Global Responsibility to Protect, 2(3) 267–286 (2010).

Convention, and therefore the judgement stands out as a landmark for all future discussions of these issues.

In the original application Bosnia and Herzegovina had argued that Yugoslavia in numerous ways violated the Genocide Convention and other rules of international law and asked the International Court of Justice urgently to issue provisional measures to protect the rights of Bosnia and Herzegovina.\(^\text{42}\) In response, less than three weeks later, on 8 April 1993, the Court issued an order calling on Yugoslavia to do everything possible to prevent acts of genocide.\(^\text{43}\) The following years the case made little progress, as both parties requested extensions for their filings, and Yugoslavia raised a number of procedural issues the Court first had to rule on. Finally, in its 2007 judgement, the Court held that genocide had been committed in July 1995 in and around Srebrenica. Moreover, massive killings and other atrocities had been committed in Bosnia, but the Court found other than for the mass executions at Srebrenica there was no evidence to demonstrate the specific intent that is required for the crime of genocide.\(^\text{44}\) For those genocidal atrocities, however, the Court could not establish that Serbia had the requisite degree of control over the Bosnian Serb forces carrying out the mass killings which meant that Serbia herself did not incur state responsibility for committing genocide.\(^\text{45}\) Nonetheless the Court held Serbia responsible for two violations of the Genocide Convention: first, Serbia had failed its legal duty to punish génocidaires by not cooperating fully with the International Criminal Tribunal for the former Yugoslavia. Second, and more importantly in the context of the responsibility to protect, the Court found that Serbia had violated her legal duty to prevent genocide in Srebrenica by not taking the necessary measures.\(^\text{46}\)

The Court’s finding on a legal duty to prevent genocide was historic, as it empowered the dormant Article I of the Genocide Convention. Based on the wording (states parties ‘undertake to prevent’ genocide) and the drafting history of the provision, the judgement clarified that the duty to prevent is a distinct and direct obligation under the Convention.\(^\text{47}\) It applies within the territory of each state party and outside.\(^\text{48}\) The Court stated that this duty to prevent arises when the state is aware – or should have known – of the serious risk that genocide will be committed.\(^\text{49}\) In such scenario, the state would be under an obligation to employ all means reasonably available to prevent genocide, within the limits permitted by international law.\(^\text{50}\)

---


\(^\text{43}\) \textit{ibid.}, Request for the Indication of Provisional Measures, Order, 8 April 1993, para. 52.

\(^\text{44}\) Bosnia and Herzegovina v. Serbia and Montenegro, Merits, Judgement, paras. 319, 328, 334, 354 and 361. This specific finding of the Court has received harsh criticism. See, for example, David Scheffer, ‘The World Court’s Fractured Ruling on Genocide’, \textit{Genocide Studies and Prevention}, 2(1) 123–136 (2007), pp. 125–129.

\(^\text{45}\) Bosnia and Herzegovina v. Serbia and Montenegro, Merits, Judgement, paras. 415, 424 and 471 (2)-(4).

\(^\text{46}\) \textit{ibid.}, paras. 449 and 471 (6) (on the legal duty to punish genocide) and \textit{ibid.}, paras. 438 and 471 (5) (on the legal duty to prevent genocide). In the following we will focus on the duty to prevent genocide as the broader notion, resembling the responsibility to protect. On the duty to punish finding see, for example, Zyberi, ‘The International Court of Justice’, pp. 379–381.

\(^\text{47}\) Bosnia and Herzegovina v. Serbia and Montenegro, Merits, Judgement, paras. 162–165.

\(^\text{48}\) \textit{ibid.}, para. 183.

\(^\text{49}\) The following is a summary of the Court’s elaboration of the scope of the duty to prevent, cf. \textit{ibid.}, paras. 430–432.

\(^\text{50}\) In its initial application, in light of an arms embargo issued by the UN Security Council, Bosnia had also referred to the duty of all other states parties to the Genocide Convention to prevent genocide. Bosnia argued this meant they were under an obligation to provide support ‘including military weapons, equipment, supplies troops and financing’. See Bosnia and Herzegovina v. Yugoslavia, Application, para. 111. The Court refused to
The duty to prevent genocide is one of conduct, not one of result, meaning that the state is not under an obligation to succeed but will incur responsibility if it manifestly failed to take all measures that were within its power. This means that the duty to prevent is measured against the respective state’s capacity to influence the potential génocidaires which the Court, by way of example, associated with geographic proximity to the concerned state (without making it a necessary condition) and political, financial, or military influence over that state. This duty to try everything possible and lawful applies regardless of whether the prevention efforts would have been successful, as such assessment is difficult to make and may have looked different if more states had lived up to their duty to prevent.

The Court added that a state can only be held responsible for violating its duty to prevent genocide if a genocide was actually committed. If this is the case, the question of reparations arises, and here the Court finds that financial compensation only can be appropriate if there is a causal nexus between the preventative measures the respondent state failed to take and the genocide. In the Bosnia case, the Court found that Serbia and Montenegro did not yield such influence over the situation in and around Srebrenica.  

3.3. The International Court of Justice as New Actor in the Responsibility to Protect?

It is evident that R2P does not apply directly to the ICJ, as the norm sets out responsibilities of states, not courts, and is linked to state sovereignty. That said, it should be noted that the ICJ already through its core function of judicial dispute settlement (for example, regarding boundary issues), can contribute to the prevention of armed conflicts between states which otherwise might entail new atrocity crimes. At this point, however, we will focus on whether the International Court of Justice can function as a ‘tool’ that states can turn to in order to prevent atrocity crimes and more specifically genocide. When examining the potential place of the ICJ within the R2P toolbox, we will look at the Court’s possible role regarding all three pillars of R2P and reflect R2P’s focus on prevention rather than intervention.

Regarding pillar 1, a first step is taken when the state ratifies the UN Genocide Convention and accepts its jurisdictional clause which provides access to the International Court of Justice. Similar to the situation after joining the International Criminal Court, the ICJ and the option to institute legal proceedings can act as a general deterrent regarding potential violations of the Genocide Convention. This preventive function would be stronger, though, if the International Court of Justice since the Convention’s entering into force had seen more applications regarding genocide or would be able to initiate such proceedings itself, as the Prosecutor at the ICC.

In practice, there have been less than a handful of situations in which a state has turned to the Court to argue that a third state violates the Genocide Convention. In such scenarios, the ICJ may be the only international court that is available, as the jurisdiction of the International Criminal Court also has a number of limitations. Turning to the International Court of Justice, as the UN’s highest judicial organ, provides an elevated legal forum to highlight the atrocities that have been committed as well as continuing atrocity risks, and this may help to deter the...
perpetrators from the commission of further acts. With a view to this prevention objective, the affected state may also seek provisional measures from the Court in order to protect its rights under the Genocide Convention and its population until the final judgement has been rendered. While the Court at this stage will not make any definite findings, it can deliver an authoritative statement that there are serious risks for atrocity crimes which may increase the pressure on other actors to respond to the situation. Once such an interim order is issued, it is binding on both states parties and communicated to the Security Council, presenting a public judicial intervention which may have an additional deterrent impact. In this regard the Court can request the states to keep it informed on the implementation of the provisional measures and modify the order if the situation so requires. The ICJ tasks an ad hoc committee of three judges with monitoring.

There are risks, though, when turning to the ICJ. While the Court may be quick to respond and order provisional measures, the remainder of the proceedings can be arduous and protracted, due to both the general pace of the Court and procedural manoeuvres of the respondent state. The lack of a final judgement may undermine the intended impact regarding the ongoing atrocities and responsibilities which in turn might severely undermine any preventive objective. In addition, the respondent state may opt to violate the provisional measures, leaving the applicant state and the relevant population with little protection. Bosnia and Herzegovina requested for this reason later in 1993 a second set of provisional measures from the Court – but nonetheless the genocide in and around Srebrenica was committed in July 1995.

Regarding R2P’s second pillar, the Bosnia case has shown that a state could call on the International Court of Justice to force support for the protection of the relevant population by means of judicial measures. The Bosnia case has also shown, however, that such support may be difficult to obtain through judicial proceedings, as there are both legal obstacles and political risks. This holds true for the directly affected state (in this case, Bosnia and Herzegovina) but would also be pertinent for any third state when considering a lawsuit against, for example, one of the five permanent members of the Security Council which indeed may not have done everything at its disposal to prevent genocide in a given case. This set of obstacles may help to explain why there have been no efforts since the Bosnia judgement in 2007 to hold a state accountable before the ICJ for failing its legal duty to prevent genocide.

In a different pillar 2 scenario a third state launches a lawsuit against the alleged offender state to support the state whose population is facing serious risks of genocide through the actions of that other state. By way of example, a third state could have turned to the ICJ to hold Serbia accountable rather than leaving this to Bosnia and Herzegovina. In this type of scenario, we can also see how the motives underlying R2P’s third pillar can become relevant, that is, the notion that the international community steps in if the relevant state manifestly fails to protect its population against the four R2P atrocity crimes. Given the jurisdictional

---

54 Bosnia and Herzegovina announced in November 1993 a separate ICJ lawsuit against the United Kingdom because it had ‘failed’ and ‘refused to prevent genocide against the People of Bosnia and Herzegovina’. The lawsuit would also ‘implicate’ other members of the UN Security Council as ‘aiders and abettors to genocide’. See A/48/659, 26 November 1993, pp. 2–3. The United Kingdom rejected these claims as ‘totally without foundation’: A/48/736–S/26847, 6 December 1993. Bosnia and Herzegovina never filed any application in this regard with the ICJ.
regime of the International Court of Justice, there is no access for the international community acting as a collective, but individual states (provided there is jurisdiction) could bring the state that is seen to commit violations of the UN Genocide Convention to the ICJ in order to provide protection to the population in danger. This approach would both reflect the internationalisation of responsibility as expressed in pillar 3 and the *erga omnes* character of the legal obligations under the Genocide Convention.\(^{55}\) These are owed not only bilaterally, from state party to state party, but also in a wider network from each state party to all other states parties which in turn allows all of them to take up legal action when a violation is committed, regardless of whether that state is directly affected by that violation.

As a preliminary conclusion it is obvious that there are clear and severe limitations as to the role the International Court of Justice can play in regard to atrocity and more specifically genocide prevention. Chief among them, the ICJ has only limited jurisdiction, and the Genocide Convention only provides direct access for a case concerning the possible commission of genocide if the relevant state has ratified the Convention and not entered any disabling reservation against the ICJ’s jurisdiction. In addition, while binding provisional measures may be issued within a matter of weeks, the actual court case will typically take years. It is also important to note that an ICJ case requires a state that is willing and able – for example, in terms of jurisdiction, financial resources, and political capital – to initiate and proceed with a long-lasting lawsuit at the ICJ; in contrast, at the International Criminal Court also the independent Prosecutor can take the lead.

That being said, the limitations of the International Court of Justice are far from unique when it comes to the role and functioning of international institutions and UN organs in atrocity prevention. The UN Security Council, for example, is the by far most powerful organ to adopt R2P measures, in particular regarding pillar 3, but in practice it is very rarely able to overcome its political divisions meaning that potential R2P measures frequently are not even tabled or vetoed. Illustrations of this incapacity to respond to R2P situations include the failure to refer the Syria situation to the International Criminal Court and the lack of any referral from the Security Council to the ICC since Libya in 2011. In addition, it should be recalled that after the two referrals of Darfur in 2005 and Libya in 2011, there was no follow-up from the Council which meant that the question of accountability was left to the ICC alone.

In comparison, the International Court of Justice can under certain circumstances provide a public forum to raise R2P issues for a global audience and quickly issue a binding (and ideally deterrent) court order asking the (potential) wrongdoer to restrain from any further actions that might violate the rights at stake. Unlike an ICC referral through the Security Council, an ICJ case would build on the sovereign consent the respondent state has given to the proceedings which may strengthen their legitimacy. Ultimately, a judgement by the International Court of Justice may determine violations of the Genocide Convention and mandate certain measures of compensation. This would at the same time reinforce the different responsibilities under R2P and, if the Court so decides, add an element of the

---

responsible to rebuild as foreseen by the International Commission on Intervention and State Sovereignty when presenting in 2001 the predecessor to the UN’s R2P norm.\(^\text{56}\)

### 4. Myanmar and the Responsibility to Protect before the International Court of Justice

On 11 November 2019, the West African state of The Gambia, on behalf of the Organisation of Islamic Cooperation, instituted proceedings against Myanmar before the International Court of Justice for violations of the UN Genocide Convention. More than 26 years had passed since Bosnia and Herzegovina had submitted their application under the Genocide Convention.\(^\text{57}\) This could suggest a lack of relevance and imply that the Court’s role under R2P is a rather theoretical one, but this lapse in time could also illustrate that the ICJ – like other R2P actors – depends on the willingness of states to activate it. Long before the Myanmar situation escalated, the ICJ could have been engaged in other situations with serious genocide risks as, for example, in Darfur, Sudan, in 2003–2005.\(^\text{58}\) In the following we will first briefly summarise The Gambia’s application and the ICJ’s subsequent order, before reviewing the case and the Court’s role from an R2P perspective.

#### 4.1. The Current Status of The Gambia v. Myanmar

The Gambia argued in her application to the ICJ that Myanmar through its policies had committed genocide against the Rohingya and in numerous ways violated the Genocide Convention, including a failure to prevent and punish genocide.\(^\text{59}\) The Court’s jurisdiction was said to be based on both states being parties to the Convention without having entered any reservations to the treaty’s reference to the ICJ in Article IX.\(^\text{60}\) Regarding the commission of genocide, The Gambia relied heavily on the work of the UN Fact-Finding Mission, quoting extensively the Mission reports and testimonies given to the Mission. The Gambia concluded the application by adding a request for provisional measures, arguing that the Rohingya and the rights at stake in the application needed the Court’s urgent protection to avert further, irreparable harm. The Gambia called on the Court to request Myanmar to cease all violations of the Genocide Convention and to report to the Court on meeting the provisional measures four months after their adoption.\(^\text{61}\)

This part of the proceedings does not foresee a written response by the respondent state, Myanmar. Instead, both states are afforded the opportunity to address the Court in oral hearings and to respond to each other’s arguments there. The hearings took place on 10–12 December 2019.\(^\text{62}\) On 23 January 2020, the International Court of Justice responded to The Gambia’s application by issuing an order requesting Myanmar to ‘take all measures within its

---


\(^\text{57}\) Aside from the case brought by Bosnia and Herzegovina, the conflict in the former Yugoslavia led to several other, all unsuccessful lawsuits under the Genocide Convention. See in particular the case initiated by Croatia against Serbia and its files on the ICJ website at https://www.icj-cij.org/en/case/118, accessed 8 February 2021.

\(^\text{58}\) Sudan acceded to the UN Genocide Convention on 13 October 2003 and entered no reservation to its jurisdiction clause which means the ICJ could have heard such case. Whether the atrocities in Darfur amounted to genocide, as argued by the ICC’s Office of the Prosecutor, remained, however, contentious. See, for example, Michael J. Kelly, ‘The Debate Over Genocide in Darfur, Sudan’, University of California-Davis Journal of International Law & Policy, 18(1) 205–223 (2011).


\(^\text{60}\) ibid., paras. 17–19.

\(^\text{61}\) ibid., paras. 113–134. In the oral hearings, The Gambia reminded the Court that in the Bosnia case the worst atrocities of that conflict, in and around Srebrenica, occurred after the issuance of provisional measures which made compliance reporting a relevant consideration. See International Court of Justice, The Gambia v. Myanmar, Verbatim Record, 10 December 2019, p. 72.

powers’ to prevent genocide, not to let its military or other actors commit genocide, and to take effective measures to preserve evidence relating to alleged acts of genocide.\(^{63}\) Quite exceptionally, it did so unanimously for the entire set of provisional measures – and this included the *ad hoc* judge that Myanmar had been invited to appoint for the purpose of this case.\(^{64}\)

At this stage, the Court did not yet pronounce on whether the atrocities against the Rohingya were committed with the requisite genocidal intent, but instead declared that there is a ‘real and imminent risk of irreparable prejudice’ to the Rohingya as a protected group under the Genocide Convention.\(^{65}\) Going beyond The Gambia’s request to ask both parties for a single compliance report, the judges decided to request Myanmar for a first report to the Court after four months, ‘on all measures taken to give effect to this order’, and thereafter every six months. These confidential reports will be shared with The Gambia for comments.\(^{66}\) The Court concluded by reaffirming that this order and its requests entail binding international legal obligations for the parties to the case.\(^{67}\)

In the fall of 2020, The Gambia filed its memorial with the Court, detailing its case against Myanmar. In response, Myanmar is to deliver its counter-memorial by 23 July 2021. In the meantime, on 20 January 2021, Myanmar raised preliminary objections which means that the case on the merits (but not the provisional measures) is suspended until the Court has ruled whether it is in a position to entertain The Gambia’s application. Already during the oral hearings for the provisional measures Myanmar had questioned inter alia whether The Gambia in a legal sense was ‘affected’ by the alleged genocide.\(^{68}\) At the time of writing, it remains unclear whether and how the recent military coup in Myanmar may impact the proceedings.

### 4.2. The Responsibility to Protect and The Gambia v. Myanmar Case

With the ICJ case taking its course, we can begin to assess the potential role of the International Court of Justice in the R2P framework. While the term ‘responsibility to protect’ did not appear a single time in The Gambia’s application to the ICJ, the hearings before the Court, or the court order, there are elements which are interesting to highlight from an R2P perspective.\(^{69}\) There are three in particular that deserve closer attention.

First, there is the fact that the proceedings are driven by The Gambia – which has no direct link to the alleged violations of the UN Genocide Convention that would qualify it to act as a ‘specially affected’ state.\(^{70}\) In the opening statement, the agent of The Gambia declared that the lawsuit was initiated ‘to awaken the conscience of the world, and to arouse the voice of


\(^{64}\) See Declaration by Judge *ad hoc* Kress, para. 1.

\(^{65}\) The Gambia v. Myanmar, Provisional Measures, Order, paras. 75 and 56.

\(^{66}\) *ibid.*, para. 82.

\(^{67}\) *ibid.*, para. 84.


\(^{69}\) In the previous case initiated by Bosnia and Herzegovina, the applicant’s counsel once referred to R2P in the oral hearings. See International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Verbatim Record 2006/11, 7 March 2006, p. 8.

the international community’.71 Earlier, at the opening debate of the UN General Assembly, The Gambia had called ‘on all stakeholders to support that process. As a global community with a conscience, we cannot continue to ignore the plight of the Rohingya.’72 This ambition resembles the very notion behind R2P and its creation in response to the Rwandan genocide and Srebrenica: the international community had to realise and act on its responsibility to protect endangered populations against atrocity crimes.

Notably, and unanimously, the Court in the current case decided for the purpose of these preliminary proceedings to accept the idea that a single state, as state party to the Genocide Convention, could raise issues regarding alleged violations of this treaty and gain standing before the Court.73 While the notion of each state party being in a position to raise issues that bind all states parties of a given treaty seems to have become accepted jurisprudence, the decision granted a state party without any further connection the right to take this matter to the ICJ in order to ensure compliance. While this may seem intuitively right, it is a big step in the state consent–centered world of international law and remains to be confirmed when the Court addresses Myanmar’s preliminary objections.74 From an R2P perspective, however, this step is welcome as a reflection of the special devastation that flows from genocide (and the other atrocity crimes) and a means to enable the exercise of the responsibility to protect by others if the home state manifestly fails to do so under pillar 1. Conceptually, the new ICJ approach to an erga omnes based standing for any state party to the Genocide Convention does not fit squarely into the R2P framework, as it allows one state alone to act on behalf of the international community, while R2P requires a collective approach to all measures taken under its pillar 3. A step towards a more collective understanding of The Gambia’s lawsuit might be seen in the support provided by the Organisation of Islamic Cooperation (OIC) which, however, also includes a number of countries that are very sceptical of the R2P norm.75

Second, it is noteworthy that the Court decided to follow The Gambia’s argumentation that the provisional measures aimed to protect both The Gambia’s rights as party to the Genocide Convention and those of the Rohingya as protected group under that treaty.76 At the same stage of the Bosnia and Herzegovina case, the Court had only focused on the rights of the applicant state, not those of the Bosnian Muslims as a protected group under the Genocide Convention. This is notable from an R2P perspective because the responsibility to protect as a concept very much aims at the protection of the relevant population rather than to elevate presumed rights of a third state as the traditional concept of humanitarian intervention was perceived to do. The court’s order thus reinforced the protective character of its provisional measures in accordance with the objectives underlying the R2P norm. While the judges never referred to R2P as such, they did cite the fact that the Rohingya ‘remain extremely vulnerable’.”77 From an R2P perspective it also is important to note that the Court referred to

---

72 A/74/PV.8, 26 September 2019, p. 31.
73 The Gambia v. Myanmar, Provisional Measures, Order, paras. 41–42.
74 See also the strong criticism in the Separate Opinion of Judge Xue, ibid., paras. 6–8.
76 ibid., paras. 56 and 52.
77 ibid., para. 72.
The logic of the responsibility to protect is that the state under pillar 1 has a responsibility to protect *its* population, regardless its specific status under domestic laws. Thus, the Rohingya may not count among the ethnic or racial groups which Myanmar has recognised internally, but they do form part of its population and thus matter for R2P – and this was recognised by the ICJ.

Third, when examining the content of the provisional measures the Court ordered, it is striking that the focus is on calling Myanmar to comply with its obligations under the Genocide Convention. The order is about not committing genocide, preventing genocide, and making it possible to punish genocide. All these steps follow the logic of provisional measures which at this stage of the proceedings seek to protect the relevant rights against irreparable harm – but these steps are also in line with what Myanmar should do when exercising its responsibility under pillar 1 of R2P. The Court’s order thus acts as a judicial, binding reinforcement of pillar 1 – emphasising its existing legal foundations. What is more, the ICJ added to the provisional measures a distinct preventive element by requesting Myanmar to report not once but on a regular basis to the ICJ (and The Gambia) on all the steps taken to implement the Court’s order.

These initial observations underscore that states should view the International Court of Justice as an instrument that can help to implement the responsibility to protect. Thus, two key supporters of R2P, Canada and the Netherlands, stated in their joint announcement to intervene in the case initiated by The Gambia that they ‘consider it our obligation to support these efforts which are of concern to all of humanity’.79

5. Looking Ahead: Issues and Prospects for the Responsibility to Protect before the International Court of Justice

The provisional measures issued by the ICJ on 23 January 2020 were only a first step in what may turn out to be proceedings that continue for years or find an abrupt end; for example, if the Court upholds Myanmar’s preliminary objections. It is important to note that the provisional measures ‘in no way’ prejudged questions of jurisdiction, admissibility, or the merits of the case.80 There are, amongst others, difficult questions regarding the definition of genocide that remain to be addressed in a much more detailed manner, and these new findings may have repercussions for the status of the responsibility to protect in this case. This includes the well-documented, massive sexual violence committed against Rohingya women during the ‘clearance operations’ and its place in the alleged violations of the Genocide Convention.81 While The Gambia included rape explicitly as an act of genocide into two of its requests for provisional measures and elaborated on these atrocities during the oral hearings, the Court failed to make a single mention of this issue in its order.82

---

78 The Court has not made any determination as to the Rohingya’s status as a protected group under the Genocide Convention. See *ibid.*, paras. 14–15.
79 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, 2 September 2020. The first country to state its intention to intervene in the case was the Maldives in February 2020.
82 For the argumentation presented by The Gambia see The Gambia v. Myanmar, Application Instituting Proceedings and Request for Provisional Measures, paras. 61–66 and 91–98, and The Gambia v. Myanmar, Verbatim Record, 10 December 2019, for example pp. 23–26. It is interesting to note that the *ad hoc* judge nominated by The Gambia for the current case is Ms Navanethem Pillay, who previously, as judge of the
In addition, there is the difficult and crucial question of the specific genocidal intent that has not been addressed in any detail yet. So far, The Gambia has mainly cited from the work of the UN Fact-Finding Mission, listing numerous incidents that could be classified as acts of genocide but not providing as much material on the requisite intent which distinguishes genocide from other atrocity crimes. This was sufficient for the first phase of the case, but the Vice-President of the Court, Judge Xue, has already remarked that the Rohingya were a ‘case of a protracted problem of ill-treatment of ethnic minorities in Myanmar rather than of genocide’. This seems a very euphemistic description, but it gives an indication of how much work lies ahead for The Gambia in the coming stages of the proceedings.

It is important to recall in this context that the ICJ in previous cases concerning the UN Genocide Convention has followed a rather conservative approach. Relying heavily on the genocide case-law developed by the International Criminal Tribunal for the former Yugoslavia, the Court determined that only the mass executions of Srebrenica qualify as genocide – but rejected this finding for all the other atrocities committed in Bosnia and Herzegovina. The Court similarly refused to find genocide in the separate lawsuit initiated by Croatia against Serbia. In both instances, the decisive factor was the (lack of) genocidal intent; this, in part, was linked to the question of whether and how ethnic cleansing, another atrocity crime covered by the responsibility to protect, could be part of genocide – and the same question has been raised in the current case. The outcome of this genocide question matters greatly, as the Court only can find that Myanmar has violated her duty not to commit genocide if the crime actually has been committed.

Our analysis has highlighted a number of issues in the relationship between the International Court of Justice and the responsibility to protect: the ICJ is state-centred, providing no meaningful option to hold accountable the non-state actor responsible for the genocide against the Yazidi in 2014 in northern Iraq. Some states have shielded themselves with reservations to Article IX of the Genocide Convention from contentious matters reaching the International Court of Justice. Direct access to the ICJ is limited to one out of the four atrocity crimes as the Genocide Convention is the only existing international treaty that has a

---


83 Separate Opinion of Judge Xue, The Gambia v. Myanmar, Provisional Measures, Order, para. 3. See on this also the Declaration by ad hoc judge Kress, ibid., para. 5. At a later stage, the Court also will have to decide how much it can rely on the documentation provided by the UN Fact-Finding Mission. See on this Bosnia and Herzegovina v. Serbia and Montenegro, Merits, Judgement, paras. 227–230.

84 For a criticism of the Court’s approach see Scheffer, ‘The World Court’s Fractured Ruling on Genocide’, pp. 125–129. The ICJ did state that its determination of genocide does not depend on whether there is already such finding by another tribunal (Bosnia and Herzegovina v. Serbia and Montenegro, Merits, Judgement, paras. 180–182). As that case was limited to the Genocide Convention, the ICJ could not rule on potential war crimes or crimes against humanity as violations of international law. See ibid., paras. 319, 328, 334, 354, 361.


88 This applies, for example, to China. The full list of states parties and their respective reservations is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4, accessed 8 February 2021.
jurisdictional reference to the ICJ. This may mean, as in Myanmar and Bosnia and Herzegovina, that some victim groups are precluded from seeing their suffering taken up at the ICJ, and this may have further adverse impact on the relations between different groups.\textsuperscript{89} The access is limited to the one R2P crime that is the hardest to prove and dependent on whether the relevant states have become members to the UN Genocide Convention and whether a genocide has been committed.\textsuperscript{90} The International Court of Justice can act fast when asked for provisional measures but is slow when it comes to the final judgement. Even if an ICJ case is pursued, it is clear that a country such as Myanmar will need to undergo a larger process of transitional justice – which only can start in earnest when there is an interest to do so inside Myanmar.\textsuperscript{91}

The list of limitations is long – but so is the list for many other R2P instruments.\textsuperscript{92} The present analysis has demonstrated that the International Court of Justice can form part of the R2P ‘toolbox’ and should be considered as such. The Court offers another opportunity to address R2P issues by asking the UN’s highest judicial organ, with its special legal and moral standing, to reinforce the obligations under the UN Genocide Convention which inform pillar 1 of the responsibility to protect. The Court’s power to issue provisional measures provides a unique option to strengthen efforts to prevent atrocities in a situation with serious atrocity risks. This may not always work as intended because the respondent state, unlike Myanmar, could ignore the Court or commit further atrocities as the Bosnian Serbs at Srebrenica two years after the issuance of binding provisional measures – but no R2P measure is fail-safe. Rather it is striking that it took 68 years since the entry into force of the Genocide Convention for a state party to make use of this option and to approach the ICJ.

Even if ultimately the Court should conclude that the definition of genocide has not been met, the provisional measures and the court proceedings seem to have had an impact on the situation (up to the military’s coup) – and not all R2P measures can claim that. While the government continues to deny a genocidal campaign against the Rohingya and refuses to interact with any of the other international accountability mechanisms, Myanmar did engage with the ICJ case, reported in time on the implementation of the provisional measures, and

\begin{itemize}
\item This also means that the ICJ cannot address the new atrocities committed by the Myanmar military against the civilian population demonstrating against the violent coup. These widespread killings, acts of torture, and disappearances may qualify as crimes against humanity but not as genocide and fall thus outside the scope of the ICJ’s jurisdiction in the current case.
\item This could change in the future, as the UN’s International Law Commission has prepared a draft convention on the prevention and punishment of crimes against humanity which in its Article 15(2) contains a reference providing for ICJ jurisdiction over future disputes regarding crimes against humanity. The draft is currently under consideration in the UN General Assembly, see Charles C. Jalloh, ‘The International Law Commission’s First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, Or Both?’, Case Western Reserve Journal of International Law, 52(1) 331–405 (2020).
\item On the need of a comprehensive transitional process in Myanmar, see UNFFM, Report of the Detailed Findings, paras. 1573ff.
\item This also applies to the ICC, including in regard to Myanmar where its role is limited to a certain fraction of the atrocities (deportation) committed against one victim group (the Rohingya). See Pre-Trial Chamber, International Criminal Court, Decision on the Authorization of an Investigation into the Situation in Bangladesh/Myanmar, 14 November 2019. The ICC’s limitations also show when receiving a referral of a given R2P situation from the UN Security Council – an option often advocated for by key supporters of R2P such as the member states of the European Union. The last such referral took place in 2011 and any new referral has become largely unrealistic in light of the entrenched anti-ICC positions among some permanent members of the Security Council. If it does occur, it may end up a poisoned chalice due to the persisting lack of support the ICC has seen after such referrals. See on this Weerdesteijn and Holá, “‘Tool in the R2P Toolbox’”, pp. 407–411.
\end{itemize}
did not carry out new systematic attacks on the Rohingya remaining in Myanmar.\textsuperscript{93} At the oral hearings, the government, through then State Counsellor Aung San Suu Kyi, admitted for the first time that there had been an internal armed conflict in Rakhine, the suffering of the population, and that war crimes may have been committed by the military.\textsuperscript{94} In addition, the government in April 2020 issued three directives requesting officials not to commit genocide, not to destroy evidence of genocide, and to counter hate speech – ostensibly responding to the Court’s provisional measures. Questions remain, however, around the implementation of these directives and the lack of other measures and fundamental reforms to protect the Rohingya from further genocidal violence.\textsuperscript{95} During the review of Myanmar’s human rights record at the UN Human Rights Council, a few days before the military coup, the government confirmed that it would comply with the Court’s provisional measures.\textsuperscript{96}

For states parties to the Genocide Convention, efforts to obtain protective provisional measures from the International Court of Justice could be an important step to meet their obligation to prevent genocide. States that support the responsibility to protect, such as the members of the Global Network of Focal Points for R2P and the Groups of Friends of R2P at the UN, should equally integrate the ICJ into their efforts to operationalise R2P and consider the ICJ as an option when facing relevant country situations. This will not be a panacea and will raise political and legal issues – but such is the reality of atrocity prevention.

\textsuperscript{93} The Rohingya, as well as other ethnic groups, continue to suffer serious human rights violations. See UN High Commissioner for Human Rights, \textit{Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar}, A/HRC/45/5, 3 September 2020.


\textsuperscript{95} The UN Special Rapporteur on Myanmar welcomed the government’s engagement with the ICJ and its provisional measures: \textit{Situation of Human Rights in Myanmar}, A/75/335, 1 September 2020, paras. 91–92. For a critical view see Global Justice Centre and Global Centre for Responsibility to Protect, \textit{Myanmar: UPR Submission to the UN Human Rights Council}, July 2020, pp. 6–7.