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Consejo de Seguridad

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Carta de fecha 24 de enero de 2020 dirigida a la Presidencia del Consejo de Seguridad por el Secretario General

A raíz de una notificación recibida del Secretario de la Corte Internacional de Justicia y de conformidad con el párrafo 2 del Artículo 41 del Estatuto de la Corte, tengo el honor de adjuntar a la presente una copia de la providencia en que se indican medidas provisionales en la causa relativa a la *Aplicación de la Convención para la Prevención y la Sanción del Delito de Genocidio (Gambia c. Myanmar)* (véase el anexo)*.

(*Firmado*) António **Guterres**

* El anexo se distribuye únicamente en el idioma en que fue presentado.

Anexo

[Original: francés e inglés]

23 JANUARY 2020

ORDER

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(THE GAMBIA *v.* MYANMAR)

APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(GAMBIE c. MYANMAR)

23 JANVIER 2020

ORDONNANCE

TABLE OF CONTENTS

INTERNATIONAL COURT OF JUSTICE

YEAR 2020

2020
23 January
General List
No. 178

23 January 2020

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(THE GAMBIA *v.* MYANMAR)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* YUSUF; *Vice-President* XUE; *Judges* TOMKA, ABRAHAM, BENNOUNA, CANÇADO TRINDADE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN, SALAM, IWASAWA; *Judges* ad hoc PILLAY, KRESS; *Registrar* GAUTIER.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

1. On 11 November 2019, the Republic of The Gambia (hereinafter "The Gambia") filed in the Registry of the Court an Application instituting proceedings against the Republic of the Union of Myanmar (hereinafter "Myanmar") concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or the "Convention").

2. At the end of its Application, The Gambia

"respectfully requests the Court to adjudge and declare that Myanmar:

— has breached and continues to breach its obligations under the Genocide Convention, in particular the obligations provided under Articles I, III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV, V and VI;

— must cease forthwith any such ongoing internationally wrongful act and fully respect its obligations under the Genocide Convention, in particular the obligations provided under Articles I, III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV, V and VI;

— must ensure that persons committing genocide are punished by a competent tribunal, including before an international penal tribunal, as required by Articles I and VI;

— must perform the obligations of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group, including but not limited to allowing the safe and dignified return of forcibly displaced Rohingya and respect for their full citizenship and human rights and protection against discrimination, persecution, and other related acts, consistent with the obligation to prevent genocide under Article I; and

— must offer assurances and guarantees of non-repetition of violations of the Genocide Convention, in particular the obligations provided under Articles I, III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV, V and VI."

3. In its Application, The Gambia seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention.

4. The Application contained a Request for the indication of provisional measures submitted with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

5. At the end of its Request, The Gambia asked the Court to indicate the following provisional measures:

"*(a)* Myanmar shall immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent all acts that amount to or contribute to the crime of genocide, including taking all measures within its power to prevent the following acts from being committed against [any] member of the Rohingya group: extrajudicial killings or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part;

(b) Myanmar shall, in particular, ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any act of genocide, of conspiracy to commit genocide, or direct and public incitement to commit genocide, or of complicity in genocide, against the Rohingya group, including: extrajudicial killing or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part;

(c) Myanmar shall not destroy or render inaccessible any evidence related to the events described in the Application, including without limitation by destroying or rendering inaccessible the remains of any member of the Rohingya group who is a victim of alleged genocidal acts, or altering the physical locations where such acts are alleged to have occurred in such a manner as to render the evidence of such acts, if any, inaccessible;

(d) Myanmar and The Gambia shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of this Application, or render it more difficult of resolution; and

(e) Myanmar and The Gambia shall each provide a report to the Court on all measures taken to give effect to this Order for provisional measures, no later than four months from its issuance."

6. The Registrar immediately communicated to the Government of Myanmar the Application containing the Request for the indication of provisional measures, in accordance with Article 40, paragraph 2, of the Statute of the Court, and Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing by The Gambia of the Application and the Request for the indication of provisional measures.

7. Pending the notification provided for by Article 40, paragraph 3, of the Statute, the Registrar informed all States entitled to appear before the Court of the filing of the Application and the Request for the indication of provisional measures by a letter dated 11 November 2019.

8. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. The Gambia chose Ms Navanethem Pillay and Myanmar Mr. Claus Kress.

9. By letters dated 12 November 2019, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had fixed 10, 11 and 12 December 2019 as the dates for the oral proceedings on the Request for the indication of provisional measures.

10. By a letter dated 9 December 2019, a copy of which was immediately communicated to Myanmar, The Gambia submitted to the Court the text of the following additional provisional measure requested from the Court:

> "The Gambia requests that Myanmar be ordered to grant access to, and cooperate with, all United Nations fact-finding bodies that are engaged in investigating alleged genocidal acts against the Rohingya, including the conditions to which the Rohingya are subjected."

11. At the public hearings, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of The Gambia:	H.E. Mr. Abubacarr Marie Tambadou, Mr. Payam Akhavan, Mr. Andrew Loewenstein, Ms Tafadzwa Pasipanodya, Mr. Arsalan Suleman, Mr. Pierre d'Argent, Mr. Paul Reichler, Mr. Philippe Sands.
On behalf of Myanmar:	H.E. Ms Aung San Suu Kyi, Mr. William Schabas, Mr. Christopher Staker, Ms Phoebe Okowa.

12. At the end of its second round of oral observations, The Gambia asked the Court to indicate the following provisional measures:

> "*(a)* Myanmar shall immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent all acts that amount to or contribute to the crime of genocide, including taking all measures within its power to prevent the following acts from being committed against any member of the Rohingya group: extrajudicial killings or physical abuse; rape or other forms of sexual

violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part;

(b) Myanmar shall, in particular, ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any act of genocide, of conspiracy to commit genocide, or direct and public incitement to commit genocide, or of complicity in genocide, against the Rohingya group, including: extrajudicial killing or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part;

(c) Myanmar shall not destroy or render inaccessible any evidence related to the events described in the Application, including without limitation by destroying or rendering inaccessible the remains of any member of the Rohingya group who is a victim of alleged genocidal acts, or altering the physical locations where such acts are alleged to have occurred in such a manner as to render the evidence of such acts, if any, inaccessible;

(d) Myanmar and The Gambia shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of this Application, or render it more difficult of resolution;

(e) Myanmar and The Gambia shall each provide a report to the Court on all measures taken to give effect to this Order for provisional measures, no later than four months from its issuance; and

(f) Myanmar shall grant access to, and cooperate with, all United Nations fact-finding bodies that are engaged in investigating alleged genocidal acts against the Rohingya, including the conditions to which the Rohingya are subjected."

13. At the end of its second round of oral observations, Myanmar requested the Court:

"(1) to remove the case from its List;

(2) in the alternative, to reject the request for the indication of provisional measures submitted by The Gambia."

*

* *

14. In its Application, The Gambia seeks protection for "all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Genocide Convention". According to a 2016 Report of the United Nations High Commissioner for Human Rights, Rohingya Muslims "self-identify as a distinct ethnic group with their own language and culture, and claim a longstanding connection to Rakhine State"; however, "[s]uccessive Governments [of Myanmar] have rejected these claims, and the Rohingya were not included in the list of recognized ethnic groups. Most Rohingya are stateless" (United Nations, Situation of human rights of Rohingya Muslims and other minorities in Myanmar, doc. A/HRC/32/18, 29 June 2016, para. 3).

15. The Court's references in this Order to the "Rohingya" should be understood as references to the group that self-identifies as the Rohingya group and that claims a longstanding connection to Rakhine State, which forms part of the Union of Myanmar.

I. PRIMA FACIE JURISDICTION

1. General introduction

16. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, *inter alia*, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 630, para. 24).

17. In the present case, The Gambia seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention (see paragraph 3 above). The Court must therefore first determine whether those provisions prima facie confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

18. Article IX of Genocide Convention provides:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

19. The Gambia and Myanmar are parties to the Genocide Convention. Myanmar deposited its instrument of ratification on 14 March 1956, without entering a reservation to Article IX, but making reservations to Articles VI and VIII. The Gambia acceded to the Convention on 29 December 1978, without entering any reservation.

2. Existence of a dispute relating to the interpretation, application or fulfilment of the Genocide Convention

20. Article IX of the Genocide Convention makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation, application or fulfilment of the Convention. A dispute between States exists where they hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations (see *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 115, para. 22, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). The claim of one party must be "positively opposed" by the other (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The Court cannot limit itself to noting that one of the parties maintains that a dispute exists, and the other denies it (cf. *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16). Since The Gambia has invoked as a basis of the Court's jurisdiction the compromissory clause in an international convention, the Court must ascertain whether the acts complained of by the Applicant are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1159, para. 47). The Court also recalls that, "[i]n principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court" (see, for example, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 271, para. 39).

* *

21. The Gambia contends that a dispute exists with Myanmar relating to the interpretation and application of the Genocide Convention and the fulfilment by Myanmar of its obligations "to prevent genocide and to desist from its own acts of genocide". Specifically, The Gambia asserts that in October 2016 the Myanmar military and other Myanmar security forces began widespread and systematic "clearance operations" against the Rohingya group, during the course of which they committed mass murder, rape and other forms of sexual violence, and engaged in the systematic destruction by fire of Rohingya villages, often with inhabitants locked inside burning houses, with the intent to destroy the Rohingya as a group, in whole or in part. The Gambia alleges that, from August 2017 onwards, such genocidal acts continued with Myanmar's resumption of "clearance operations" on a more massive and wider geographical scale.

22. The Gambia maintains that, prior to filing its Application, it made clear to Myanmar that the latter's actions constituted a violation of its obligations under the Genocide Convention, but that Myanmar "has rejected and opposed any suggestion that it has violated the Genocide Convention". In this connection, The Gambia argues that it has made several statements

in multilateral settings whereby it clearly addressed the situation of the Rohingya in Rakhine State, including allegations of breaches by Myanmar of the Genocide Convention, and expressed its readiness to take this issue to the Court. The Gambia adds that Myanmar was aware that the Independent International Fact-Finding Mission on Myanmar established by the Human Rights Council of the United Nations (hereinafter the "Fact-Finding Mission") welcomed the efforts of States, in particular Bangladesh and The Gambia, and the Organisation of Islamic Cooperation (hereinafter the "OIC") "to encourage and pursue a case against Myanmar before the International Court of Justice under the Convention on the Prevention and Punishment of the Crime of Genocide" (United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/42/50, 8 August 2019, para. 107). According to The Gambia, Myanmar completely rejected the Fact-Finding Mission reports and the conclusions contained therein. Finally, The Gambia emphasizes that its claims against Myanmar regarding breaches by the latter of its obligations under the Genocide Convention were specifically communicated to Myanmar by a Note Verbale sent on 11 October 2019, to which Myanmar did not respond.

*

23. Myanmar contends that the Court does not have jurisdiction under Article IX of the Genocide Convention. It first argues that there is no dispute between the Parties in view of the fact that the proceedings before the Court were instituted by The Gambia, not on its own behalf, but rather as a "proxy" and "on behalf of" the OIC. It further argues that no such dispute existed at the time of the filing of the Application. In this regard, Myanmar asserts that the allegations contained in the OIC documents and statements regarding the situation of the Rohingya mentioned by The Gambia could not give rise to a dispute between the Parties as they did not amount to allegations of violations of the Genocide Convention made by The Gambia against Myanmar. It also contends that the Court cannot infer the existence of a dispute between the Parties from The Gambia's Note Verbale of 11 October 2019 and the absence of any response by Myanmar before the filing of the Application on 11 November 2019. In Myanmar's opinion, the Note Verbale in question did not call for a response as it did not formulate specific allegations of violations of the Convention, and, in any event, such a response could not be expected within a month.

24. Myanmar concludes that, in the absence of a dispute, the Court's lack of jurisdiction is manifest and the case should be removed from the General List.

* *

25. With regard to Myanmar's contention that, in bringing before the Court its claims based on alleged violations of the Genocide Convention, The Gambia acted as a "proxy" for the OIC in circumvention of Article 34 of the Statute, the Court notes that the Applicant instituted proceedings

in its own name, and that it maintains that it has a dispute with Myanmar regarding its own rights under the Convention. In the view of the Court, the fact that The Gambia may have sought and obtained the support of other States or international organizations in its endeavour to seise the Court does not preclude the existence between the Parties of a dispute relating to the Genocide Convention.

26. Turning to the question whether there was a dispute between the Parties at the time of the filing of the Application, the Court recalls that, for the purposes of deciding this issue, it takes into account in particular any statements or documents exchanged between the Parties (see *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 443-445, paras. 50-55), as well as any exchanges made in multilateral settings (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 94, para. 51 and p. 95, para. 53). In so doing, it pays special attention to "the author of the statement or document, their intended or actual addressee, and their content" (*ibid.*, p. 100, para. 63). The existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 270, paras. 35-36).

27. The Court notes that, on 8 August 2019, the Fact-Finding Mission published a report which affirmed its previous conclusion "that Myanmar incurs State responsibility under the prohibition against genocide" and welcomed the efforts of The Gambia, Bangladesh and the OIC to pursue a case against Myanmar before the Court under the Genocide Convention (United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/42/50, 8 August 2019, paras. 18 and 107). On 26 September 2019, The Gambia stated during the general debate of the seventy-fourth session of the General Assembly of the United Nations that it was ready to lead concerted efforts to take the Rohingya issue to the International Court of Justice (United Nations, *Official Records of the General Assembly*, doc. A/74/PV.8, 26 September 2019, p. 31). Myanmar addressed the General Assembly two days later, characterizing the Fact-Finding Mission reports as "biased and flawed, based not on facts but on narratives" (United Nations, *Official Records of the General Assembly*, doc. A/74/PV.12, 28 September 2019, p. 24). In the Court's view, these statements made by the Parties before the United Nations General Assembly suggest the existence of a divergence of views concerning the events which allegedly took place in Rakhine State in relation to the Rohingya. In this regard, the Court recalls that

> "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis* . . . the position or the attitude of a party can be established by inference, whatever the professed view of that party" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89).

28. In addition, the Court takes into account The Gambia's Note Verbale of 11 October 2019, in which The Gambia, referring to the reports of the Fact-Finding Mission, wrote that it "underst[ood] Myanmar to be in ongoing breach of [its] obligations under the [Genocide] Convention and under customary international law" and "insist[ed] that Myanmar take all necessary actions to comply with these obligations". The Court observes that this Note Verbale specifically referred to the reports of the Fact-Finding Mission and indicated The Gambia's opposition to the views of Myanmar, in particular as regards the latter's denial of its responsibility under the Convention. In light of the gravity of the allegations made therein, the Court considers that the lack of response may be another indication of the existence of a dispute between the Parties. As the Court has previously held, "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 271, para. 37).

29. As to whether the acts complained of by the Applicant are capable of falling within the provisions of the Genocide Convention, the Court recalls that The Gambia contends that Myanmar's military and security forces and persons or entities acting on its instructions or under its direction and control have been responsible, *inter alia*, for killings, rape and other forms of sexual violence, torture, beatings, cruel treatment, and for the destruction or denial of access to food, shelter and other essentials of life, all with the intent to destroy the Rohingya group, in whole or in part. In The Gambia's view, these acts are all attributable to Myanmar, which it considers to be responsible for committing genocide. The Gambia contends that Myanmar has also violated other obligations under the Genocide Convention, "including by attempting to commit genocide; conspiring to commit genocide; inciting genocide; complicity in genocide; and failing to prevent and punish genocide". The Court notes that Myanmar, for its part, denied that it has committed any of the violations of the Genocide Convention alleged by The Gambia, arguing in particular the absence of any genocidal intent.

30. For the purposes of the present proceedings, the Court is not required to ascertain whether any violations of Myanmar's obligations under the Genocide Convention have occurred. Such a finding, which notably depends on the assessment of the existence of an intent to destroy, in whole or in part, the group of the Rohingya as such, could be made by the Court only at the stage of the examination of the merits of the present case. What the Court is required to do at the stage of making an order on provisional measures is to establish whether the acts complained of by The Gambia are capable of falling within the provisions of the Genocide Convention. In the Court's view, at least some of the acts alleged by The Gambia are capable of falling within the provisions of the Convention.

31. The Court finds therefore that the above-mentioned elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.

3. The reservation of Myanmar to Article VIII of the Convention

32. Myanmar further submits that The Gambia cannot validly seise the Court as a result of Myanmar's reservation to Article VIII of the Genocide Convention, which specifically deals with the right of any of the Contracting Parties to the Convention to seise any competent organ of the United Nations. According to the Respondent, this provision applies to the Court, being a competent organ of the United Nations. In its view, only this provision enables States parties not specially affected to bring a claim before the Court for alleged breaches of the Convention by another State party. Myanmar therefore submits that the valid seisin of the Court by The Gambia, on the basis of Article VIII, is a necessary precondition to the exercise of the Court's jurisdiction under Article IX of the Genocide Convention. In light of its reservation to Article VIII, Myanmar concludes that the Court should not assume jurisdiction in the present case.

*

33. The Gambia submits that Myanmar's argument based on its reservation to Article VIII of the Genocide Convention should be rejected as it would amount to depriving Article IX of any substance. In particular, the Applicant contends that the Respondent has not explained how its argument could be reconciled with Myanmar's consent to Article IX and to the Court's jurisdiction.

* *

34. The Court recalls that Myanmar has made a reservation to Article VIII of the Genocide Convention, which reads as follows: "With reference to article VIII, the Union of Burma makes the reservation that the said article shall not apply to the Union."

Article VIII of the Genocide Convention provides:

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

35. The Court considers that, although the terms "competent organs of the United Nations" under Article VIII are broad and may be interpreted as encompassing the Court within their scope of application, other terms used in Article VIII suggest a different interpretation. In particular, the Court notes that this provision only addresses in general terms the possibility for any Contracting Party to "call upon" the competent organs of the United Nations to take "action" which is "appropriate" for the prevention and suppression of acts of genocide. It does not refer to the submission of disputes between Contracting Parties to the Genocide Convention to the Court for

adjudication. This is a matter specifically addressed in Article IX of the Convention, to which Myanmar has not entered any reservation. Article VIII and Article IX of the Convention can therefore be said to have distinct areas of application. It is only Article IX of the Convention which is relevant to the seisin of the Court in the present case (cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 23, para. 47).

36. In view of the above, Myanmar's reservation to Article VIII of the Genocide Convention does not appear to deprive The Gambia of the possibility to seise the Court of a dispute with Myanmar under Article IX of the Convention.

4. Conclusion as to prima facie jurisdiction

37. In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article IX of the Genocide Convention to deal with the case.

38. Given the above conclusion, the Court considers that it cannot accede to Myanmar's request that the case be removed from the General List for manifest lack of jurisdiction.

II. Question of the standing of The Gambia

39. Myanmar accepts that, because of the *erga omnes partes* character of some obligations under the Convention, The Gambia has an interest in Myanmar's compliance with such obligations. It disputes, however, that The Gambia has the capacity to bring a case before the Court in relation to Myanmar's alleged breaches of the Genocide Convention without being specially affected by such alleged violations. Myanmar argues that "it is the right of an injured State to decide if, and eventually how, to invoke the responsibility of another State, and that the right of non-injured States to invoke such responsibility is subsidiary". The Respondent submits that Bangladesh, as the State being specially affected by the events forming the subject-matter of the Application, would be the State entitled to invoke the responsibility of Myanmar, but that Bangladesh is prevented from doing so in light of its declaration made with regard to Article IX of the Genocide Convention.

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40. The Gambia contends that, since the obligations under the Genocide Convention are obligations *erga omnes partes*, any State party to the Genocide Convention is entitled to invoke the responsibility of another State party for the breach of its obligations, without having to prove a special interest. The Gambia argues that the fact of being party to a treaty imposing obligations *erga omnes partes* suffices to establish its legal interest and legal standing before the Court. In this regard, it refers to the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, in which the Court recognized the capacity of Belgium to bring a

claim before the Court in relation to alleged breaches of *erga omnes partes* obligations by Senegal under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the "Convention against Torture"), without determining whether Belgium had been specially affected by those breaches. The Gambia also submits that if a special interest were required with respect to alleged breaches of obligations *erga omnes partes*, in many cases no State would be in a position to make a claim against the perpetrator of the wrongful act.

* *

41. The Court recalls that in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it observed that

> "[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions." (*I.C.J. Reports 1951*, p. 23.)

In view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. In its Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, the Court observed that the relevant provisions in the Convention against Torture were "similar" to those in the Genocide Convention. The Court held that these provisions generated "obligations [which] may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case" (*Judgment, I.C.J. Reports 2012 (II)*, p. 449, para. 68). It follows that any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end.

42. The Court concludes that The Gambia has prima facie standing to submit to it the dispute with Myanmar on the basis of alleged violations of obligations under the Genocide Convention.

III. The rights whose protection is sought and the link between such rights and the measures requested

43. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such

measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, pp. 421-422, para. 43).

44. At this stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights which The Gambia wishes to see protected exist; it need only decide whether the rights claimed by The Gambia on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*ibid.*, para. 44).

* *

45. In its Application, The Gambia states that it seeks to assert the rights of "all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Genocide Convention", including the "rights of the Rohingya group to exist as a group", to be protected from acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide, in accordance with Article III of the Convention. The Gambia adds that it "also seeks to protect the *erga omnes partes* rights it has under the Convention, which mirror the *erga omnes* obligations of the Convention with which it is entitled to seek compliance".

46. The Gambia contends that, for the purposes of the indication of provisional measures, the rights it asserts in the present case are plausible, and that their protection coincides with the very object and purpose of the Convention. The Gambia affirms that, based on the evidence and material placed before the Court, the acts of which it complains are capable of being characterized at least plausibly as genocidal. The Applicant maintains that the evidence of the specific genocidal intent *(dolus specialis)* can be deduced from the pattern of conduct against the Rohingya in Myanmar and refers, in this regard, to the inference of such intent drawn by the Fact-Finding Mission in its reports. In The Gambia's view, the Court should not be required, before granting provisional measures, to ascertain whether the existence of a genocidal intent is the only plausible inference to be drawn in the given circumstances from the material put before it, a requirement which would amount to making a determination on the merits. In this regard, the fact that some of the alleged acts may also be characterized as crimes other than genocide would not be inconsistent with and should not exclude the plausible inference of the existence of the said genocidal intent.

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47. Myanmar does not specifically address the question whether, for the purposes of the indication of provisional measures, the rights asserted by The Gambia are at least plausible. The Respondent rather contends that the Court should indicate provisional measures only if the claims put forward by The Gambia, based on the facts alleged in its Application, are plausible. Myanmar argues that, for that purpose, a "plausible claim" under the Genocide Convention must include evidence of the required specific genocidal intent. For Myanmar, "it is this subjective intent that is the critical element distinguishing genocide from other violations of international law such as crimes against humanity and war crimes". Myanmar maintains that the Court should take into account the exceptional gravity of the alleged violations in assessing whether the required level of plausibility is met. It submits that the Court should therefore determine whether it is plausible that the existence of a genocidal intent is the only inference that can be drawn from the acts alleged and the evidence submitted by the Applicant. In this respect, the Respondent explains that if the information and the materials invoked in support of the Application may provide evidence indicating alternative inferences that can be drawn from the alleged conduct, other than an inference of a genocidal intent, the Court should conclude that the claims are not plausible.

48. On that basis, Myanmar states that, in the present case, the Applicant has not provided sufficient and reliable evidence to establish that the acts complained of were plausibly committed with the required specific genocidal intent. The Respondent argues that alternative inferences, other than a genocidal intent to destroy, in whole or in part, the Rohingya group as such, may be drawn from the alleged conduct of Myanmar vis-à-vis the Rohingya.

* *

49. The Court observes that, in accordance with Article I of the Convention, all States parties thereto have undertaken "to prevent and to punish" the crime of genocide. Article II provides that

> "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> *(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."

50. Pursuant to Article III of the Genocide Convention, the commission of the following acts, other than genocide itself, are also prohibited by the Convention: conspiracy to commit genocide (Article III, para. *(b)*), direct and public incitement to commit genocide (Article III, para. *(c)*), attempt to commit genocide (Article III, para. *(d)*) and complicity in genocide (Article III, para. *(e)*).

51. The obligation to prevent and punish genocide set out in Article I of the Convention is supplemented by the distinct obligations which appear in the subsequent articles, especially those in Articles V and VI requiring the enactment of the necessary legislation to give effect to the provisions of the Convention, as well as the prosecution of persons charged with such acts. In so far as these provisions concerning the duty to punish also have a deterrent and therefore a preventive effect or purpose, they too meet the obligation to prevent genocide (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 109, para. 159 and p. 219, para. 426).

52. The Court further observes that the provisions of the Convention are intended to protect the members of a national, ethnical, racial or religious group from acts of genocide or any other punishable acts enumerated in Article III. The Court also considers that there is a correlation between the rights of members of groups protected under the Genocide Convention, the obligations incumbent on States parties thereto, and the right of any State party to seek compliance therewith by another State party (cf. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 426, para. 51). In the Court's view, the Rohingya in Myanmar appear to constitute a protected group within the meaning of Article II of the Genocide Convention.

53. In the present case, the Court notes that, at the hearings, Myanmar, referring to what it characterizes as "clearance operations" carried out in Rakhine State in 2017, stated that

> "it cannot be ruled out that disproportionate force was used by members of the Defence Services in some cases in disregard of international humanitarian law, or that they did not distinguish clearly enough between [Arakan Rohingya Salvation Army] fighters and civilians",

and that

> "[t]here may also have been failures to prevent civilians from looting or destroying property after fighting or in abandoned villages".

54. The Court also notes that the United Nations General Assembly, in its resolution 73/264 adopted on 22 December 2018, expressed

> "grave concern at the findings of the independent international fact-finding mission on Myanmar that there [was] sufficient information to warrant investigation and prosecution so that a competent court may determine liability for genocide in relation

> to the situation in Rakhine State, that crimes against humanity and war crimes have been committed in Kachin, Rakhine and Shan States, including murder, imprisonment, enforced disappearance, torture, rape, sexual slavery and other forms of sexual violence, persecution and enslavement, that children were subjected to and witnessed serious human rights violations, including killing, maiming and sexual violence, that there are reasonable grounds to conclude that serious crimes under international law have been committed that warrant criminal investigation and prosecution and that the military has consistently failed to respect international human rights law and international humanitarian law".

By the same resolution, the General Assembly condemned

> "all violations and abuses of human rights in Myanmar, as set out in the report of the fact-finding mission, including the widespread, systematic and gross human rights violations and abuses committed in Rakhine State, including the presence of elements of extermination and deportation and the systematic oppression and discrimination that the fact-finding mission concluded may amount to persecution and to the crime of apartheid".

It also

> "strongly condemn[ed] the grossly disproportionate response of the military and the security forces, deplore[d] the serious deterioration of the security, human rights and humanitarian situation and the exodus of more than 723,000 Rohingya Muslims and other minorities to Bangladesh and the subsequent depopulation of northern Rakhine State, and call[ed] upon the Myanmar authorities to ensure that those responsible for violations of international law, including human rights violations and abuses, are held accountable and removed from positions of power" (United Nations, doc. A/RES/73/264, 22 December 2018, paras. 1-2).

55. In this connection, the Court recalls that the Fact-Finding Mission, to which the General Assembly refers in its above-mentioned resolution, stated, in its report of 12 September 2018, that it had "reasonable grounds to conclude that serious crimes under international law ha[d] been committed that warrant[ed] criminal investigation and prosecution", including the crime of genocide, against the Rohingya in Myanmar (United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/39/64, 12 September 2018, paras. 83 and 84-87). The Court notes that, regarding the acts perpetrated against the Rohingya in Rakhine State, the Fact-Finding Mission, in its 2018 detailed findings, observed that

> "[t]he actions of those who orchestrated the attacks on the Rohingya read as a veritable check-list: the systematic stripping of human rights, the dehumanizing narratives and rhetoric, the methodical planning, mass killing, mass displacement, mass fear, overwhelming levels of brutality, combined with the physical destruction of the home of the targeted population, in every sense and on every level" (United Nations, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/39/CRP.2, 17 September 2018, para. 1440).

The Fact-Finding Mission concluded that "on reasonable grounds . . . the factors allowing the inference of genocidal intent [were] present" (United Nations, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/39/CRP.2, 17 September 2018, para. 1441). The Fact-Finding Mission reiterated its conclusions, based on further investigations, in its report of 8 August 2019 (United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/42/50, 8 August 2019, para. 18). The Court further notes that the Fact-Finding Mission, in its 2018 detailed findings, also asserted, based on its overall assessment of the situation in Myanmar since 2011, and particularly in Rakhine State, that the extreme levels of violence perpetrated against the Rohingya in 2016 and 2017 resulted from the "systemic oppression and persecution of the Rohingya", including the denial of their legal status, identity and citizenship, and followed the instigation of hatred against the Rohingya on ethnic, racial or religious grounds (United Nations, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/39/CRP.2, 17 September 2018, paras. 458-748). The Court also recalls that following the events which occurred in Rakhine State in 2016 and 2017, hundreds of thousands of Rohingya have fled to Bangladesh.

56. In view of the function of provisional measures, which is to protect the respective rights of either party pending its final decision, the Court does not consider that the exceptional gravity of the allegations is a decisive factor warranting, as argued by Myanmar, the determination, at the present stage of the proceedings, of the existence of a genocidal intent. In the Court's view, all the facts and circumstances mentioned above (see paragraphs 53-55) are sufficient to conclude that the rights claimed by The Gambia and for which it is seeking protection — namely the right of the Rohingya group in Myanmar and of its members to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of The Gambia to seek compliance by Myanmar with its obligations not to commit, and to prevent and punish genocide in accordance with the Convention — are plausible.

* *

57. The Court now turns to the issue of the link between the rights claimed and the provisional measures requested.

* *

58. The Gambia submits that the provisional measures it requests (see paragraph 12 above) are directly linked to the rights which form the subject-matter of the dispute. In particular, the Applicant asserts that the first two provisional measures have been requested to ensure Myanmar's compliance with its obligation to prevent genocide and to uphold the rights of The Gambia to protect the Rohingya group against total or partial destruction, and that the four other provisional measures requested are aimed at protecting the integrity of the proceedings before the Court and The Gambia's right to have its claim fairly adjudicated.

*

59. Myanmar does not dispute the link of the provisional measures requested with the rights under the Genocide Convention for which protection is sought by the Applicant, except with regard to the fifth and sixth provisional measures requested. The Respondent claims that these last two measures would go beyond the specific purpose of preserving the respective rights of the Parties pending a final decision by the Court. Furthermore, with regard to the sixth provisional measure, Myanmar argues that the indication of such a measure would circumvent Myanmar's reservation to Article VIII of the Genocide Convention.

* *

60. The Court has already found (see paragraph 56 above) that the rights asserted by The Gambia under the Genocide Convention are plausible.

61. The Court considers that, by their very nature, the first three provisional measures sought by The Gambia (see paragraph 12 above) are aimed at preserving the rights it asserts on the basis of the Genocide Convention in the present case, namely the right of the Rohingya group in Myanmar and of its members to be protected from acts of genocide and other acts mentioned in Article III, and the right of The Gambia to have Myanmar comply with its obligations under the Convention to prevent and punish acts identified and prohibited under Articles II and III of the Convention, including by ensuring the preservation of evidence. As to the fourth and fifth provisional measures requested by The Gambia, the question of their link with the rights for which The Gambia seeks protection does not arise, in so far as such measures would be directed at preventing any action which may aggravate or extend the existing dispute or render it more difficult to resolve, and at providing information on the compliance by the Parties with any specific provisional measure indicated by the Court.

62. As to the sixth provisional measure requested by The Gambia, the Court does not consider that its indication is necessary in the circumstances of the case.

63. The Court concludes, therefore, that a link exists between the rights claimed and some of the provisional measures being requested by The Gambia.

IV. Risk of irreparable prejudice and urgency

64. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences (*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 645, para. 77).

65. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision. The condition of urgency is met when the acts

susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case. The Court must therefore consider whether such a risk exists at this stage of the proceedings (*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, pp. 645-646, para. 78).

66. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of the Genocide Convention, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures.

* *

67. The Gambia contends that there is a risk of irreparable prejudice to the rights of the Rohingya and to its own rights under the Genocide Convention, as well as urgency. According to The Gambia, not only have the Rohingya been subjected to genocidal acts in the recent past, but there is a grave danger of further such acts because the Government of Myanmar continues to harbour genocidal intent and to commit crimes against members of the Rohingya group. The Gambia thus argues that the Rohingya remaining in Myanmar face grave threats to their existence, placing them in urgent need of protection.

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68. Myanmar denies that there exists a real and imminent risk of irreparable prejudice in the present case. Myanmar first asserts that it is currently engaged in repatriation initiatives for the return of displaced Rohingya presently in Bangladesh, with the support of international actors, whose support would not be forthcoming if there was an imminent or ongoing risk of genocide. Myanmar also argues that it is engaged in a range of initiatives aimed at bringing stability to Rakhine State, protecting those who are there or who will return there, and holding accountable those responsible for past violence — actions which are inconsistent with it allegedly harbouring genocidal intent. Finally, Myanmar stresses the challenges it is facing, *inter alia*, in ending an ongoing "internal armed conflict" with the Arakan Army in Rakhine State. It submits that the indication of provisional measures by the Court might reignite the 2016-2017 "internal armed conflict" with the Arakan Rohingya Salvation Army, and undermine its current efforts towards reconciliation.

* *

69. The Court recalls that, as underlined in General Assembly resolution 96 (I) of 11 December 1946,

> "[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations".

The Court has observed, in particular, that the Genocide Convention "was manifestly adopted for a purely humanitarian and civilizing purpose", since "its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23).

70. In view of the fundamental values sought to be protected by the Genocide Convention, the Court considers that the rights in question in these proceedings, in particular the right of the Rohingya group in Myanmar and of its members to be protected from killings and other acts threatening their existence as a group, are of such a nature that prejudice to them is capable of causing irreparable harm.

71. The Court notes that the reports of the Fact-Finding Mission (see paragraph 55 above) have indicated that, since October 2016, the Rohingya in Myanmar have been subjected to acts which are capable of affecting their right of existence as a protected group under the Genocide Convention, such as mass killings, widespread rape and other forms of sexual violence, as well as beatings, the destruction of villages and homes, denial of access to food, shelter and other essentials of life. As indicated in resolution 74/246 adopted by the General Assembly on 27 December 2019, this has caused almost 744,000 Rohingya to flee their homes and take refuge in neighbouring Bangladesh (United Nations, doc. A/RES/74/246, 27 December 2019, preambular para. 25). According to the 2019 detailed findings of the Fact-Finding Mission, approximately 600,000 Rohingya remained in Rakhine State as of September 2019 (United Nations, Detailed findings of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/42/CRP.5, 16 September 2019, paras. 4, 57, 107, 120, 158 and 212).

72. The Court is of the opinion that the Rohingya in Myanmar remain extremely vulnerable. In this respect, the Court notes that in its resolution 74/246 of 27 December 2019, the General Assembly reiterated

> "its grave concern that, in spite of the fact that Rohingya Muslims lived in Myanmar for generations prior to the independence of Myanmar, they were made stateless by the enactment of the 1982 Citizenship Law and were eventually disenfranchised, in 2015, from the electoral process" (United Nations, doc. A/RES/74/246, 27 December 2019, preambular para. 14).

The Court further takes note of the detailed findings of the Fact-Finding Mission on Myanmar submitted to the Human Rights Council in September 2019, which refer to the risk of violations of the Genocide Convention, and in which it is "conclude[d] on reasonable grounds that the Rohingya people remain at serious risk of genocide under the terms of the Genocide Convention" (United Nations, Detailed findings of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/42/CRP.5, 16 September 2019, para. 242; see also paras. 58, 240 and 667).

73. The Court takes note of the statement of Myanmar during the oral proceedings that it is currently engaged in repatriation initiatives to facilitate the return of Rohingya refugees present in Bangladesh and that it intends to promote ethnic reconciliation, peace and stability in Rakhine State, and to make its military accountable for violations of international humanitarian and human rights law. In the view of the Court, however, these steps do not appear sufficient in themselves to remove the possibility that acts causing irreparable prejudice to the rights invoked by The Gambia for the protection of the Rohingya in Myanmar could occur. In particular, the Court notes that Myanmar has not presented to the Court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention. Moreover, the Court cannot ignore that the General Assembly has, as recently as on 27 December 2019, expressed its regret that "the situation has not improved in Rakhine State to create the conditions necessary for refugees and other forcibly displaced persons to return to their places of origin voluntarily, safely and with dignity" (United Nations, doc. A/RES/74/246, 27 December 2019, preambular para. 20). At the same time the General Assembly reiterated

> "its deep distress at reports that unarmed individuals in Rakhine State have been and continue to be subjected to the excessive use of force and violations of human rights and international humanitarian law by the military and security and armed forces, including extrajudicial, summary or arbitrary killings, systematic rape and other forms of sexual and gender-based violence, arbitrary detention, enforced disappearance and government seizure of Rohingya lands from which Rohingya Muslims were evicted and their homes destroyed" (*ibid.*, preambular para. 16).

74. Finally, the Court observes that, irrespective of the situation that the Myanmar Government is facing in Rakhine State, including the fact that there may be an ongoing internal conflict between armed groups and the Myanmar military and that security measures are in place, Myanmar remains under the obligations incumbent upon it as a State party to the Genocide Convention. The Court recalls that, in accordance with the terms of Article I of the Convention, States parties expressly confirmed their willingness to consider genocide as a crime under international law which they must prevent and punish independently of the context "of peace" or "of war" in which it takes place (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 615, para. 31). The context invoked by Myanmar does not stand in the way of the Court's assessment of the existence of a real and imminent risk of irreparable prejudice to the rights protected under the Convention.

75. In light of the considerations set out above, the Court finds that there is a real and imminent risk of irreparable prejudice to the rights invoked by The Gambia, as specified by the Court (see paragraph 56 above).

V. Conclusion and measures to be adopted

76. From all of the above considerations, the Court concludes that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by The Gambia, as identified above (see paragraph 56).

77. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power in the past (see, for example, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 651, para. 96).

78. In the present case, having considered the terms of the provisional measures requested by The Gambia and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

79. Bearing in mind Myanmar's duty to comply with its obligations under the Genocide Convention, the Court considers that, with regard to the situation described above, Myanmar must, in accordance with its obligations under the Convention, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of the Convention, in particular: *(a)* killing members of the group; *(b)* causing serious bodily or mental harm to the 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; and *(d)* imposing measures intended to prevent births within the group.

80. Myanmar must also, in relation to the members of the Rohingya group in its territory, ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit acts of genocide, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide.

81. The Court is also of the view that Myanmar must take effective measures to prevent the destruction and ensure the preservation of any evidence related to allegations of acts within the scope of Article II of the Genocide Convention.

82. Regarding the provisional measure requested by The Gambia that each Party shall provide a report to the Court on all measures taken to give effect to its Order, the Court recalls that it has the power, reflected in Article 78 of the Rules of Court, to request the parties to provide information on any matter connected with the implementation of any provisional measures it has indicated. In view of the specific provisional measures it has decided to indicate, the Court considers that Myanmar must submit a report to the Court on all measures taken to give effect to

this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court. Every report so provided shall then be communicated to The Gambia which shall be given the opportunity to submit to the Court its comments thereon.

83. The Gambia has further requested the Court to indicate measures aimed at ensuring the non-aggravation of the dispute with Myanmar. In this respect, the Court recalls that when it is indicating provisional measures for the purpose of preserving specific rights, it also possesses the power to indicate additional provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require (see *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, pp. 551-552, para. 59). However, in the circumstances of the present case, and in view of the specific provisional measures it has decided to take, the Court does not deem it necessary to indicate an additional measure relating to the non-aggravation of the dispute between the Parties.

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84. The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

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* *

85. The Court further reaffirms that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of The Gambia and Myanmar to submit arguments and evidence in respect of those questions.

*

* *

86. For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) Unanimously,

The Republic of the Union of Myanmar shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:

(a) killing members of the group;

(b) causing serious bodily or mental harm to the 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; and

(d) imposing measures intended to prevent births within the group;

(2) Unanimously,

The Republic of the Union of Myanmar shall, in relation to the members of the Rohingya group in its territory, ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in point (1) above, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide;

(3) Unanimously,

The Republic of the Union of Myanmar shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide;

(4) Unanimously,

The Republic of the Union of Myanmar shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-third day of January, two thousand and twenty, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of The Gambia and the Government of the Republic of the Union of Myanmar, respectively.

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Philippe GAUTIER,
Registrar.

Vice-President XUE appends a separate opinion to the Order of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court; Judge *ad hoc* KRESS appends a declaration to the Order of the Court.

(Initialled) A.A.Y.

(Initialled) Ph.G.

SEPARATE OPINION OF VICE-PRESIDENT XUE

1. I voted in favour of the operative paragraph of the Order, however, with reservations to some of the reasoning. Given the importance of the issues involved, even at the present stage of the proceedings, I feel obliged to put on record my separate opinion.

2. First of all, I have serious reservations with regard to the plausibility of the present case under the Genocide Convention. For the genocide offence to be distinguished from other most serious international crimes, e.g. crimes against humanity, war crimes, genocidal intent constitutes a decisive element. Even accepting that, for the purpose of indication of provisional measures, a determination of the existence of such intent is not necessarily required, the alleged acts and the relevant circumstances should, prima facie, demonstrate that the nature and extent of the alleged acts have reached the level where a pattern of conduct might be considered as genocidal conduct. In other words, there should be a minimum standard to be applied at this early stage. In order to found the jurisdiction of the Court under Article IX of the Genocide Convention to indicate provisional measures, the Court has to determine, prima facie, that the subject-matter of the dispute between the Parties could possibly concern genocide.

3. The evidence and documents submitted to the Court in the present case, while displaying an appalling situation of human rights violations, present a case of a protracted problem of ill-treatment of ethnic minorities in Myanmar rather than of genocide. This can be observed from the official statements of the Government of Bangladesh, whose interest was specially affected by this crisis (see statements by the Foreign Minister of Bangladesh, Observations of the Republic of The Gambia, Annexes 8, 10; press releases of the Ministry of Foreign Affairs of Bangladesh, Observations of the Republic of The Gambia, Annexes 7, 9, 11, 12). From these statements one can tell that the cross-border displacements of hundreds of thousands of Myanmar residents, mostly the Rohingya, after the "clearance operations" in 2016 and 2017, have brought the issue of ethnic minorities to a breaking point. The gravity of the matter, nevertheless, does not change the nature of its subject, namely, the issue of national reconciliation and equality of ethnic minorities in Myanmar. Bangladesh's position to seek "a durable solution" to this protracted problem in close co-operation with the Myanmar Government indicates that the particular circumstances from which the present case has arisen could not possibly suggest a case of genocide.

4. On the question of the standing of The Gambia, first of all, I am of the opinion that the Court's reliance on *Belgium* v. *Senegal* to establish The Gambia's standing in the present case is flawed. I will not repeat my dissenting opinion to the Court's statement in that case relating to the common interest, but only wish to emphasize that the facts of the present case are entirely different from those in *Belgium* v. *Senegal*. In that case, Belgium acted, pursuant to Article 7 of the Convention against Torture, as a requesting State for legal assistance and extradition from Senegal. It instituted the case against Senegal in the Court not because it merely had an interest as shared by all the States parties in the compliance of the Convention against Torture, but because it was specially affected by Senegal's alleged non-fulfilment of its obligation *aut dedere aut judicare* under Article 7 of the Convention, as its national courts were seised with lawsuits against Mr. Hissène Habré for allegations of torture. In other words, it was supposedly an injured State under the rules of State responsibility.

5. In *Belgium* v. *Senegal*, the Court stated that

> "[t]he common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* . . . and to bring that failure to an end." (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 450, para. 69.)

This interpretation of the Convention against Torture, in my view, drifts away from the rules of treaty law. I doubt that, on the basis of public international law and practice as it stands today, one can easily draw such a sweeping conclusion; it is one thing for each State party to the Convention against Torture to have an interest in compliance with the obligations *erga omnes partes* thereunder, and it is quite another to allow any State party to institute proceedings in the Court against another State party without any qualification on jurisdiction and admissibility. The same consideration equally applies to the Genocide Convention, or any of the other human rights treaties.

6. Lofty as it is, the *raison d'être* of the Genocide Convention, as illustrated by the Court in its Advisory Opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, does not, in and by itself, afford each State party a jurisdictional basis and the legal standing before the Court. Otherwise, it cannot be explained why reservation to the jurisdiction of the Court under Article IX of the Convention is permitted under international law. Those States which have made a reservation to Article IX are equally committed to the *raison d'être* of the Genocide Convention. The fact that recourse to the Court cannot be used either by or against them in no way means that they do not share the common interest in the accomplishment of the high purposes of the Convention. To what extent a State party may act on behalf of the States parties for the common interest by instituting proceedings in the Court bears on international relations, as well as on the structure of international law.

7. Moreover, resort to the Court is not the only way to protect the common interest of the States parties in the accomplishment of the high purposes of the Convention. Under Article VIII, any State party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III. As a matter of fact, United Nations organs, including the General Assembly, the Human Rights Council and the Office of the United Nations High Commissioner for Human Rights, all stand ready, and indeed, are being involved in the current case to see to it that acts prohibited by the Genocide Convention be prevented and, should they have occurred, perpetrators be brought to justice. In this regard, the national legal system of criminal justice of the State concerned bears the primary responsibility.

8. What Myanmar argued on this point reflects the existing rules of international law, *lex lata*, on State responsibility as codified by the International Law Commission (hereinafter the "ILC"). That is to say, under the rules of State responsibility, it is the injured State, which is specially affected by the alleged violations, that has the standing to invoke the responsibility of

another State in the Court. The position taken by the Court in this Order, albeit provisional, would put to a test Article 48 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts. How far this unintended interpretation of the Convention can go in practice remains to be seen, as its repercussions on general international law and State practice would likely extend far beyond this particular case.

9. Notwithstanding my above reservations, I agree with the indication of the provisional measures for the following considerations. First, the two reports of the Independent International Fact-Finding Mission on Myanmar established by the Human Rights Council of the United Nations, issued in 2018 and 2019 respectively, reveal, even prima facie, that there were serious violations of human rights and international humanitarian law against the Rohingya and other ethnic minorities in Rakhine State of Myanmar, particularly during the "clearance operations" carried out in 2016 and 2017. Although at this stage, the Court could not, and rightly need not, ascertain the facts, the weight of the said reports cannot be ignored. In other words, the human rights situation in Myanmar deserves serious attention from the Court. Considering the gravity and scale of the alleged offences, measures to ensure that Myanmar, as a State party to the Genocide Convention, observe its international obligations under the Convention, especially the obligation to prevent genocide, should not be deemed unwarranted under the circumstances.

10. Secondly, during the oral proceedings, Myanmar acknowledged that during their military operations, there may have been excessive use of force and violations of human rights and international humanitarian law in Rakhine State and there may also have been failures to prevent civilians from looting or destroying property after fighting or in abandoned villages. Whether any criminal offences were committed during that period, and if so, what offences were committed, have to be determined in the course of criminal justice process and, whether such acts constitute breaches of the Genocide Convention in the present case is a matter that should be dealt with on the merits, if the case proceeds to that stage. However, as internal armed conflicts in Rakhine State may erupt again, the provisional measures as indicated by the Court would, in my view, enhance the control of the situation.

11. Lastly, it is apparent that the Rohingya as a group remain vulnerable under the present conditions. With more than 740,000 people displaced from their homeland, the situation demands preventive measures.

12. In light of the foregoing considerations, I concur with the indication of the provisional measures. As the Court reaffirms in the Order, "the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves" (Order, paragraph 85). The issues I have raised in this opinion should be further considered in due course.

(Signed) XUE Hanqin.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

Table of Contents

I. *PROLEGOMENA*: SOME INTRODUCTORY CONSIDERATIONS IN HISTORICAL PERSPECTIVE.

1. I have voted in support of the present Order of Provisional Measures of Protection, in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Gambia *versus* Myanmar), which has just been adopted by the International Court of Justice (ICJ), significantly by unanimity. The provisional measures just ordered are intended to bring the necessary protection to human beings who have been suffering for a long time in a situation of extreme vulnerability.

2. Once again, in the *cas d'espèce*, the ICJ is seized of a case on the basis of the 1948 Convention against Genocide. Looking back in time, when the Convention was adopted, on 09.12.1948, on the eve of the adoption of the Universal Declaration of Human Rights (on 10.12.1948), the ICJ, established in June 1945, was still in its initial years. Shortly afterwards, the ICJ was already called upon to pronounce on the matter, still in the very early years of its existence, when it delivered, on 28.05.1951, its Advisory Opinion on *Reservations to the Convention against Genocide*.

3.Several years passed until the ICJ became seized of successive contentious cases specifically on the basis of the Convention against Genocide, especially in respect of the victims of wars and of devastation in the Balkans in the last decade of the XXth. century (case of the *Application of the Convention against Genocide*, Bosnia-Herzegovina *versus* Serbia and Montenegro, Judgment of 26.02.2007; and case of the *Application of the Convention against Genocide*, Croatia *versus* Serbia, Judgment of 03.02.2015).

4. There have also been occasions in which the ICJ addressed the Convention against Genocide together with other U.N. Conventions (on Human Rights): this occurred, e.g., in the ICJ's Judgment of 03.02.2006 (on jurisdiction and admissibility) in the case of *Armed Activities in the Territory of Congo* (paras. 27 *et seq.*). In that decision, the ICJ acknowledged the universality of the Convention against Genocide and the importance of the principles underlying the Convention (para. 64); it referred to the norms contained in the substantive provisions of the Convention as being *jus cogens*, creating rights and obligations *erga omnes* (para. 64).

5. Yet, in that same Judgment, when the ICJ turned to its own jurisdiction, and pursued a voluntarist outlook, attentive to the consent of States (paras. 78, 125 and 127). This was unfortunate, as it deprived the Court to develop further its own reasoning in a matter of such importance. This is a point which I shall retake later (cf. parts V-VI, *infra*). In my own perception, human conscience stands above the will of States. In this understanding, I shall present my Separate Opinion, identifying, at first, the points to be examined in sequence.

6. They are the following ones: a) provisional measures of protection in ICJ cases under the Convention against Genocide; b) international fact-finding: relevant passages of U.N. Reports of the Independent International Fact-Finding Mission on Myanmar, and of the U.N. Special Rapporteur on Human Rights in Myanmar; c) provisional measures of protection and the imperative of overcoming the extreme vulnerability of victims, encompassing the legacy of the II World Conference on Human Rights (1993) in its attention to human vulnerability, and international case-law and the need of properly addressing human vulnerability; d) the great relevance of the safeguard of fundamental rights by provisional measures of protection, in the domain of *jus cogens*, under the Convention against Genocide and the corresponding customary international law. The way is then paved for the presentation of an epilogue.

II. Provisional Measures of Protection in ICJ Case under the Convention against Genocide.

7. The presence of the invocation of the *Convention against Genocide* before the ICJ, time and time again, discloses its great importance, given the timeless and most regrettable presence of violence and cruelty in human relations. Yet, the occasions have been rare when the ICJ has been called upon to decide on requests for provisional measures of protection on the basis of the Convention against Genocide (cases of Bosnia-Herzegovina *versus* Yugoslavia [Serbia and Montenegro] in 1993, and now of Gambia *versus* Myanmar), as I shall consider in sequence.

1. Provisional Measures in the First Case on the *Application of the Convention against Genocide.*

8. In the first case before the ICJ on the *Application of the Convention against Genocide*, following the original request for provisional measures by Bosnia-Herzegovina, the ICJ adopted its Order of 08.04.1993, and, following the second request for additional provisional measures, the ICJ adopted its Order of 13.09.1993. In the first Order, of 08.04.1993, the ICJ held that it has *prima facie* jurisdiction under Article IX of the Convention against Genocide, and can thus consider indicating provisional measures protecting rights under the Convention. It then stressed that, that under Article I of the Convention against Genocide, all States Parties have undertaken the duty to prevent and punish genocide as a crime under international law[1].

9. As there was a grave risk of acts of genocide being committed, the ICJ issued two provisional measures relating to the Convention against Genocide, whereby Yugoslavia should promptly: a) take all measures within its power to prevent the commission of the crime of genocide; and b) ensure that any military or organizations and persons under its control, direction or influence do not commit any acts of genocide, of conspiracy to commit genocide, of incitement to commit genocide, or of complicity in genocide (para. 52A). Moreover, the ICJ issued a more general provisional measure, whereby both Parties should take no action, and ensure that no action is taken, that may aggravate or extend the existing dispute, or make it more difficult to reach a solution (para. 52B).

10. Subsequently, in its Order of 13.09.1993, the ICJ found that the development of the situation in Bosnia-Herzegovina justified consideration of the second request; while Bosnia-Herzegovina attempted to expand the bases of the Court's *prima facie* jurisdiction beyond the Convention against Genocide, the ICJ once again held that its jurisdiction is based on Article IX of the Convention. It then proceeded to examine the new request keeping in mind the provisional measures of protection it had already ordered five months earlier.

11. The Court found that the ten additional provisional measures just requested by Bosnia-Herzegovina do not concern the protection of disputed rights which might form the basis of a judgment in the exercise of the Court's jurisdiction under Article IX of the Convention against Genocide. The ICJ reasserted that the two Parties were already under a clear obligation to do all in their power to prevent the commission of any acts of genocide (under the Convention itself), and, furthermore, to ensure that no action was taken to aggravate or extend the existing dispute (as it determined in the provisional measures indicated in its previous Order of 08.04.1993).

[1] Bosnia-Herzegovina and Yugoslavia had thus a clear duty to take all measures to prevent any acts of genocide (irrespective of whether any past acts were legally imputable to them).

12. As the ICJ was not satisfied with the situation as it remained, it found that it required, instead of additional measures, the prompt and effective compliance with the existing provisional measures indicated by its Order of 08.04.1993. In the same Order of 13.09.1993, the ICJ reiterated the undertaking to prevent and punish genocide contained in Article I of the Convention against Genocide, and the recognition thereunder that the crime of genocide, whether committed in time of peace or in time of war, "shocks the conscience of mankind", results in "great losses to humanity", and goes against "the spirit and aims of the United Nations", as promptly stated in General Assembly resolution 96 (I) of 11.12.1946 (paras. 50-51).

2. Provisional Measures in the Present Case on the *Application of the Convention against Genocide.*

13. The present case now before the ICJ, opposing Gambia to Myanmar, is a new occasion of requested provisional measures of protection before the ICJ, again concerning the *Application of the Convention against Genocide*. The Applicant State, as will be seen next (parts III and IV), refers to international fact-finding, comprising U.N. Mission's Reports (2018 and 2019) and Reports of the U.N. Special Rapporteur on Human Rights in Myanmar (2018 and 2019).

14. An account of their contents will pave the way for an examination of provisional measures of protection and the imperative of overcoming the extreme vulnerability of victims (part IV) in the present Separate Opinion. It is significant that the needed protection of persons and groups in extreme vulnerability is attracting the attention of the United Nations, by the work of its Human Rights Council *(infra)* as well as of the ICJ, in the present request of provisional measures of protection. This is, in my perception, a matter of great concern in the contemporary law of nations as a whole.

III. International Fact-Finding: Relevant Passages of U.N. Reports of the Independent International Fact-Finding Mission on Myanmar.

15. On 11.11.2019, Gambia has submitted an *Application* to the ICJ instituting proceedings against Myanmar concerning alleged violations of the 1948 Convention against Genocide, and requesting the indication of provisional measures of protection, in accordance with Article 41 of the ICJ Statute and Articles 73, 74, and 75 of the Rules of Court. In its *Application*, Gambia describes "a brutal and continuing campaign of sweeping genocidal acts and measures, imposed by Myanmar against members of the Rohingya group, intended to destroy the group in whole or in part", in violation of the Convention against Genocide (para. 114). Gambia, as a State Party to the Convention, submits that provisional measures are necessary to protect against further irreparable harm to the rights of the Rohingya group under the Convention (para. 115)[2].

16. The aforementioned *Application* by Gambia in the *cas d'espèce,* on alleged acts of genocide against the Rohingya people in Myanmar, includes references to: a) two reports by the Independent International Fact-Finding Mission on Myanmar, which provide evidence of intent of genocide against the Rohingya population in Myanmar; and b) three reports by the Special Rapporteur of the Human Rights Council on the Situation of Human Rights in Myanmar, which provide evidence of continuing discrimination and potential genocide against the Rohingya population in Myanmar. May I summarize the relevant passages of them.

[2] And cf. also paras. 113 *et seq.*

17. The Independent International Fact-Finding Mission on Myanmar was established by the U.N. Human Rights Council (resolution 34/22). The Mission found consistent patterns of grave violations of human rights in Kachin, Rakhine and Shan States in Myanmar, in addition to grave violations of International Humanitarian Law, including the deliberate targeting of civilians. The Mission further found that these violations were committed mainly by Myanmar security forces. The Mission also noted a pervasive situation of impunity at domestic level, as well as a lack of cooperation from the Government of Myanmar with the Mission, and recommended that the impetus for accountability must come from the international community.

18. Throughout its *Application Instituting Proceedings*, Gambia refers to reports (of 2018 and 2019) of the Independent International Fact-Finding Mission on Myanmar, stating that their findings are "especially significant" (para. 10). It refers primarily to two detailed reports on the findings of the Mission, namely, the "*Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*" (of 17.09.2018)[3] and the "*Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*" (of 16.09.2019)[4].

19. Gambia's *Application* refers, furthermore, to the condensed report presented to the U.N. Human Rights Council on 12.09.2018[5]. The aforementioned consolidated reports submitted to the U.N. Human Rights Council, of 12.09.2018[6] of 08.08.2019[7], in addition to the extensive "*Detailed Findings*" of 16.09.2019 (cf. *infra*), all cited by Gambia in its *Application*, contain passages deserving particular attention, which I proceed to summarize in sequence.

1. Mission's Report on Myanmar of 12.09.2018.

20. In considering allegations of grave violations of human rights, the 2018 U.N. Fact-Finding Mission Report focuses on three emblematic situations, namely: the crisis in Rakhine State; the hostilities in Kachin and Shan States; and the infringement on the exercise of fundamental freedoms and the issue of hate speech (para. 15). As to the crisis in Rakhine State, the Mission states that the Government of Myanmar has implemented policies and practices over decades which have steadily marginalized the Rohingya people, and led to their "extreme vulnerability", resulting in "a continuing situation of severe, systemic and institutionalized oppression from birth to death" (para. 20).

21. The Mission Report outlines as a cornerstone of this oppression of the Rohingya their lack of legal status (para. 21), their restrictions to food, health and education[8], disclosing "a looming catastrophe for decades" (para. 22). It then refers to "[o]ther discriminatory restrictions", such as those to freedom of movement, to marriage authorization, to reproduction, and to birth registration (para. 23).

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[3] *Application Instituting Proceedings*, paras. 10-12, and cf. n. (11), citing U.N. Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar* (17.09.2018), U.N. doc. A/HRC/39/CRP.2.

[4] *Application*, paras. 13-14, and cf. n. (21), citing U.N. Human Rights Council, *Detailed Findings of the Independent International Fact-Finding Mission on Myanmar* (16.09.2019), U.N. doc. A/HRC/42/CRP.5.

[5] *Application*, paras. 10 *et seq.* and n. (11); citing U.N. Human Rights Council, *Report…*, *op. cit. infra* n. (6).

[6] U.N. Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (12.09.2018), U.N. doc. A/HRC/39/64 [2018 Mission Report].

[7] U.N. Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (08.08.2019), U.N. doc. A/HRC/42/50 [2019 Mission Report].

[8] Their degree of malnutrition witnessed in northern Rakhine State being "alarming" (para. 23).

22. The Mission, moreover, addresses grave violations of human rights which took place during the outbreak of violence in 2012, as well as during the "clearance operations" of 2017 (paras. 24-54). In relation to Kachin and Shan States, the Report notes that similar patterns of conduct by security forces (Tatmadaw soldiers and others) were witnessed, including violations against ethnic and religious minorities committed with persecutory intent (paras. 55-70).

23. The Report further dwells upon the continuing systematic oppression of the Rohingya in Myanmar, with persisting violence and restrictive policies on the Rohingya (paras. 49-51), including unlawful killings and torture of civilians (against men, women and children — paras. 60 -61). Moreover, it also refers to the systematic appropriation of vacated Rohingya land (para. 50), sexual violence (para. 62), and forced labour (paras. 60-61 and 63-64).

24. The 2018 Mission Report further addresses hate speech, noting dehumanizing and stigmatizing language against the Rohingya and Muslims in general, used by extremist Buddhist groups, which has been condoned and mirrored by the Myanmar authorities themselves (para. 73). The 2018 Mission Report determines, as hallmarks of Tatmadaw operations (paras. 75-82), the following ones: a) the targeting of civilians (paras. 76-78); b) sexual violence as a recurrent feature (para. 79); c) exclusionary rhetoric and systematic discriminatory policies against the Rohingya (paras. 80-81); d) and impunity within the Tatmadaw and in Myanmar more generally (paras. 82, 95-98 and 100).

25. The Mission finds, on the basis of the information it has collected, that it has reasonable grounds to conclude that serious crimes under international law have been committed, considering separately genocide, crimes against humanity, and war crimes (paras. 83-89). As to genocide (paras. 84-87), the Report suggests that the crimes in Rakhine State and the manner whereby they were perpetrated are similar in nature, gravity and scope to facts which have allowed genocidal intent to be established in other contexts (paras. 85-86)[9].

26. Furthermore, the Mission states that the primary perpetrator of grave violations of human rights and of crimes under international law, in relation to the facts at issue, was the Tatmadaw, with the contribution of civilian authorities by way of inaction, denial of wrongdoing, blocking independent investigation, and destroying evidence (paras. 90-94)[10]. Successive paragraphs refer to evidence relating to alleged genocide against the Rohingya people.

27. The Report addresses the systematic oppression of the Rohingya through governmental policies implemented over decades, including restrictions on citizenship, freedom of movement, marriage authorization, reproduction, and birth registration (paras. 20-23). In devoting attention to the escalation of violence in 2012 (paras. 24-30), it singles out, in particular: a) the plan to instigate violence and amplify tensions through a campaign of hate and dehumanization of the Rohingya (para. 25); b) the complicity of Myanmar security forces through inaction or active participation in the violence against the Rohingya (para. 26); c) displacement, and restrictions on freedom of movement, on the right to education and on the right to vote (paras. 29-30).

[9] It concludes that there is sufficient information to warrant the investigation and prosecution of senior officials for genocide (para. 87).

[10] Cf., in relation to civilian authorities, para. 93.

28. The 2018 Mission Report then dwells upon the "clearance operations" conducted by Myanmar security forces against the Rohingya in 2017 (paras. 31-54), including, in particular: a) the disproportionate and targeted attacks on the Rohingya villages (para. 33), and the *modus operandi* of these targeted attacks (para. 34); b) the level of pre-planning and design of the attacks (paras. 35, 43, 45-46, 48 and 53); c) the violence being perpetrated by Myanmar security forces, with the participation of some male civilians of different ethnic groups (paras. 52-53); d) the indiscriminate killing (paras. 36-37 and 39-41); e) the sexual violence (paras. 36 and 38-39); f) the widespread targeted destruction of Rohingya-populated areas (para. 42).

2. Mission's Report on Myanmar of 08.08.2019.

29. The 2019 Mission Report proceeds to the consolidation of its findings on conflict-related human rights issues in Rakhine, Chin, Shan and Kachin States, with a view to its handover to the Independent Investigative Mechanisms for Myanmar; it also provides an update on the situation of the Rohingya (paras. 76-94). The Mission notes that, despite mass displacement of the Rohingya people, some 600,000 Rohingya are estimated to remain in Rakhine State in Myanmar, and continue to be subjected to discriminatory policies, including segregation and restricted movement, deprivation of citizenship, physical attacks, arbitrary arrests, and other violations of their human rights (para. 76).

30. The Mission focuses its discussion on movement restrictions as "one of the clearest indicators of their chronic persecution", noting that such restrictions have tightened since the violence perpetrated in 2012, as well as the ways in which the movement restrictions affect access by the Rohingya to economic, social and cultural rights (such as health services, education, and livelihoods) (paras. 77-78 and 80). The Mission also addresses internment camps, wherein some 126,000 Rohingya were still living, subject to appalling conditions, with no foreseeable plan for relocation (para. 82).

31. The Mission adds that the Government of Myanmar appears to be continuing its plan to keep the Rohingya off their lands and further to segregate them, according to satellite imagery and witness testimony about the construction of new camps for displaced Rohingya refugees (para. 84). The Mission further notes the continued discrimination with respect to citizenship laws and forcing Rohingya to accept national verification cards through threat and intimidation (paras. 86-87).

32. The Mission's update Report indicates that the situation of the Rohingya remains largely unchanged, and warns, as to genocide, that it has reasonable grounds to conclude that there is a strong inference of genocidal intent on the part of the State, that there is a serious risk of recurrence of genocidal actions, and that Myanmar is failing in its obligations to prevent, investigate, and enact legislation to criminalize and punish genocide (paras. 89-90).

33. The Report refers to evidence relating to the alleged genocide against the Rohingya people, encompassing: a) ongoing chronic persecution measures, including movement restrictions affecting the Rohingya's access to economic, social, and cultural rights (paras. 76-81); b) internment camps for displaced Rohingya, with the Government of Myanmar continuing its plan to keep the Rohingya off their lands and segregated (paras. 82-84); c) forced labour, including Rohingya being forced to build new camps for the displaced Rohingya (para. 88); d) continued discrimination with respect to citizenship laws and forcing Rohingya to accept national verification cards through threat and intimidation (paras. 86-87).

34. The Mission concludes that the situation of the Rohingya remains largely unchanged and the Myanmar Government's acts "continue to be part of a widespread and systematic attack that amounts to persecution and other crimes against humanity against the Rohingya in Rakhine State" (para. 89). It adds that

> "the Mission also has reasonable grounds to conclude that there is a strong inference of genocidal intent on the part of the State, that there is a serious risk that genocidal actions may recur, and that Myanmar is failing in its obligation to prevent genocide, to investigate genocide, and to enact effective legislation criminalizing and punishing genocide" (para. 90).

3. Mission's "Detailed Findings" on Myanmar of 16.09.2019.

35. Shortly after its Report of 08.08.2019, the Mission submitted to the U.N. Human Rights Council the extensive "Detailed Findings" on Myanmar, of 16.09.2019, as a complementary factual information (in 190 pages)[11]. The document starts with a summary of the forms of grave violations incurred into (para. 2), the determination of State responsibility (paras. 45 and 58-59) and the need of reparations (paras. 42-43). The "detailed findings" cover violence in distinct forms (including beatings), torture and cruel treatment, forced labour (paras. 190-194), deprivation of food and of humanitarian relief (paras. 172-175)[12], as well as deprivation of health and of land (paras. 139-140).

36. According to the document, violence also encompassed forced displacement of persons and human trafficking (para. 589), as well as other war crimes, amidst humiliation or degradation (para. 192). It stressed the prohibition of torture as one of *jus cogens*, as a peremptory norm of customary international law (para. 389). Those grave breaches, — it warned, — disclosed the need of assertion of State responsibility, keeping in mind the continuity of the intent of genocide (paras. 230, 233, 238, 667 and 669).

37. The document devoted particular attention to the endeavours of the U.N. Mission (reports of 2018-2019) to infer the "genocidal intent under the rules of State responsibility" on the part of the State of Myanmar (para. 223, and cf. para 220). In the words of the "detailed findings",

> "The Mission has identified seven indicators from which it inferred genocidal intent to destroy the Rohingya people as such, all based on the consideration of indicators of genocidal intent in international case law: first, the Tatmadaw's extreme brutality during its attacks on the Rohingya; second, the organized nature of the Tatmadaw's destruction; third, the enormity and nature of the sexual violence perpetrated against women and girls during the "clearances operations"; fourth, the insulting, derogatory, racist and exclusionary utterances of Myanmar officials and others prior, during and after the "clearance operations"; fifth, the existence of discriminatory plans and policies, such as the Citizenship Law and the NVC process, as well as the Government's efforts to clear, raze, confiscate and build on land in a manner that sought to change the demographic and ethnic composition of Rakhine State, the goal being to reduce the proportion of Rohingya; sixth, the Government's tolerance for public rhetoric of hatred and contempt for the Rohingya; and seventh, the State's failure to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law, both as they were

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[11] *Cit.* in n. (4) *supra.*

[12] It stressed the need of humanitarian relief to be extended to the most vulnerable victims (para. 633).

occurring and after they occurred. These seven indicators also allow the Mission to infer that the State did not object and in fact endorsed the Tatmadaw's "clearance operations" and the manner in which they were conducted.

Every one of these indicators is linked to the acts or omissions of Myanmar State organs, including the military, other security forces, ministries, legislative bodies, the UEHRD and other civilian institutions. Collectively they demonstrate a pattern of conduct that infers genocidal intent on the part of the State to destroy the Rohingya, in whole or in part, as a group. For reasons explained in its 2018 report, there is no reasonable conclusion to draw, other than the inference of genocidal intent, from the State's pattern of conduct" (paras. 224-225).

38. The "detailed findings", furthermore, revealed a temporal perspective of the grave breaches: it pointed out that, even before the occurrences of violence against the Rohingya in 2012 and 2016-2017, leading to the forced displacement and exodus of those victimized: there were other periods of violence, — it added, — such as the military operations in 1977, which led some 200,000 Rohingya to flee to Bangladesh; this again happened in 1992 (amidst killings, torture, rape and other violations), which led 260,000 Rohingya to flee to Bangladesh (paras. 202-205 and 214-215).

39. Still in this temporal perspective, the document identified in the 1982 Citizenship Law of Myanmar as discriminatory against the Rohingya people, denying them citizenship and other "fundamental rights", causing them "great physical or mental suffering" constituting "crime against humanity" (paras. 101-106 and 216). It added that there was need of further investigation of the facts, so as to render justice (para. 226), given the grave violations committed mainly by the Tatmadaw (the Myanmar military) of the International Law of Human Rights and International Humanitarian Law (para. 457), as well as of the U.N. Convention on the Rights of the Child (para. 527).

40. Over the last decades those violations have established a level of continuing oppression against the Rohingya rendering their life in Myanmar unbearable. They had to face the denial of their rights, and even of legal status and identity. State-sanctioned laws and policies "occurred in the context of State-sanctioned discriminatory rhetoric", with "institutionalized oppression" amounting to persecution (para. 210). The attacks against "Myanmar's Rohingya population" were undertaken with "genocidal intent", and ever since the Mission's 2018 Report "the situation of the 600,000 Rohingya remaining in Myanmar is worse after another year of living under deplorable conditions" (paras. 212-213).

IV. International Fact-Finding: Reports of the U.N. Special Rapporteur on Human Rights in Myanmar.

41. In its *Application*, Gambia further notes that the U.N. Human Rights Council's Special Rapporteur on the Situation of Human Rights in Myanmar (Ms. Yanghee Lee) has carried out extensive fact-finding on Myanmar's campaign against the Rohingya[13]. The Special Rapporteur, in addition to her statements made at the U.N. Human Rights Council, also submitted reports to it, on

[13] It cites her statement at the 37th. session of the Human Rights Council on 12.03.2018; *Application*, para. 7 and n. 4.

the situation of human rights in Myanmar, including a recent report presented on 30.08.2019[14]. Two of her earlier reports (of 02.05.2019[15] and 20.08.2018[16]) are also of particular interest in relation to allegations of genocide against the Government of Myanmar.

1. Report of the Special Rapporteur on the Situation of Human Rights in Myanmar (of 30.08.2019).

42. In her Report of 30.08.2019, the Special Rapporteur on the Situation of Human Rights in Myanmar, referring to armed conflict and violence, addresses reports of ongoing violent attacks against the Rohingyas (and property) in the context of the conflict with the Arakan Army in Rakhine State (para. 40). She observes that living conditions for the Rohingya in northern Rakhine State "remain dreadful", with continuing reports of beatings, killings, and the burning of houses and rice stores (para. 40).

43. She outlines the need to conduct policies "in a rights-based manner", and to put an end to the root-causes of forced displacement of persons (para. 44). Moreover, as to internally displaced persons, the Special Rapporteur points out that, in central Rakhine State, "128,000 Rohingya and Kaman people remain interned in camps where they have lived in squalid conditions since 2012", with restrictions on their freedom of movement (para. 45).

44. The Special Rapporteur (Ms. Yanghee Lee) then warns that, if the process being pursued continues, it will result in the permanent segregation of displaced Rohingya and Kaman communities in Rakhine (para. 45). As to Rohingya refugees, she expresses her view that "Myanmar has entirely failed to dismantle the system of persecution under which the Rohingya in Rakhine continue to live. While this situation persists, it is not safe or sustainable for refugees to return" (para. 54)[17].

2. Report of the Special Rapporteur on the Situation of Human Rights in Myanmar (of 02.05.2019).

45. Earlier on, in her Report of 02.05.2019, the Special Rapporteur notes that the campaign to impose national verification cards on the Rohingya is continuing unabated, and the Rohingya are still required to apply for permission to leave their villages in accordance with existing restrictions on their movement (para. 34). Furthermore, in relation to Rohingya refugees, the Special Rapporteur observes that the conditions for voluntary, safe, dignified and sustainable returns do not exist, despite the Governments of Bangladesh and Myanmar having agreed to begin repatriation in mid-November 2018 (para. 43).

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[14] U.N. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar — Yanghee Lee* (30.08.2019), U.N. doc. A/74/342 [August 2019 Report of the Special Rapporteur].

[15] U.N. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar — Yanghee Lee* (02.05.2019), U.N. doc. A/HRC/40/68.

[16] U.N. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar — Yanghee Lee* (20.08.2018), U.N. doc. A/73/332.

[17] Furthermore, she expresses concern that national verification cards will be issued to Rohingya returnees after their biometric data is collected, noting the possibility that any biometric data collected could be used to place further controls on Rohingya who return to Myanmar (para. 55).

46. She addresses the overcrowded conditions for the Rohingya refugees in Bangladesh, as well as the fear of refugees of forced repatriation following the aforementioned agreement between the Governments of Bangladesh and Myanmar (paras. 41-43). The Special Rapporteur (Ms. Yanghee Lee) further notes that this planned repatriation has caused high levels of fear and anxiety among the refugee population at the prospect of forced return, leading some refugees to go into hiding or even attempt to take their own lives to avoid forced return to Myanmar (para. 43).

47. And, as to institutionalized hate speech, she expresses alarm at its pervasive nature, particularly due to the use of hate speech by senior governmental officials (para. 51). She warns that "hate speech and misinformation" have come from "public institutions linked to the military" (para. 53), and calls for definitely avoiding to teach children ideas promoting "racial superiority and communal disharmony", removing "all incendiary passages from all textbooks" (para. 52).

3. Report of the Special Rapporteur on the Situation of Human Rights in Myanmar (of 20.08.2018).

48. Even earlier, in her Report of 20.08.2018, the Special Rapporteur condemns the widespread and systematic violations of the International Law of Human Rights and International Humanitarian Law committed by the Tatmadaw against the Rohingya population in Myanmar for decades, with particular attention to the armed conflict and situations of violence from March 2018 (para. 36). She declares that there is "credible information" that the 33rd. and 99th. Light Infantry Divisions of the Tatmadaw were among those responsible for perpetrating "extreme violence against the Rohingya population in northern Rakhine State" (as from 25.08.2017) (para. 37), including massacres involving "the killings of many men, women and children, beatings, rapes and the burning of houses" (paras. 38-39)[18].

49. The Special Rapporteur (Ms. Yanghee Lee) specifically addresses sexual violence, stating that "the widespread threat and use of sexual violence" was part of the "Tatmadaw's strategy of humiliating, terrorizing and collectively punishing the Rohingya community" and forcing them "to flee and prevent their return" (para. 48). She also expresses concern in relation to the dire living conditions in the internment camps, given the continuing violence and discrimination against the Rohingya in Rakhine State, as well as in relation to its intended closure of the camps to hasten the return of displaced persons to their places of origin (paras. 52-53).

50. The Special Rapporteur's concern also encompasses the ongoing discrimination in citizenship laws in Myanmar, with the lack of citizenship status of the Rohingya people in Myanmar, and the lack of recognition of refugee status for the Rohingya people in Bangladesh (paras. 58-60 and 62). She notes that, according to statements from newly arrived Rohingya refugees in Cox's Bazar, conditions for the Rohingya in Rakhine State have "worsened significantly since before the violence of August 2017 as a result of heightened movement restrictions, lack of access to livelihoods, education, health and basic services, and ongoing violence, intimidation and extortion by security forces" (para. 61).

51. Furthermore, discriminatory laws, including those relating to freedom of movement, family registration, marriage and birth, remain in place (para. 61). The Special Rapporteur notes that pressure by security forces for the Rohingya to accept national verification cards has led to violence (para. 62). As to the destruction of Rohingya villages, the Special Rapporteur notes that

[18] Citing Amnesty International, "We Will Destroy Everything: Military Responsibility for Crimes against Humanity in Rakhine State" (27.06.2018).

bases for security forces, reception and transit centres for repatriation and model villages — which have historically been used to encourage the resettlement of Buddhists to Rakhine State, displacing the Muslim population, — have been built on land that was previously home to the Rohingya (para. 63).

52. The Special Rapporteur (Ms. Yanghee Lee) comes to the conclusion that the aforementioned situation in Myanmar calls for accountability, and "[j]ustice and the right of victims to reparation should not be contingent on any political or economic interest", keeping in mind that "there can be no genuine or meaningful accountability unless the victims' concerns are addressed" (para. 73). To that effect, she presents a series of recommendations (paras. 75-80).

V. Provisional Measures of Protection and the Imperative of Overcoming the Extreme Vulnerability of Victims.

53. The U.N. reports above reviewed give accounts of great suffering on the part of the numerous victims of the tragedy in Myanmar; further to those who were killed or died, the surviving ones remain in a situation of extreme vulnerability. I ascribe considerable importance to human vulnerability, to which I have always been attentive, and I shall address this point further in the following paragraphs of the present part V of the Separate Opinion.

54. The Provisional Measures of Protection just ordered by the ICJ in the *cas d'espèce* aim to safeguard the fundamental rights of the surviving victims. The suffering of victims has marked presence in the writings of thinkers along the centuries. May I here just recall that, in the mid-XXth. century, Cecília Meireles observed, in her poem "*Os Mortos/The Ones Who Died*" (1945):

"Creio que o morto ainda tinha chorado, depois da morte:
enquanto os pensamentos se desagregavam,
depois de o coração se acostumar de ter parado. (...)

Creio que o morto chorou depois da morte.
Chorou por não ter sido outro. (...)

Mas sobre seus olhos havia uns outros, mais infelizes,
que estavam vendo, e entendendo, e continuavam sem nada.
Sem esperança de lágrima.
Recuados para um mundo sem vibração.
Tão incapazes de sentir que se via o tempo de sua morte.
Antiga morte já entrada em esquecimento.
Já de lágrimas secas".

["I believe that the one who died had still cried, after death:
while the thoughts disaggregated themselves,
after the heart gets used to have stopped. (...)

I believe the one who died cried after death.
Cried for not having been someone else. (...)

But over his eyes there were some others, more unfortunate ones,
who were seeing, and understanding, and remained without anything.
Without hope of tear.
Moved back into a world without vibration.
So incapable of feeling that one was seeing the time of their death.
Ancient death already entered into oblivion.
Already of dry tears". — [My own translation].

1. The Legacy of the II World Conference on Human Rights (1993), in Its Attention to Human Vulnerability.

55. May I now turn to another issue of particular importance here. In the course of the work of the II World Conference on Human Rights (Vienna, 1993), — as I recall in my memories of it, — a special attention was turned to vulnerable persons and groups in great need of protection, so as to overcome their defenselessness[19]. There was stress on the need of positive measures and obligations to this effect[20]. The II World Conference on Human Rights left an important legacy, as found in its final document, the Vienna Declaration and Programme of Action, — of which I keep a very good memory, having participated in the work of its Drafting Committee.

56. One of the key points of the 1993 Declaration and Programme of Action was its special attentiveness to discriminated or disadvantaged persons, to vulnerable persons and groups, to the poor and the socially excluded, in sum, to all those in greater need of protection[21]. It was not surprising that the 1993 World Conference was particularly attentive, *inter alia*, to the condition of vulnerable groups and persons, — as the issue which was already under the attention of U.N. organs.

57. In effect, due to the endeavours of international supervisory organs at global and regional levels, numerous lives had been spared, reparations for damages had been awarded, legislative measures had been adopted or modified for the sake of protection, wrongful administrative practices had to the same effect been terminated[22]. Its legacy as a whole is to be kept in mind nowadays[23], given the subsequent and current occurrence of atrocities against human beings.

58. In the adjudication by the ICJ of recent cases pertaining to human violence affecting vulnerable victims, I have deemed it fit to focus on the legacy of the II World Conference on Human Rights in relation to the vulnerability of the victims. Thus, in my three extensive Dissenting Opinions in the three cases of the *Obligation of Nuclear Disarmament* (Judgments

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[19] A.A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza/Brazil, IBDH/IIDH/SLADI, 2014, pp. 59, 65, 73, 93 and 103-104.

[20] *Ibid.*, p. 76; emphasis was given to the 1948 Universal Declaration of Human Rights (*ibid.*, p. 97 n. 151), and the universal juridical conscience was acknowledged as the ultimate material source of the law of nations, of all Law (*ibid.*, p. 106).

[21] United Nations, *Vienna Declaration and Programme of Action*, New York, U.N., 1993, pp. 25-71. — As it became clear that human rights permeate all areas of human activity, the incorporation of the human rights dimension in all programs and activities of the United Nations was propounded in the Vienna Conference.

[22] In addition, national democratic institutions had been strengthened, and positive measures and educational programmes had been adopted.

[23] Cf. A.A. Cançado Trindade, "The International Law of Human Rights Two Decades After the Second World Conference on Human Rights in Vienna in 1993", in *The Realization of Human Rights: When Theory Meets Practice — Studies in Honour of Leo Zwaak* (eds. Y. Haeck et alii), Cambridge/Antwerp/Portland, Intersentia, 2013, pp. 15-39.

of 10.05.2016 — cf. *infra*), in my firm support of that universal obligation I drew attention to the focus on "attention on vulnerable segments of the populations" and the concern with "meeting basic human needs" (para. 124).

59. I added that a basic concern of the II World Conference on Human Rights

> "— as I have pointed out on distinct occasions along the last two decades[24] — can be found in the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living of all human beings everywhere. The placing of the well-being of peoples and human beings, of the improvement of their conditions of living, at the centre of the concerns of the international community, is remindful of the historical origins of the *droit des gens*[25]" (para. 125).

60. Moreover, I have retaken my considerations on the matter in my subsequent Separate Opinion in the ICJ's Order (of 19.04.2017) in the case of the *Application of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and of the Convention on the Elimination of All Forms of Racial Discrimination* (CERD) (Ukraine *versus* Russian Federation), wherein I have stressed the relevance of provisional measures of protection in a situation of a strong adversity and sufferings of the victimized persons. I have proceeded, in this new and long Separate Opinion, to elucidate a series of issues, some of which raised also now in the *cas d'espèce*.

61. It is not my intention to reiterate here all my clarifications made and examined in my Separate Opinion of almost three years ago. May I just refer briefly here to some of the points I have made on that occasion in the ICJ's decision in that case opposing Ukraine to the Russian Federation. To start with, I have examined the treatment of human vulnerability — including cases of extreme vulnerability — in the case-law of contemporary international tribunals, such as the ICJ, the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) (paras. 12-20).

62. In my examination of such treatment in successive cases, I have pondered, *inter alia*, that

> "It is significant that, in our times, cases pertaining to situations of extreme adversity or vulnerability of human beings have been brought to the attention of the ICJ as well as other international tribunals. This is, in my perception, a sign of the new

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[24] A.A. Cançado Trindade, *A Proteção dos Vulneráveis...*, *op. cit. supra* n. (19), 2014, pp. 13-356; A.A. Cançado Trindade, "Sustainable Human Development and Conditions of Life as a Matter of Legitimate International Concern: The Legacy of the U.N. World Conferences", in *Japan and International Law — Past, Present and Future* (International Symposium to Mark the Centennial of the Japanese Association of International Law), The Hague, Kluwer, 1999, pp. 285-309; A.A. Cançado Trindade, "The Contribution of Recent World Conferences of the United Nations to the Relations between Sustainable Development and Economic, Social and Cultural Rights", in *Les hommes et l'environnement: Quels droits pour le vingt-et-unième siècle? — Études en hommage à Alexandre Kiss* (eds. M. Prieur and C. Lambrechts), Paris, Éd. Frison-Roche, 1998, pp. 119-146; A.A. Cançado Trindade, "Memória da Conferência Mundial de Direitos Humanos (Viena, 1993)", 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* (1993-1994) pp. 9-57.

[25] Those Conferences acknowledged that human rights do in fact permeate all areas of human activity, and contributed decisively to the reestablishment of the central position of human beings in the conceptual universe of the law of nations (*droit des gens*). Cf., on the matter, A.A. Cançado Trindade, *Évolution du Droit international au droit des gens - L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pédone, 2008, pp. 1-187.

> paradigm of the *humanized* international law, the new *jus gentium* [26]of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability. The case-law of international human rights tribunals is particularly illustrative in this respect" (para. 17).

63. In the same case of *Ukraine versus Russian Federation*, — I have gone on, — a worrisome illustration of the urgent need for provisional measures of protection was provided by the continuous indiscriminate shelling of the civilian population from all sides, in densely populated areas (in east of Ukraine), in breach of the International Law of Human Rights and of International Humanitarian Law (paras. 27-28). Non-compliance with the needed provisional measures of protection generates the responsibility of the State, with legal consequences (para. 8).

64. The gravity of the situation in the *cas d'espèce*, — I have proceeded, — required provisional measures of protection, oriented by the principle *pro persona humana*, *pro victima* (para. 85). This, — I have added, —

> "requires the ICJ to go beyond the strict inter-State dimension (the one it is used to, attached to a dogma of the past), and to concentrate attention on *victims* (including the potential ones[27]), — be they individuals[28], groups of individuals[29], peoples or humankind[30], as subjects of international law, — and not on inter-State susceptibilities. Human beings in vulnerability are the ultimate beneficiaries of provisional measures of protection, endowed nowadays with a truly *tutelary* character, as true jurisdictional guarantees of preventive character" (para 86).

65. I have then warned that the need of greater attention to human vulnerability was to be carefully faced with full awareness of the pressing need to secure protection to the affected human beings (paras. 87-88). The principle of humanity comes to the fore (para. 90), permeating the whole *corpus juris* of contemporary international law, with "a clear incidence on the protection of persons in situations of great vulnerability. (…) Human beings stand in need, ultimately, of protection against evil, which lies within themselves" (para. 91).

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[26] Cf. A.A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd. rev. ed., Belo Horizonte, Edit. Del Rey, 2015, pp. 3-782; A.A. Cançado Trindade, *La Humanización del Derecho Internacional Contemporáneo*, México, Edit. Porrúa/IMDPC, 2013, pp. 1-324; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185.

[27] On the notion of *potential* victims in the framework of the evolution of the notion of victim (or the condition of the complainant) in the domain of the International Law of Human Rights, cf. A.A. Cançado Trindade, "Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de Haye* (1987), ch. XI, pp. 243-299, esp. pp. 271-292.

[28] As I pointed out in my Separate Opinions of the *A.S. Diallo* case (Judgments of 30.11.2010, merits; and of 19.06.2012, reparations).

[29] As I sustained in my Dissenting and Separate Opinions in the case of the *Obligation to Prosecute or Extradite* (Order of 28.05.2009, and Judgment of 20.07.2012, respectively), as well as in my Dissenting Opinion in the case of the *Application of the Convention against Genocide* (Judgment of 03.02.2015).

[30] As I upheld in my three Dissenting Opinions in the three cases of the *Obligations of Nuclear Disarmament* (Judgments of 05.10.2016).

2. International Case-Law and the Need of Properly Addressing Human Vulnerability.

a) **Support for the Relevance of Consideration of Vulnerability of the Victims.**

66. The II World Conference on Human Rights remained faithful to the legacy of the 1948 Universal Declaration of Human Rights, and provided responses to new challenges. The warning of the Universal Declaration has been kept in mind, to the effect that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" (preamble, para. 2). The Declaration further warns that "it is essential, if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" (preamble, para. 3). And it asserts that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (preamble, para. 1).

67. International case-law is gradually reckoning the need of properly addressing human vulnerability. Within the ICJ, I have been constantly attentive to this needed development. Thus, in my Separate Opinion in the ICJ's Order of Provisional Measures of Protection (of 18.07.2011) in the case of the *Temple of Preah Vihear* (Cambodia *versus* Thailand), I pointed out that there have been cases where the ICJ, in indicating such measures, like in the *cas d'espèce*, "most significantly went *beyond the inter-State dimension*, in expressing its concern also for *the human persons (les personnes humaines)* in situations of risk, or vulnerability and adversity" (para. 74).

68. In my Separate Opinion in the ICJ's Judgment (on reparations, of 19.06.2012) in the case of *A.S. Diallo* (Guinea *versus* D.R. Congo), I pondered that measures adopted for the rehabilitation of those victimized in cases of grave violations of their rights, "have intended to overcome the extreme vulnerability of victims, and to restore their identity and integrity" (para. 84). Earlier on, in the same case of *A.S. Diallo* (merits, Judgment of 30.11.2010), I related, in my Separate Opinion, the pressing need to overcome the situation of vulnerability or even defenselessness of victims to the principle of humanity in its wide dimension (para. 105).

69. On other occasions, likewise, I have addressed the matter in the ICJ: for example, in my Dissenting Opinion in the case of the *Jurisdictional Immunities of the State* (Judgment of 03.02.2012), I drew attention to the increased vulnerability of victimized persons (para. 175); and in my Separate Opinion in the case of the *Obligation to Prosecute or Extradite* (Judgment of 20.07.2012), I considered the vulnerability and rehabilitation of victims (para. 174). All these ponderations, in addition to others, are duly systematized[31].

b) **Invocation of Occurrence of Extreme Human Vulnerability.**

70. In the oral proceedings before the ICJ in the *cas d'espèce*, the applicant State has been attentive to the utter vulnerability of the Rohingya; thus, in the public hearing of 10.12.2019, it has referred, in this respect, to the point made by the U.N. Mission's Report (of 17.09.2018)[32] that their "extreme vulnerability" has been "a consequence of State policies and practices implemented over

[31] Cf. *Judge A.A. Cançado Trindade — The Construction of a Humanized International Law — A Collection of Individual Opinions (1991-2013)*, vol. II (International Court of Justice), The Hague/Leiden, Brill/Nijhoff, 2014, pp. 967, 1779-1780, 1685, 1469 and 1597, respectively.

[32] U.N. Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, U.N. doc. A/HRC/39/CRP.2 (17.09.2018), para. 458.

decades"[33]. Gambia has devoted a whole part of its oral arguments to "The Rohingya's Vulnerability to Continuing Acts of Genocide" (part IV); in assessing "the situation of the approximately 600,000 Rohingya who remain in Myanmar today" (p. 37, para. 1), it characterized their situation as "one of extreme vulnerability, with ongoing acts of genocide against them, and the grave risk that even more heinous atrocities (...) will be inflicted upon them at any time" (p. 37, para. 2).

71. Moreover, in referring to occasions in which the ICJ took note of human vulnerability in its own case-law (p. 58, paras. 9 and 11), Gambia has added that in the present case "the Rohingya are not only deprived of their political, social and cultural rights, they are threatened with *massive loss of life itself*, and, striking at the heart of these proceedings, with *loss of their very existence as a group*" (p. 58, para. 11).

72. Invocation of extreme human vulnerability is a key element to be taken into account in a decision concerning provisional measures of protection, in a case like the present one, on the *Application of the Convention against Genocide*. In effect, from time to time, the ICJ has been seized of cases disclosing human cruelty, always present in the history of humankind. For example, in its three Judgments in the three cases of the *Obligation of Nuclear Disarmament* (Marshall Islands *versus* United Kingdom, India and Pakistan; of 10.05.2016), as the Court has found itself — by a split majority — without jurisdiction to adjudicate them, I have appended three strong Dissenting Opinions thereto.

73. In my three dissents, I have warned as to the manifest illegality of nuclear weapons, which constitute a continuing threat to humankind as a whole. I dwelt extensively upon evil and cruelty in human relations, having deemed it fit to devote one part (XVI) of my Dissenting Opinions to "The Principle of Humanity and the Universalist Approach: *Jus Necessarium* Transcending the Limitations of *Jus Voluntarium*", preceded *inter alia* by another part (VIII) on "Human Wickedness: From the XXIst. Century Back to the Book of *Genesis*".

74. In this earlier part of my dissents, I have recalled the presence in the reasoning of many influential thinkers of the XXth. century (*inter alii*, in the middle of last century, Mahatma Gandhi and Stefan Zweig, among several others in distinct continents) warning against human wickedness with its numerous victims of the atrocities perpetrated at that time and before, and continuing nowadays. And I have stressed, in face of persistence of human cruelty, the great need of a people-centred approach, keeping in mind the fundamental right to life, with the *raison d'humanité* prevailing over the *raison d'État*.

VI. The Utmost Importance of the Safeguard of Fundamental Rights by Provisional Measures of Protection, in the Domain of *Jus Cogens*.

1. Fundamental, Rather than "Plausible", Rights.

75. The rights protected by the present Order of Provisional Measures of Protection are truly fundamental rights, starting with the right to life, right to personal integrity, right to health, among others. The ICJ, once again, refers to rights which appear to it "plausible" (e.g., para. 56), as it has

[33] *Cit.* in ICJ, doc. CR 2019/18, of 10.12.2019, p. 23, para. 9.

become used to, always with my criticisms. In referring to the arguments of the contending parties, only in paragraphs 46-47 of the present Order, among others, there appear ten references to "plausible", related to rights, acts, facts, claims, genocidal intent, inferences.

76. There is great need of serious reflection on this superficial use of "plausible", devoid of a meaning. I do not intend to reiterate here all the criticisms I have been making on resort to "plausible", whatever that means. May I just recall that, in the course of last year (2018), on more than one occasion I dwelt upon this matter. Thus, in my Separate Opinion in the case of *Application of the U.N. Convention on the Elimination of All Forms of Racial Discrimination* (CERD — Qatar *versus* United Arab Emirates, provisional measures of protection, Order of 23.07.2018), I pondered that

> "The test of so-called 'plausibility' of rights is, in my perception, an unfortunate invention — a recent one — of the majority of the ICJ. (…)
>
> It appears that each one feels free to interpret so-called 'plausibility' of rights in the way one feels like; this may be due to the fact that the Court's majority itself has not elaborated on what such 'plausibility' means. To invoke 'plausibility' as a new 'precondition', creating undue difficulties for the granting of provisional measures of protection in relation to a *continuing situation*, is misleading, it renders a disservice to the realization of justice" (paras. 57 and 59).

77. In sequence, in the same Separate Opinion, I deemed it fit to warn *inter alia* that

> "The so-called 'plausibility' of rights is surrounded by uncertainties, which are much increased in trying to add to it the so-called 'plausibility' of admissibility, undermining provisional measures of protection as jurisdictional guarantees of a preventive character. It is time to awaken and to concentrate attention on the nature of provisional measures of protection, particularly under human rights treaties, to the benefit of human beings experiencing a *continuing situation* of vulnerability affecting their rights" (para. 60).

78. Shortly afterwards, in my Separate Opinion in the case of *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran *versus* United States, provisional measures of protection, Order of 03.10.2018), I criticized the unnecessary resort by the ICJ to "plausibility" in a continuing situation of vulnerability (paras. 72-76)[34]. I pondered that

> "the avoidance of referring to 'plausibility' would have enhanced the Court's reasoning, rendering it clearer. Particularly in cases, like the present one, where the rights — the protection of which is sought by means of provisional measures — are clearly defined in a treaty, to invoke 'plausibility' makes no sense. The legal profession, in also indulging here in so-called 'plausibility' (whatever that means), is incurring likewise into absurd uncertainties" (para. 77).

[34] As I had earlier done also in my Separate Opinion in the case of *Jadhav* (India *versus* Pakistan, Order of 18.05.2017), para. 19.

79. As in the present Order of Provisional Measures of Protection we are really in face of fundamental rights (not "plausible" ones), the basic principle of equality and non-discrimination also marks its presence here. I addressed this point in my aforementioned recent Separate Opinion in the case of *Application of the CERD Convention* (Order of 23.07.2018 — para. 76, *supra*), where I pointed out that

> "The advances in respect of the basic principle of equality and non-discrimination at normative and jurisprudential levels[35], have not, however, been accompanied by the international legal doctrine, which so far has not dedicated sufficient attention to that fundamental principle; it stands far from guarding proportion to its importance both in theory and practice of Law. This is one of the rare examples of international case-law preceding international legal doctrine, and requiring from it due and greater attention" (para. 18).

80. I then drew attention to the sufferings affecting numerous migrants nowadays, and warned that

> "Nothing has been learned from sufferings of past generations; hence the need to remain attached to the goal of the realization of justice, bearing in mind that law and justice go indissociably together. The ICJ has a mission to keep on endeavouring to contribute to a *humanized* law of nations, in the dehumanized world of our days" (para. 28).

It is necessary to keep in mind that the principle of equality and non-discrimination lies in the foundations of the rights safeguarded under the Convention against Genocide, and human rights Conventions, also by means of provisional measures of protection.

2. *Jus Cogens* under the Convention against Genocide and the Corresponding Customary International Law.

81. As examined in a recent study of the developing international case-law on the matter, provisional measures of protection are nowadays endowed with an autonomous legal regime of their own[36], which is of great significance for the protection of fundamental human rights. Such rights remain in the domain of *jus cogens*. This is a point which did not pass unperceived in the oral procedure before the ICJ: in the public hearing of 10.12.2019, the delegation of Gambia made a reference to such acknowledgment of *jus cogens*[37], an issue which could have been addressed by the ICJ in its present Order.

82. It would not have been the first time, as the issue is present in the ICJ's case-law, though it requires nowadays further development. May I just recall, in this respect, the main points addressed by the Court so far. Thus, looking further back in time, in the aforementioned case of *Armed Activities in the Territory of Congo*, opposing D.R. Congo to Rwanda (cf. para. 4, *supra*), the ICJ recognized (in its Judgment on jurisdiction and admissibility, of 03.02.2006) the prohibition of genocide as a peremptory norm of international law (para. 64).

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[35] To the study of which I have dedicated my extensive book: A.A. Cançado Trindade, *El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial*, 1st. ed., Santiago de Chile, Ed. Librotecnia, 2013, pp. 39-748.

[36] Cf. A.A. Cançado Trindade, *O Regime Jurídico Autônomo das Medidas Provisórias de Proteção*, The Hague/Fortaleza, IBDH/IIDH, 2017, pp. 13-348.

[37] ICJ, doc. CR 2019/18, of 10.12.2019, p. 51, para. 7.

83. One decade earlier, in the case of *Application of the Convention against Genocide* (Bosnia-Herzegovina *versus* Serbia and Montenegro (Judgment on preliminary objections, of 11.07.1996), the ICJ observed *inter alia* that the terms of Article IX of the Convention against Genocide do "not exclude any form of State responsibility" (para. 32). In my understanding, State responsibility and individual criminal responsibility cannot be dissociated in cases of massacres[38].

84. The subsequent case-law of the ICJ again addressed the matter, in the aforementioned cases (cf. para. 3, *supra*) of *Application of the Convention against Genocide*, opposing Bosnia-Herzegovina to Serbia and Montenegro (Judgment of 26.02.2007), as well as of *Application of the Convention against Genocide*, opposing Croatia to Serbia (Judgment of 03.02.2015). On both occasions, the treatment of the matter by the Court was incomplete and unsatisfactory.

85. Thus, in its 2007 Judgment, the Court confirmed the applicability of the rules on State responsibility between States in the context of genocide (para. 167), but not without underlining that in its view the recognition of State responsibility should not be understood as making room for State crimes , thus imposing limitations on the matter (paras. 167-170). And in its 2015 Judgment, the Court briefly referred to *jus cogens* without considering its legal effects (para. 87).

86. In my Dissenting Opinion appended thereto, I sustained that grave violations of human rights and of International Humanitarian Law, and acts of genocide, among other atrocities, are in breach of responsibility and call for reparations to the victims. This is in line with the idea of *rectitude* (in conformity with the *recta ratio* of natural law), underlying the conception of Law (in distinct legal systems — *Droit / Right / Recht / Direito / Derecho / Diritto*) as a whole (paras. 318-319).

87. I then added, *inter alia*, that the Convention against Genocide is *people-oriented* (paras. 521, 529, 542 and 545), with attention needing to be focused on the segment of the population concerned, in pursuance of a humanist outlook, in the light of the principle of humanity (part XVIII). The Convention, — I further added, — calls for care to be turned to the victims, rather than to inter-State susceptibilities (paras. 494-496)[39]. In sum, *jus cogens* is to be properly considered under the Convention against Genocide and the corresponding customary international law.

VII. Epilogue.

88. In my understanding, it is necessary to take all the above considerations into account in order to secure the advances in the domain of the autonomous legal regime of provisional measures of protection. As to the *cas d'espèce*, it is significant that the present Order of Provisional Measures of Protection has just been adopted by the ICJ by unanimity. The measures of protection have, in my understanding, been ordered by the ICJ to safeguard the fundamental rights of those who remain, in the tragedy of Myanmar, in a continuing situation of extreme vulnerability, if not defenselessness.

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[38] On the lessons from the international adjudication of such cases, cf. A.A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Utrecht, Universiteit Utrecht, 2011, pp. 1-71; A.A. Cançado Trindade, *La Responsabilidad del Estado en Casos de Masacres - Dificultades y Avances Contemporáneos en la Justicia Internacional*, México, Edit. Porrúa/Escuela Libre de Derecho, 2018, pp. 1-104.

[39] For a recent case-study, on the basis of my extensive Dissenting Opinion in this case, cf. A.A. Cançado Trindade, *A Responsabilidade do Estado sob a Convenção contra o Genocídio: Em Defesa da Dignidade Humana*, Fortaleza, IBDH/IIDH, 2015, pp. 9-265.

89. Last but not least, may I proceed to a brief recapitulation of the main points I have deemed it fit to make, in the present Separate Opinion, in respect of provisional measures of protection under the Convention against Genocide. *Primus*: In a case like the present one, the provisions of the Convention conform a *Law of protection* (a *droit de protection*), oriented towards the safeguard of the fundamental rights of those victimized in a continuing situation of human vulnerability, so as also to secure the prevalence of the rule of law *(la prééminence du droit)*.

90. *Secundus*: The ICJ has, along the years, been giving its contribution to the international case-law concerning the Convention against Genocide; yet, the Court's Orders on provisional measures of protection under the Convention have been rather rare, though they play their role of extending protection to the fundamental rights of persons and groups in extreme vulnerability. *Tertius*: In relation to the occurrences in the tragedy in Myanmar, international fact-finding has been undertaken by the Reports of the U.N. Mission on Myanmar (of 2018 and 2019), including "detailed findings", as well as by the Reports of the U.N. Special Rapporteur on Human Rights in Myanmar (of 2018 and 2019).

91. *Quartus*: These successive U.N. Reports give account of a *continuing situation* affecting human rights of numerous persons under the Convention against Genocide. *Quintus*: Provisional measures of protection, like the ones indicated in the present Order, are intended to put an end to a continuing situation of extreme vulnerability of the victimized persons. *Sextus*: In a *continuing situation* of the kind, the fundamental rights requiring protection are clearly known, there being no sense to wonder whether they are "plausible". *Septimus*: A *continuing situation* in breach of human rights is a point which has been attracting the attention of the ICJ in recent cases, at distinct stages of the proceedings.

92. *Octavus*: Provisional measures of protection have, in recent years, been protecting growing numbers of persons in situations of extreme vulnerability, having thus been transformed into a true jurisdictional *guarantee* of preventive character. *Nonus*: Extreme human vulnerability is a test more compelling than resort to so-called 'plausibility' of rights for the ordering of provisional measures of protection under the Convention against Genocide.

93. *Decimus*: The legacy of the II World Conference on Human Rights (Vienna, 1993) has been much contributing to the protection of human beings in situations of great vulnerability. *Undecimus*: Furthermore, international case-law, as the *cas d'espèce* shows, can serve the need of properly addressing extreme human vulnerability. *Duodecimus*: It is of the utmost importance the safeguard of fundamental rights by provisional measures of protection, in the domain of *jus cogens*, under the Convention against Genocide and the corresponding customary international law.

94. *Tertius decimus*: There continues to be an advance towards the consolidation of what I have been calling, along the years, the *autonomous legal regime* of provisional measures of protection. *Quartus decimus*: The historical formation of the *corpus juris* of international protection of the rights of the human person has much contributed to a growing awareness of the importance of the prevalence also of the basic principle of equality and non-discrimination.

Quintus decimus: The present case once again shows that the determination and ordering of provisional measures of protection under the Convention against Genocide, and under human rights Conventions, can only be properly undertaken from a humanist perspective, necessarily avoiding the pitfalls of an outdated and impertinent State voluntarist outlook.

(Signed) Antônio Augusto CANÇADO TRINDADE.

DECLARATION OF JUDGE *AD HOC* KRESS

Standard of plausibility — Genocidal intent — Protected group under the Genocide Convention.

1. I have voted in favour of all points contained in operative paragraph 86 of the Order. I also concur with the essence of the Court's reasoning. I only wish to add a few observations regarding the plausibility standard, and, in particular, regarding its connection with the questions of genocidal intent and protected groups under the Genocide Convention.

2. It would seem that the plausibility of the rights claimed as a prerequisite for the indication of provisional measures is by now quite firmly anchored in the Court's jurisprudence. At the same time, it would seem that questions remain open regarding the precise scope of the requirement and that it remains a challenge to describe the Court's standard of plausibility with precision[1].

3. The partial rejection of plausibility of the rights claimed in the *Ukraine* v. *Russian Federation* case (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 131-132, para. 75) has given rise to the interpretation that the Court has widened the scope of the plausibility requirement so that it includes, at least partially, the plausibility of breach of rights[2]. Additionally, there is the question whether the Court's Order in that case may have set a comparatively demanding standard of plausibility with respect to the mental elements of crimes in question (see, in particular, the separate opinion of Judge Owada in the aforementioned Order, *I.C.J. Reports 2017*, pp. 147-148, paras. 21-23). It is against this background, that Myanmar, in the current proceedings, has placed special emphasis on the *Ukraine* v. *Russian Federation* case in order to make the argument that the standard of plausibility extended to the requirement of genocidal intent and that this standard was not met (CR 2019/19, pp. 24-25, paras. 9-11 (Schabas)). As part of this argument, Myanmar further advanced the view that in "a case like this involving allegations of exceptional gravity" the Court should apply a "stricter plausibility standard" (CR 2019/19, p. 25, para. 13 (Schabas)).

4. In paragraph 56 of the Order, the Court rejects the idea of such a more stringent standard. I agree and wish to add that, rather than saying, as Myanmar has done, that a strict standard to be applied at the merits stage in case of exceptionally grave allegations, must apply *"a fortiori"* "at the provisional measures phase" *(ibid.)*, one might wonder whether the distinct — that is, the protective — function of provisional measures does not point in the opposite direction, precisely because fundamental values are at stake.

5. Irrespective of this last consideration, it is apparent from paragraph 56 of the Order, read in its immediate context, that the Court has applied a low plausibility standard with respect to the question of genocidal intent. Whatever the correct interpretation of the standard applied in the Court's Order in the *Ukraine* v. *Russian Federation* case might be, the Court, in the present case,

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[1] For a useful recent analysis, see Cameron Miles, "Provisional Measures and the 'New' Plausibility in the Jurisprudence of the International Court of Justice", *British Yearbook of International Law* (2018, forthcoming), available at https://doi.org/10.1093/bybil/bry011.

[2] *Ibid.*, pp. 32-39 (provisional pagination).

has not proceeded to anything close to a detailed examination of the question of genocidal intent. In that respect it seems worth recalling that, in the separate opinion he appended to the *Pulp Mills* case, Judge Abraham distinguished between *fumus boni juris* and *fumus non mali juris* (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, pp. 140-141, para. 10). In my view, it is the latter formulation that captures far better the approach taken by the Court in this Order with respect to the question of genocidal intent. Drawing a distinction between the words *"boni"* and *"non mali"* may be a "subtlety", as Judge Abraham suggested in his separate opinion. But in the present case at least, it would be an important subtlety. I make this observation also because, even on the basis of the low standard applied by the Court in this case, it is not entirely without hesitation that I have come to the conclusion that the materials provided by The Gambia so far are sufficient to enable the Court to conclude that the plausibility test was met with respect to the question of genocidal intent.

6. While the exceptional gravity of the violations alleged in this case does not justify the application of a stringent standard of plausibility as a prerequisite for the indication of provisional measures, the same exceptional gravity does justify, and perhaps even calls for emphasizing that this Order's finding on plausibility in no way whatsoever prejudges the merits.

7. This is as true for the question of genocidal intent as it is for the question whether the Rohingya in Myanmar constitute a protected group under the Genocide Convention. The Order alludes to this issue in one single sentence in paragraph 52. Here, the Court states that "the Rohingya appear to constitute a protected group within the meaning of Article II of the Genocide Convention". I would have preferred seeing the Court express more clearly than by the mere use of the word "appear" that, with respect to the question of protected groups under the Genocide Convention, it cannot go beyond the point of plausibility at this stage of the proceedings. This preference is based, not least, on the fact that the question of protected groups under the Genocide Convention did not receive closer attention during the proceedings.

(Signed) Claus KRESS.