Corrigé
Corrected

CR 2019/19

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Wednesday 11 December 2019, at 10 a.m., at the Peace Palace,

President Yusuf presiding,

***in the case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia *v.* Myanmar)**

VERBATIM RECORD

ANNÉE 2019

Audience publique

tenue le mercredi 11 décembre 2019, à 10 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

***en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar)**

COMPTE RENDU

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

Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Bennouna
Cançado Trindade
Mme Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian
Salam
Iwasawa, juges
Mme Pillay
M. Kress, juges *ad hoc*

M. Gautier, greffier

The Government of the Republic of The Gambia is represented by:

H.E. Mr. Abubacarr Marie Tambadou, Attorney General and Minister of Justice, Republic of The Gambia,

as Agent;

Mr. Paul S. Reichler, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court and the District of Columbia,

Mr. Philippe Sands, QC, Professor of International Law at University College London, Barrister-at-Law, Matrix Chambers, London,

Mr. Payam Akhavan, LLM, SJD (Harvard), Professor of International Law, McGill University, member of the Bars of New York and the Law Society of Ontario, member of the Permanent Court of Arbitration,

Ms Tafadzwa Pasipanodya, Attorney-at-Law, Foley Hoag LLP, member of the Bars of New York and the District of Columbia,

Mr. Pierre d'Argent, *professeur ordinaire*, Catholic University of Louvain, member of the Institut de droit international, Foley Hoag LLP, member of the Bar of Brussels,

Mr. Andrew Loewenstein, Attorney-at-Law, Foley Hoag LLP, member of the Bar of Massachusetts,

Mr. Arsalan Suleman, Attorney-at-Law, Foley Hoag LLP, member of the Bars of New York and the District of Columbia,

as Counsel and Advocates;

H.E. Mr. Cherno Marenah, Solicitor General, Ministry of Justice,

Mr. Hussein Thomasi, Ministry of Justice,

Ms Bafou Jeng, Ministry of Justice,

Mr. Amadou Jaiteh, Permanent Mission of the Republic of The Gambia to the United Nations,

Mr. Peter Tzeng, Attorney-at-Law, Foley Hoag LLP, member of the Bars of New York and the District of Columbia,

Ms Yasmin Al Ameen, Attorney-at-Law, Foley Hoag LLP,

Ms Jessica Jones, Barrister-at-Law, Matrix Chambers, London,

as Counsel;

H.E. Mr. Omar G. Sallah, Ambassador and Permanent Representative of the Republic of The Gambia to the Organisation of Islamic Cooperation,

H.E. Mr. Youssef Aldobeay, Assistant Secretary General for Political Affairs, Organisation of Islamic Cooperation,

Le Gouvernement de la République de Gambie est représenté par :

S. Exc. M. Abubacarr Marie Tambadou, *Attorney General* et ministre de la justice de la République de Gambie,

comme agent ;

M. Paul S. Reichler, avocat, cabinet Foley Hoag LLP, membre des barreaux de la Cour suprême des Etats-Unis d'Amérique et du district de Columbia,

M. Philippe Sands, QC, professeur de droit international à l'University College de Londres, avocat, Matrix Chambers (Londres),

M. Payam Akhavan, LLM, SJD (Université de Harvard), professeur de droit international à l'Université McGill, membre du barreau de l'Etat de New York et du barreau de l'Ontario, membre de la Cour permanente d'arbitrage,

Mme Tafadzwa Pasipanodya, avocate, cabinet Foley Hoag LLP, membre des barreaux de New York et du district de Columbia,

M. Pierre d'Argent, professeur ordinaire, Université catholique de Louvain, membre de l'Institut de droit international, Foley Hoag LLP, membre du barreau de Bruxelles,

M. Andrew Loewenstein, avocat, cabinet Foley Hoag LLP, membre du barreau du Massachusetts,

M. Arsalan Suleman, avocat, cabinet Foley Hoag LLP, membre des barreaux de New York et du district de Columbia,

comme conseils et avocats ;

S. Exc. M. Cherno Marenah, *Solicitor General*, ministère de la justice,

M. Hussein Thomasi, ministère de la justice,

Mme Bafou Jeng, ministère de la justice,

M. Amadou Jaiteh, mission permanente de la République de Gambie auprès de l'Organisation des Nations Unies,

M. Peter Tzeng, avocat, cabinet Foley Hoag LLP, membre des barreaux de New York et du district de Columbia,

Mme Yasmin Al Ameen, avocate, cabinet Foley Hoag LLP,

Mme Jessica Jones, avocate, Matrix Chambers (Londres),

comme conseils ;

S. Exc. M. Omar G. Sallah, ambassadeur et représentant permanent de la République de Gambie auprès de l'Organisation de la coopération islamique,

S. Exc. M. Youssef Aldobeay, sous-secrétaire général aux affaires politiques, Organisation de la coopération islamique,

H.E. Mr. Hassan Ali Hassan, Director of Legal Affairs, Organisation of Islamic Cooperation,

Mr. Hassan Abedin, Adviser to the Secretary General, Organisation of Islamic Cooperation,

Ms Yasmin Ullah, President of the Rohingya Human Rights Network,

Ms Razia Sultana, Director of the Arakan Rohingya National Organization and Coordinator of the Free Rohingya Coalition,

Mr. Wakar Uddin, Director General of the Arakan Rohingya Union,

Ms Hasina Begum,

Ms Hamida Khatun,

Mr. Yousuf Ali,

as Advisers;

Mr. Scott Edmonds, Cartographer, International Mapping,

Ms Vickie Taylor, Cartographer, International Mapping,

as Technical Advisers;

Ms Elise Barber, Washington, DC,

Ms Nancy Lopez, Washington, DC,

as Assistants;

Mr. Mark van Melle,

Mr. Erik Alexander van Houwelingen,

Mr. Robby Veltmeijer,

as Security Officers.

The Government of the Republic of the Union of Myanmar is represented by:

H.E. Ms Aung San Suu Kyi, Union Minister for Foreign Affairs of the Republic of the Union of Myanmar,

as Agent;

H.E. Mr. Kyaw Tint Swe, Union Minister for the Office of the State Counsellor of the Republic of the Union of Myanmar,

as Alternate Agent;

H.E. Mr. Kyaw Tin, Union Minister for International Cooperation of the Republic of the Union of Myanmar,

as Senior member of the delegation;

S. Exc. M. Hassan Ali Hassan, directeur des affaires juridiques, Organisation de la coopération islamique,

M. Hassan Abedin, conseiller du secrétaire général, Organisation de la coopération islamique,

Mme Yasmin Ullah, présidente du réseau de droits de la personne Rohingya,

Mme Razia Sultana, directrice de l'Arakan Rohingya National Organization et coordinatrice du réseau Free Rohingya Coalition,

M. Wakar Uddin, directeur général de l'Arakan Rohingya Union,

Mme Hasina Begum,

Mme Hamida Khatun,

M. Yousuf Ali,

comme conseillers ;

M. Scott Edmonds, cartographe, International Mapping,

Mme Vickie Taylor, cartographe, International Mapping,

comme conseillers techniques ;

Mme Elise Barber (Washington DC),

Mme Nancy Lopez (Washington DC),

comme assistantes ;

M. Mark van Melle,

M. Erik Alexander van Houwelingen,

M. Robby Veltmeijer,

comme agents de sécurité.

Le Gouvernement de la République de l'Union du Myanmar est représenté par :

S. Exc. Mme Aung San Suu Kyi, ministre des affaires étrangères de la République de l'Union du Myanmar,

comme agent ;

S. Exc. M. Kyaw Tint Swe, ministre de l'Union pour le bureau du conseiller d'Etat de la République de l'Union du Myanmar,

comme agent suppléant ;

S. Exc. M. Kyaw Tin, ministre de l'Union pour la coopération internationale de la République de l'Union du Myanmar,

comme membre principal de la délégation ;

Mr. Christopher Staker, member of the Bar of England and Wales, 39 Essex Chambers,

Mr. William Schabas, OC, MRIA, Professor of International Law, Middlesex University and Professor of International Criminal Law and Human Rights, Leiden University,

Ms Phoebe Okowa, Professor of Public International Law, Queen Mary University of London, Advocate of the High Court of Kenya, member of the Permanent Court of Arbitration,

as Counsel and Advocates;

Mr. Andreas Zimmermann, LLM (Harvard), Professor of International Law, University of Potsdam, Director of the Potsdam Centre of Human Rights, member of the Permanent Court of Arbitration,

Ms Catherine Dobson, member of the Bar of England and Wales, 39 Essex Chambers,

as Counsel;

H.E. Mr. Soe Lynn Han, Ambassador of the Republic of the Union of Myanmar to the Kingdoms of Belgium and the Netherlands,

Mr. Chan Aye, Director-General, International Organizations and Economic Department, Ministry of Foreign Affairs,

Mr. Min Thein, Director-General, Protocol Department, Ministry of Foreign Affairs,

Mr. Aung Ko, Director-General, Political Department, Ministry of Foreign Affairs,

Ms Thi Da Oo, Director-General, Attorney General's Office,

Ms Leena Ghosh, Advisor to the Alternate Agent, Senior Peace Adviser, National Reconciliation and Peace Center,

Ms Aye Thida Myo, Minister Counsellor, Permanent Mission of Myanmar to the United Nations, New York,

Ms Myo Pa Pa Htun, Minister Counsellor, Permanent Mission of Myanmar to the United Nations, Geneva,

Mr. Zaw Naing Win, Deputy Director/Personal Staff Officer to the Agent,

Ms Phoo Pwint Ko Ko, Counsellor, Myanmar Embassy, Kingdom of Belgium,

Mr. Thu Rein Saw Htut Naing, Assistant Director, International Organizations and Economic Department, Ministry of Foreign Affairs,

Mr. Swe Sett, Assistant Director/Personal Staff Officer to the Alternate Agent,

Mr. Chan Aye, First Secretary, Myanmar Embassy, Kingdom of Belgium,

Ms May Myat Noe Naing, First Secretary, Myanmar Embassy, Kingdom of Belgium,

Mr. Kyaw Kyaw Lwin, Third Secretary, Permanent Mission of Myanmar to the United Nations, Geneva,

M. Christopher Staker, membre du barreau d'Angleterre et du pays de Galles, 39 Essex Chambers,

M. William Schabas, OC, MRIA, professeur de droit international à l'Université du Middlesex et professeur de droit pénal international et des droits de l'homme à l'Université de Leyde,

Mme Phoebe Okowa, professeure de droit international public à la Queen Mary University of London, avocate près la Haute Cour du Kenya, membre de la Cour permanente d'arbitrage,

comme conseils et avocats ;

M. Andreas Zimmermann, LLM (Université de Harvard), professeur de droit international à l'Université de Potsdam, directeur du centre des droits de l'homme de l'Université de Potsdam, membre de la Cour permanente d'arbitrage,

Mme Catherine Dobson, membre du barreau d'Angleterre et du pays de Galles, 39 Essex Chambers,

comme conseils ;

S. Exc. M. Soe Lynn Han, ambassadeur de la République de l'Union du Myanmar auprès des Royaumes de Belgique et des Pays-Bas,

M. Chan Aye, directeur général du service des organisations internationales et de l'économie, ministère des affaires étrangères,

M. Min Thein, directeur général du service du protocole, ministère des affaires étrangères,

M. Aung Ko, directeur général du service politique, ministère des affaires étrangères,

Mme Thi Da Oo, directrice générale, bureau de l'*Attorney General*,

Mme Leena Ghosh, conseillère auprès de l'agent suppléant, conseillère principale pour la paix, Centre pour la réconciliation nationale et la paix,

Mme Aye Thidar Myo, ministre conseillère, mission permanente du Myanmar auprès de l'Organisation des Nations Unies à New York,

Mme Myo Pa Pa Htun, ministre conseillère, mission permanente du Myanmar auprès de l'Organisation des Nations Unies à Genève,

M. Zaw Naing Win, directeur adjoint du cabinet de l'agent,

Mme Phoo Pwint Ko Ko, conseillère, ambassade du Myanmar au Royaume de Belgique,

M. Thu Rein Saw Htut Naing, sous-directeur du service des organisations internationales et de l'économie, ministère des affaires étrangères,

M. Swe Sett, sous-directeur du cabinet de l'agent suppléant,

M. Chan Aye, premier secrétaire, ambassade du Myanmar au Royaume de Belgique,

Mme May Myat Noe Naing, première secrétaire, ambassade du Myanmar au Royaume de Belgique,

M. Kyaw Kyaw Lwin, troisième secrétaire, mission permanente du Myanmar auprès de l'Organisation des Nations Unies à Genève,

Mr. Zaw·Thet, Head of Branch II, Protocol Department, Ministry of Foreign Affairs,

Mr. Kyaw Tin, Legal Consultant,

Mr. Thihan Myo Nyun, Legal Consultant,

Ms Tint Tint Tun, aide to the Agent,

Dr. Thet Lel Swe Aye, physician to the Agent,

as Members of the delegation;

Mr. Icarus Chan, Assistant to the Secretariat,

Mr. Matthew Christopher Terry, Assistant to the Secretariat,

M. Alison Onyango, Assistant to Counsel and Advocates,

as Assistants;

Pol. Lt. Pyae Phyo Naing, Security Officer to the Agent,

Pol. Lt. Nay Min Tun, Security Officer to the Agent,

Pol. Lt Kyaw Zin Oo, Security Officer to the Agent,

Pol. WO. Cherry Htet, Security Officer to the Agent,

Pol. Sgt. Ohn Mar Myint, Security Officer to the Agent,

as Security Officers.

M. Zaw Thet, chef du service II, service du protocole, ministère des affaires étrangères,

M. Kyaw Tin, consultant juridique,

M. Thihan Myo Nyun, consultant juridique,

Mme Tint Tint Tun, assistante de l'agent,

D[r] Thet Lel Swe Aye, médecin de l'agent,

comme membres de la délégation ;

M. Icarus Chan, assistant au secrétariat,

M. Matthew Christopher Terry, assistant au secrétariat,

Mme Alison Onyango, assistante des conseils et avocats,

comme assistants ;

Pol. Lt. Pyae Phyo Naing, policier affecté à la sécurité de l'agent,

Pol. Lt. Nay Min Tun, policier affecté à la sécurité de l'agent,

Pol. Lt. Kyaw Zin Oo, policier affecté à la sécurité de l'agent,

Pol. WO. Cherry Htet, policier affecté à la sécurité de l'agent,

Pol. Sgt. Ohn Mar Myint, policier affecté à la sécurité de l'agent,

comme agents de sécurité.

The PRESIDENT: Please be seated. The sitting is open. The Court meets this morning to hear the first round of oral observations of Myanmar on the Request for the indication of provisional measures submitted by The Gambia. I shall now give the floor to the Agent of Myanmar, Her Excellency Daw Aung San Suu Kyi. You have the floor, Madam.

Daw AUNG SAN SUU KYI:

STATEMENT BY THE AGENT

1. Thank you, Mr. President and Members of the Court. It is an honour to appear as Agent of the Republic of ***the Union of*** Myanmar in these proceedings, in my capacity as Union Minister for Foreign Affairs. For materially less resourceful countries like Myanmar, the World Court is a vital refuge of international justice. We look to the Court to establish conditions conducive to respect for obligations arising from treaties and other sources of international law, one of the fundamental objectives of the United Nations Charter.

2. In the present case, Mr. President, the Court has been asked to apply the 1948 Genocide Convention, one of the most fundamental multilateral treaties of our time. Invoking the 1948 Genocide Convention is a matter of utmost gravity. This is the treaty that we made following the systematic killing of more than six million European Jews, and that my country whole-heartedly signed as early as 30 December 1949 and ratified on 14 March 1956. Genocide is the crime that the International Criminal Tribunal for Rwanda applied in response to the mass-killing of perhaps 70 per cent of the Tutsis in Rwanda. It is the crime that was *not* applied by the Tribunal ***for*** the former Yugoslavia ***to*** the displacement of approximately one million residents of Kosovo in 1999. *Neither* was it applied by that Tribunal nor by this Court when deciding upon the exodus of the Serb population from Croatia in 1995. In both situations international justice resisted the temptation to use this strongest of legal classifications because the requisite specific intent to physically destroy the targeted group in whole or in part was not present.

3. Regrettably, The Gambia has placed before the Court an incomplete and misleading factual picture of the situation in Rakhine State in Myanmar. Yet, it is of the utmost importance

that the Court assess the situation obtaining on the ground in Rakhine dispassionately and accurately.

4. The situation in Rakhine is complex and not easy to fathom. But one thing surely touches all of us equally: the sufferings of the many innocent people whose lives were torn apart as a consequence of the armed conflicts of 2016 and 2017, in particular those who have had to flee their homes and are now living in camps in Cox's Bazar.

5. Mr. President and Members of the Court, the troubles of Rakhine State and its population, whatever the background, go back into past centuries and have been particularly severe over the past few years. Currently, an internal armed conflict is going on there — between the Arakan Army, an organized Buddhist armed group with more than 5,000 fighters, and the regular Myanmar Defence Services. None of the speakers yesterday made any reference to this. The Arakan Army seeks autonomy or independence for Rakhine — or Arakan as it was called — finding inspiration in the memory of the historic Kingdom of Arakan. This conflict has led to the displacement of thousands of civilians in Rakhine. Standard security restrictions — such as curfew and check-points — are in place at present in the conflict zone and affect the situation of civilians there, regardless of their background.

6. Mr. President, on 9 October 2016, approximately 400 fighters of the Arakan Rohingya Salvation Army — known as ARSA — launched simultaneous attacks on three police posts in Maungdaw and Rathedaung Townships in northern Rakhine, near the border with Bangladesh. ARSA claimed responsibility for these attacks, which led to the death of nine police officers, more than 100 dead or missing civilians, and the theft of 68 guns and more than 10,000 rounds of ammunition. This was the start of an internal armed conflict between ARSA and Myanmar's Defence Services which lasted until late 2017. The selective factual propositions contained in The Gambia's Application actually concern this conflict.

7. In the months following the 9 October 2016 attacks, ARSA grew in strength in the Maungdaw, Buthidaung and Rathedaung Townships in northern Rakhine. It resorted to threats and intimidation against local villagers in order to gain support and allegiance, executing suspected

informers. According to, among others, the International Crisis Group, ARSA received weapons- and explosives-training from Afghan and Pakistani militants[1].

8. In the early morning of 25 August 2017, several thousand ARSA fighters launched co-ordinated attacks on more than 30 police posts and villages, and an army base in northern Rakhine. Most of the attacks took place on the narrow Maungdaw plain, which is framed by densely forested hills to the east, and the border with Bangladesh to the west. Indications are that ARSA's objective was to seize Maungdaw Township.

9. It may aid the Court to briefly consider the historical significance of Maungdaw. When Britain made Burma a colonial entity separate from British India in 1937, the border between Burma and India was drawn along the River Naf, where we find today's border between Bangladesh and Myanmar. The historical Kingdom of Arakan had at times extended much further to the north than the River Naf, including most of what is today Chittagong District in Bangladesh. Members of some Rakhine communities therefore felt that the border drawn by the British was too far south; others, that it was too far north. Myanmar has never challenged this border since independence in 1948.

10. Britain did not lose control over what is today Maungdaw Township during World War II. From September 1942, a number of local Muslim families offered fighters to the British irregular V-Force set up to collect intelligence and initially absorb any Japanese advance. Many Muslims gave their lives in combat against the Japanese in Rakhine. The sacrifices made by Muslim fighters motivated a call for the creation of an autonomous Muslim space in northern Rakhine, centred on Maungdaw. Whether or not this was encouraged by British officers, Britain rejected this call as soon as it had reoccupied Burma, before independence in 1948. The Muslim-Buddhist inter-communal violence of 1942 recurred in 1948 and several times after that. This cycle of violence has negatively affected life in northern Rakhine, making it the second-poorest state in Myanmar.

11. Mr. President and Members of the Court, may I go back to the situation in Rakhine on the morning of 25 August 2017. More than 30 police stations and villages, and one military base,

[1] International Crisis Group, "Myanmar's Rohingya Crisis Enters a Dangerous New Phase", Asia Report No. 292, 7 Dec. 2017 (available at https://legal-tools.org/doc/22qmxu).

had been attacked before sunrise in a highly co-ordinated fashion, by an organized armed group operating along a densely forested hill-range that provides ample opportunity ***to hide***. Many of the ARSA fighters had been recruited from local villages in the weeks and months preceding the attack. Myanmar's Defence Services responded to the attacks of ARSA fighters by the use of ground forces. There were armed incidents in more than 60 locations. The main clashes occurred in 12 places: in Min Gyi (Tola Toli) village, Chut Pyin village, Maung Nu village, Gutar Pyin village, Alai Than Kyaw village, Myin Lut village, Inn Din village, Chein Kharli (Koetan Kauk) village, Myo Thugyi ward, Kyauk Pandu village, wards of Maungdaw Town, and southern Maungdaw.

12. Mr. President, please allow me to clarify the use of the term "clearance operation", *nae myay shin lin yeh* in Myanmar. Its meaning has been distorted. As early as the 1950s, this term has been used during military operations against the Burma Communist Party in Bago Range. Since then, the military has used this expression in counter-insurgency and counter-terrorism operations after attacks by insurgents or terrorists. In the Myanmar language, *nae myay shin lin yeh* — literally ~~***means***~~ "clearing of locality" — simply means to clear an area of insurgents or terrorists.

13. It is still not easy to establish clear patterns of events in these 12 locations. Many ARSA fighters died. There may have been several hundred casualties in some of the 12 locations. There was some inter-communal violence. Buddhist and Hindu minority communities also feared for their security after the original ARSA attacks and many fled from their homes.

14. It may be worth noting that the use of air power in military operations was avoided as far as possible to minimize the risk of collateral damage. However, in one incident, in order to extract a unit surrounded by hundreds of ARSA fighters, the use of a helicopter was required. There was shooting from the helicopter which resulted in fatalities, which may have included non-combatants.

15. Mr. President, 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 ARSA fighters and civilians. There may also have been failures to prevent civilians from looting or destroying property after fighting or in abandoned villages. But these are determinations to be made in the due course of the criminal justice process, not by any individual in the Myanmar Government.

16. Please bear in mind this complex situation and the challenge to sovereignty and security in our country when you are assessing the intent of those who attempted to deal with the rebellion. Surely, under the circumstances, genocidal intent cannot be the only hypothesis.

17. Under its 2008 Constitution, Myanmar has a military justice system. Criminal cases against soldiers or officers for possible war crimes committed in Rakhine must be investigated and prosecuted by that system. On 25 November 2019, the Office of the Judge Advocate General announced the start of a court martial for allegations linked to the Gutar Pyin village incident, one of the 12 main incidents referred to earlier. The Office also let it be known that there will be additional courts martial if further incriminating evidence is brought up by the Independent Commission of Enquiry (ICOE). The ICOE is an independent special-investigation procedure established for Rakhine allegations by the President of Myanmar, chaired by a former Deputy Foreign Minister from the Philippines, with three other members, including a former Under-Secretary-General of the United Nations from Japan.

18. On 26 November 2019, this Commission announced that it had taken about 1,500 witness statements from all affected groups in Rakhine, and that it has interviewed 29 military personnel who were deployed to the affected townships in northern Rakhine during the military operations from 25 August 2017 to 5 September 2017, as well as 20 police personnel who were stationed at the police posts that were attacked on 25 August 2017. There is currently no other fact-finding body in the world that has garnered relevant first-hand information on what occurred in Rakhine in 2017 to the same extent as the Independent Commission of Enquiry and the Office of the Judge Advocate General in Myanmar.

19. This fact reinforces my sense that I should refrain from any action or statement that could undermine the integrity of these ongoing criminal justice processes in Myanmar. They must be allowed to run their course. It is never easy for armed forces to recognize self-interest in accountability for their members, and to implement a will to accountability through actual investigations and prosecutions. I respectfully invite the Members of the Court to consider for a moment the record of other countries. This is a common challenge, even in resource-rich countries.

20. Recent cases in the news headlines illustrate that even when military justice works, there can be reversals. This can also happen in Myanmar. As part of the overall efforts of the Myanmar

Government to provide justice, a court martial found that ten Muslim men had been summarily executed in Inn Din village, one of the 12 locations of serious incidents referred to earlier. It sentenced four officers and three soldiers each to ten years in prison with hard labour. After serving a part of their sentences, they were given a military pardon. Many of us in Myanmar were unhappy with this pardon.

21. Other cases are undertaken without controversy. For example, in the Mansi case, a court martial sat close to the location in Kachin State where three internally displaced civilians had been killed. It sentenced six soldiers, each to ten years in prison, in January 2018. Relatives of the victims and local civil society representatives were invited to the proceedings.

22. The Office of the Judge Advocate General in Myanmar is by our standards well resourced, with more than 90 staff and a presence in all regional commands throughout the country. I am encouraged by the Gutar Pyin court martial, and I expect the Office to continue its investigations and prosecutions based on reliable evidence gathered in Rakhine and from persons who witnessed what happened there.

23. Can there be genocidal intent on the part of a State that actively investigates, prosecutes and punishes soldiers and officers who are accused of wrongdoing? Although the focus here is on members of the military, I can assure you that appropriate action will also be taken against civilian offenders, in line with due process. There will be no tolerance of human rights violations in the Rakhine, or elsewhere in Myanmar.

24. Mr. President, there are those who wish to *externalize* accountability for alleged war crimes committed in Rakhine, almost automatically, without proper reflection. Some of the United Nations human rights mandates relied upon in the Application presented by The Gambia have even suggested that there cannot be accountability through Myanmar's military justice system. This not only contradicts Article 20 *(b)* of the Constitution of Myanmar, it undercuts painstaking domestic efforts relevant to the establishing of co-operation between the military and the civilian government in Myanmar, in the context of a Constitution that needs to be amended to complete the process of democratization. That process is now underway at the Pyidaungsu Hluttaw, the Union Parliament.

25. The emerging system of international criminal justice rests on the principle of complementarity. Accountability through domestic criminal justice is the norm. Only if domestic accountability fails, may international justice come into play. It would be inconsistent with complementarity to require that domestic criminal justice should proceed much faster than international criminal justice. A rush to externalize accountability may undermine professionals in domestic criminal justice agencies. What does the appearance of competition between domestic and international accountability do to the public's trust in the intentions of impatient international actors?

26. No stone should be left unturned to make domestic accountability work. It would not be helpful for the international legal order if the impression takes hold that only resource-rich countries can conduct adequate domestic investigations and prosecutions, and that the domestic justice of countries still striving to cope with the burden of unhappy legacies and present challenges cannot be made good enough. The Gambia will also understand this challenge with which they too are confronted.

27. Mr. President and Members of the Court, these reflections are relevant to the present hearing because the Applicant has brought a case based on the Genocide Convention. We are, however, dealing with an internal armed conflict, started by co-ordinated and comprehensive attacks by the Arakan Rohingya Salvation Army (ARSA), to which Myanmar's Defence Services responded. Tragically, this armed conflict led to the exodus of several hundred thousand Muslims from the three northernmost townships of Rakhine into Bangladesh — just as the armed conflict in Croatia with which the Court had to deal led to the massive exodus of, first, ethnic Croats and later, ethnic Serbs.

28. As I have already stated, if war crimes have been committed by members of Myanmar's Defence Services, they will be prosecuted through our military justice system, in accordance with Myanmar's Constitution. It is a matter for the competent criminal justice authorities to assess whether, for example, there has been inadequate distinction between civilians and ARSA fighters, disproportionate use of force, violations of human rights, failure to prevent plundering ***or*** property-destruction, or acts of forcible displacement of civilians. Such conduct, if proven, could be relevant under international humanitarian law or human rights conventions, but not under the

1948 Genocide Convention, for reasons on which Professor William Schabas will elaborate in a moment.

29. Mr. President, allow me to share one further reflection in this Great Hall of Justice. International law may well be our only global value system, and international justice a practice that affirms our common values. Leaders of States and relevant inter-governmental and non-governmental organizations should also be cognizant of their responsibility to express and affirm fundamental values. Feeding the flames of an extreme polarization in the context of Rakhine, for example, can harm the values of peace and harmony in Myanmar. Aggravating the wounds of conflict can undermine unity in Rakhine. Hate narratives are not simply confined to hate speech — language that contributes to extreme polarization also amounts to hate narratives.

30. Several international actors face a challenge here. But Myanmar also could have done more since the 1980s to emphasize the shared heritage and deeper layers of unity among the diverse peoples of our country. Cycles of inter-communal violence in Rakhine going back to the 1940s should be countered not just by practical measures aimed at sustainable development and rule of law, but also by nourishing a spiritual mindset of unity. It is a moral responsibility of leaders to guard the aspirations of people for harmony and peace.

31. U Thant, the third United Nations Secretary-General, had understood this. He wrote in his memoirs *View From the UN* published in 1974: "I even believe that the mark of the truly educated and imaginative person facing the twenty-first century is that he feels himself to be a planetary citizen" (p. 454). Encouraging this added layer of identity — a sense of planetary citizenship — is of fundamental importance for peaceful relations between nations as well as between ethnic and religious groups.

32. A commitment to broadening the mindset must go hand in hand with practical steps to improve lives. Even before the events of 2016-2017, Muslim, Buddhist and other communities in Rakhine faced what the Kofi Annan Advisory Commission described as complex challenges of low development and poverty rooted in enduring social conflict between the communities. The Myanmar Government is committed to addressing these challenges. Together with our partners, we are now striving to ensure that all communities enjoy the same fundamental rights. To expedite citizenship verification and application, a mobile team is already in operation. All children born in

Rakhine, regardless of religious background, are issued with birth certificates. Arrangements have been made to enable more Muslim youth to attend classes at universities across Myanmar. With the support of international and local partners, scholarships will also be made available to students from all communities living in Rakhine. The Government has started a social cohesion model project in Maungdaw Township, to promote social harmony among all communities. Interfaith fora have been encouraged. These are some of the steps taken to improve livelihoods, security, access to education and to health, citizenship, and social cohesion for all communities in Rakhine. Three internally displaced person (IDP) camps have already been closed, and an IDP camp closure strategy has been adopted. Myanmar is also committed to the voluntary, safe and dignified repatriation of displaced persons from Rakhine under the framework agreement reached between Bangladesh and Myanmar.

33. Mr. President, how can there be an ongoing genocide or genocidal intent when these concrete steps are being taken in Rakhine?

34. To conclude, Mr. President and Members of the Court, Rakhine today suffers an internal armed conflict between the Buddhist Arakan Army and Myanmar's Defence Services. Muslims are not a party to this conflict, but may, like other civilians in the conflict area, be affected by security measures that are in place. We pray the Court to refrain from taking any action that might aggravate the ongoing armed conflict and peace and security in Rakhine. Right now, in ***N***orthern Rakhine an army base near Paletwa is under attack by a group of more than 400 Arakan Army fighters, and some 200 insurgents have surrounded a military column near Ann City in Rakhine.

35. Since Myanmar gained independence in 1948, our people have not known the security of sustainable development that is the fruit of peace and prosperity. Our greatest challenge is to address the roots of distrust and fear, prejudice and hate, that undermine the foundations of our Union. We shall adhere steadfastly to our commitment to non-violence, human rights, national reconciliation and rule of law, as we go forward to build the Democratic Federal Union to which our people have aspired for generations past. We look to justice as a champion of the reconciliation and harmony that will assure the security and rights of all peoples.

36. Mr. President and Members of the Court, I thank you for your kind attention and I ask that you now call upon Professor William Schabas to continue the Myanmar submissions.

The PRESIDENT: I thank the Agent of Myanmar for her statement. I now invite Professor Schabas to take the floor. You have the floor.

Mr. SCHABAS: Thank you very much, Mr. President. Mr. President, Your Excellencies, it is an honour to appear before the Court today.

LACK OF A PLAUSIBLE CLAIM

1. Our hearing today does not concern the merits of the claim that The Gambia seeks to bring. It is confined to whether the Court should indicate provisional measures. It is established case law that certain preconditions must be met if the Court is to do so. My presentation will focus on the requirement of a "plausible claim". I will be followed by Mr. Staker, who will speak to the requirements of prima facie jurisdiction and ***prima facie*** standing, and then by Ms Okowa, who will complete our first round of observations by addressing the lack of real and imminent risk of irreparable prejudice to the rights in dispute.

The test for plausibility

2. The Gambia seems to accept the plausibility test developed in the Court's jurisprudence[2], but has misunderstood the standard applied by the Court. The plausibility requirement is a necessary corollary of the mandatory nature of the Court's provisional measures. For this reason, the references to provisional measures orders in 1993 may not be as helpful to the Court as The Gambia suggested yesterday[3], given that they were adopted well prior to the Court's important ruling on binding provisional measures in the *LaGrand* case[4]. The Gambia claims that the rights it alleges are plausible provided they are based on a mere "possible interpretation of the ***[Genocide]*** Convention"[5].

3. Mr. President, Your Excellencies, twice in the past 12 years this Court issued judgments on the application of the Genocide Convention. It has examined in excruciating detail both the

---

[2] Application instituting proceedings and request for provisional measures (Republic of The Gambia *v.* Republic of the Union of Myanmar), 11 Nov. 2019 (AG), para. 126.

[3] CR 2019/18, p. 21, para. 3 (Akhavan); p. 54, para. 15 (d'Argent); p. 55, para. 17 (d'Argent); p. 57, para. 8 (Reichler); p. 65, para. 4 (Reichler); p. 66, para. 6 (Sands); p. 67, para. 9 (Sands); p. 72, para. 27 (Sands).

[4] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109.

[5] AG, para. 126.

material and the psychological elements of the crime, applying well-accepted principles of interpretation, studying the *travaux préparatoires* and showing due deference for specialized bodies like the International Criminal Tribunals for Rwanda and the former Yugoslavia. Interpretations of the Convention that may have been "plausible" in 2006, before the Judgment in *Bosnia and Herzegovina* v. *Serbia*, have ceased to be plausible since then. And, if there was any doubt, the Court's Judgment in *Croatia* v. *Serbia* in 2015, resoundingly confirmed what it had said in 2007.

4. Yesterday, counsel for the Applicant avoided discussing the impact of these recent judgments. There were several references to the 1951 Advisory Opinion[6] but, apparently, none to the 2015 Judgment. In discussing the interpretation of Article 2 of the 1948 Convention, rather than turn to the Court's recent pronouncements counsel cited Raphael Lemkin's famous book, published in 1944[7]. In the sentence that was cited, Lemkin said that the focus of genocide was not on the "immediate destruction" of a group but rather with "destruction of the essential foundations of the life of national groups". Alas, Lemkin's original vision, which had much in common with our modern conception of crimes against humanity, did not prevail in the General Assembly in 1948 when the Convention was adopted. The drafters of the Convention settled on a much narrower view of the scope of genocide than Lemkin had contemplated in his book, and one that has since been confirmed in the case law of this Court. It was only on the basis of this narrower conception of the crime of genocide that States were willing to accept and undertake significant obligations, including the compromissory clause. Indeed, more than 70 years later they still hesitate to adopt a comprehensive equivalent convention dealing with crimes against humanity[8], despite noble efforts of the International Law Commission[9].

5. Here we are, four years after *Croatia* v. *Serbia*, and the Court is being asked to indicate provisional measures based upon allegations that simply cannot meet the terms of the Convention as authoritatively interpreted by the Court. In *Croatia* v. *Serbia*, the Court described the distinction

---

[6] CR 2019/18, p. 26, para. 21 (Akhavan); p. 51, paras. 5, 6 (d'Argent); p. 53, para. 13 (d'Argent).

[7] CR 2019/18, p. 69, para. 16 (Sands).

[8] Crimes against humanity, A/C.6/74/L.21.

[9] Report of the International Law Commission, Seventy-first session (29 Apr.–7 June and 8 July–9 Aug. 2019), A/74/10, Chap. IV.

between "ethnic cleansing" and genocide, with the former implying displacement and the latter referring to destruction, as — and I have highlighted the words on the screen —, "solidly rooted in its jurisprudence"[10]. The authority of that Judgment is surely enhanced by the size of the majority, 15 to 2. In *Bosnia*, the majorities, varying for each paragraph of the *disposif*, were between 11 and 14. Unless the Court were now suddenly and abruptly to abandon its *jurisprudence constante*, The Gambia, based upon the facts alleged in the Application, does not have a "plausible" case, a case with any possibility of success.

6. Members of the Court may recall that in the *Croatia* v. *Serbia* case, Croatia invited the Court to re-interpret the Convention provisions. You were told, and I quote counsel for Croatia, that "the law *has* moved on over the past seven years"[11]. The quotation is on the screen. If this case ever gets to the merits stage, I expect you will hear similar statements, proposing once again a break with your established case law. Is this plausible? Does this mean that any claim before the Court that is inconsistent with established case law is plausible because, to return to the phrase in the Application, it consists of a "possible interpretation of the [Genocide] Convention"? Can a challenge to something that is "solidly rooted" — those are the words of the Court —, in its jurisprudence have a plausible chance of success?

A stricter plausibility test in a genocide case

7. Mr. President, Your Excellencies, the "plausibility" criterion first appeared in the case law of the Court a decade ago in *Belgium* v. *Senegal*[12], a case involving no evidentiary issues[13].

8. Subsequently, Judge Greenwood wrote that the Court might just as well have opted for the term "arguable", more widely used in common law jurisdictions. He said: "unless there is a reasonable prospect that a party will succeed in establishing that it has the right which it claims and

---

[10] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. ***151***, para. 510.

[11] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia),* CR 2014/20, p. 27, para. 36; emphasis in the original.

[12] *Obligation to Prosecute or Extradite (Belgium* v. *Senegal) Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57.

[13] *Obligation to Prosecute or Extradite (Belgium* v. *Senegal) Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 152, para. 60.

that that right is applicable to the case, then it cannot be said that that right *might* be adjudged to belong to it"[14].

9. Over the years, of course, the Court has become more demanding. In recent cases it has held that *both* the legal arguments *and* the evidence presented must be plausible[15]. In *Ukraine* v. *Russia*, rejecting a request for provisional measures under the International Convention for the Suppression of the Financing of Terrorism (ICSFT)[16], the Court stressed that the applicant had to "afford . . . a sufficient basis to find it plausible" and that the constitutive elements of knowledge and intention required by the Convention were present[17]. The Court found that there was no sufficient evidentiary basis to find it plausible that such elements of intention and knowledge were indeed present[18].

10. The rejection of provisional measures in *Ukraine* v. *Russia* is especially pertinent because it involved a treaty of international criminal law, a cousin of the Genocide Convention as it were. Subjective intent and knowledge are, of course, also requirements of the Genocide Convention.

11. Thus, for the purposes of provisional measures, a "plausible claim" under the Genocide Convention must include evidence of the required specific genocidal intent. For it is this subjective intent that is *the* critical element distinguishing genocide from other violations of international law

---

[14] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I);* declaration of Judge Greenwood, p. 48, para. 5; emphasis in the original.

[15] *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. 430-431, para. 67; *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, pp. 242-243, para. 45; *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. 427, para. 54; *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. 104, paras. 74-76.

[16] *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. 104, paras. 75-76.

[17] *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. 104, para. 75.

[18] *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. 104, para. 75.

such as crimes against humanity and war crimes, for which in this case the Court obviously lacks jurisdiction.

12. Furthermore, Mr. President, Your Excellencies, in assessing whether the required level of plausibility is met, in relation to both legal and factual matters, the Court should also take into account the gravity of the alleged violations. The Court's well-established approach, at the merits stage, is that "the graver the charge the more confidence must there be in the evidence relied on"[19].

13. This principle must apply, *mutatis mutandis*, at the provisional measures phase, which may also result in a binding decision. Indeed, it must apply *a fortiori* because the Court is not able to hear full argument, with the respondent — unlike the applicant — unable to fully develop its own evidentiary base. In a case like this, involving allegations of exceptional gravity, a correspondingly stricter plausibility standard should be applied already at this phase of the proceedings.

Genocidal intent and plausibility: the only inference

14. Mr. President, Your Excellencies, in *Bosnia and Herzegovina* v. *Serbia* and *Croatia* v. *Serbia*, the Court did not have much difficulty concluding that some of the underlying acts, listed in the paragraphs of Article II of the Genocide Convention, had been established. I do not propose to consume any time here this morning arguing about this point. Let us assume, without making any admission for Myanmar, that a plausible case can be made for the application of at least one of the paragraphs of Article II of the Convention. Much time was consumed at yesterday's hearing with the recital of what we can all read in the reports of the Fact-Finding Mission, and this despite your reminder, Mr. President, of Practice Direction XI. The hard part, and it was on this that both the applications and the counter-claim floundered in the two genocide cases decided recently by this Court, is the mental element. On this point, the Applicant has had little to say, other than the mistaken assumption that a pattern of conduct is enough to constitute a plausible claim.

15. The United Nations Fact-Finding Mission, upon which the Application relies so heavily, frequently refers to "the inference" of genocidal intent. The theory seems to be that certain types of acts, taken individually or as a whole, tip the balance in favour of a conclusion that they were

[19] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003;* separate opinion of Judge Higgins, p. 234, para. 33.

committed with genocidal intent. With respect, that is not what this Court said in the *Bosnia* and in the *Croatia* cases. The real test, and the Court has repeated it on several occasions, is not that genocidal intent be a possible inference. Let me use the language of provisional measures: it is not that genocidal intent should be a plausible inference. The Court has said it is necessary "that this is the only inference that could reasonably be drawn from the acts in question"[20].

16. Addressing the counter-claim in *Croatia* v. *Serbia*, the Court said that

> "for a pattern of conduct, that is to say, a consistent series of acts carried out over a specific period of time, to be accepted as evidence of genocidal intent [I have highlighted the words up on the screen], it would have to be such that it could only point to the existence of such intent, that is to say, that it can only reasonably be understood as reflecting that intent"[21].

In declaring that genocidal intent must be the only inference that can reasonably be drawn from the acts in question, this Court has brought great clarity to the law. Instead of focusing on whether genocidal intent is plausible, it looks in the other direction: is there another explanation?

17. There is an enormous amount of unproductive speculation about genocide; it is often prefaced with phrases like "if certain things were proven, it might even be genocide". And indeed, given the prevalence in the world of today, of racial and religious discrimination, of apartheid-like policies, and of persecution of ethnic minorities, indigenous peoples, migrant workers and refugees, in many countries and conflicts there is no shortage of acts that may fit within the paragraphs of Article II of the Convention and about which it can be said "if certain things were established, this might amount to genocide".

18. By insisting that genocidal intent, if based on a pattern of conduct, be the only reasonable inference, the Court has developed an effective, realistic and workable approach to the Genocide Convention. Regrettably, there are too many commentators, political figures and campaigners who either misunderstand the Court's approach or prefer to ignore it. They cherry-pick paragraphs out of its two great judgments yet fail to grasp the most fundamental principle: where genocidal intent

---

[20] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 67, para. 148; *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*, p. 43, para. 242.

[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 151, para. 510.

is premised on a pattern of conduct, it must be the only inference that could reasonably be drawn from the acts in question.

19. This is as essential to the provisional measures stage as it is to any eventual determination of the merits. In the context of a provisional measures application based upon Article IX of the Genocide Convention, the test must be whether it is plausible that genocidal intent is the only inference that can be drawn. In other words, unless it is plausible that another reasonable explanation of the intent for the acts can be excluded, the application must fail. That is a very different test to the one proposed by the Applicant, which is whether genocidal intent is one plausible explanation. The Applicant, as well as the Fact-Finding Mission upon which the Application relies, fail entirely to address the issue of alternative explanations for the intent element. And yet, all they had to do was to read your *Bosnia* and *Croatia* decisions in order to know that this was required.

20. The genocidal intent is often described with the term "specific intent" or *dolus specialis*. We find pronouncements about the "specific intent" (sometimes the formulation is "special intent") in the earliest judgments based upon the provisions of the Genocide Convention, going right back to the *Eichmann* case[22], the two judgements of the tribunals in Israel, and the judgement of the Trial Chamber of the International Criminal Tribunal for Rwanda in *Akayesu*[23].

21. In fact, the term specific intent (or *dolus specialis*) was employed in domestic criminal law long before international criminal law had even come into existence. In ordinary criminal law, as a general rule crimes of specific intent also contain, or are underlain by, offences that do not require the specific intent. For example, the crime of planned and premeditated murder generally contains a kind of included offence of intentional homicide, or murder, and negligent homicide, or manslaughter. Where the assessment of intent is based upon inferences drawn from a pattern of conduct, rather than upon direct evidence of planning and premeditation, a person will never be convicted of planned and premeditated murder if there is an alternative explanation for that

---

[22] *A-G Israel* v. *Eichmann*, (1968), International Law Reports (ILR), Vol. 36, p.18 (District Court, Jerusalem), para. 26 (available at https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Judgement_11-12-1961.pdf).

[23] *Prosecutor* v. *Akayesu* (ICTR-96-4-T), Judgement, 2 Sep. 1998, para. 498 (available at https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf; https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/fr/980902-1.pdf).

person's mental element. This is nothing more than the reflection, in ordinary criminal law, of the approach that this Court has taken with respect to genocide.

22. Myanmar submits that the information in the Application and in the materials invoked in its support — essentially the reports of the Fact-Finding Mission — provide ample evidence to indicate alternative inferences alternative explanations for the alleged conduct, other than that it is the product of genocidal intent. Should the Court agree that there is ample support for an alternative explanation, then it cannot but conclude that the Application has no reasonable chance of success on the merits. Not a 50 per cent chance. Not a 25 per cent chance. No chance. If there is a reasonable alternative explanation for the intent behind the alleged acts then the Application simply cannot succeed. And if it cannot succeed, it is not "plausible" for the purposes of a request for provisional measures.

Deportation: intent in the ICC proceedings

23. Mr. President, Your Excellencies, in both the *Bosnia* and *Croatia* cases, the Court was assisted immensely by the work of the two *ad hoc* tribunals. Although more limited, there is some activity at the International Criminal Court that may be of help here to the International Court of Justice. It manifests the drawing of an alternative inference, other than genocidal intent, for the alleged conduct of Myanmar.

24. In April 2018, the Prosecutor of the International Criminal Court applied to a Pre-Trial Chamber for a form of advisory opinion as to whether she might be able to exercise jurisdiction over the crime against humanity of deportation given the huge cross-border flows from Myanmar into Bangladesh in 2017. Her application, as well as all of the subsequent proceedings in this matter before the International Criminal Court, relied very heavily on the same materials that The Gambia invokes in this case, principally the reports by the Fact-Finding Mission. It is worth recalling that previous judgments of the Court in genocide cases have taken into account the activities of the Prosecutors of international criminal tribunals[24].

[24] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 128, para. 440; *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. 132, para. 217, p. 145, para. 251, p. 197 para. 374.

25. In her application, the Prosecutor said that (and it's on the screen) "the Rohingya people were specifically and intentionally deported into Bangladesh"[25]. She referred to "the initiation on 25 August 2017 of a 'clearance operation' aimed at deporting all remaining Rohingya across the border to Bangladesh"[26]. She expressly distinguished the situation "from a mass exodus of civilians from one State caused for instance by an ongoing armed conflict, without evidence of deportation *per se*"[27]. In other words, in her view, the intent of the so-called "clearance operation" was deportation from Myanmar, not physical destruction.

26. It cannot have been otherwise, Mr. President, Your Excellencies, because the Rome Statute requires that crimes be committed with intent and knowledge[28]. Crimes against humanity must constitute an "attack directed against any civilian population" that takes place "pursuant to or in furtherance of a State or organizational policy"[29]. In proceeding with prosecutions for deportation — for the crime against humanity of deportation — the Prosecutor is confirming her own view that the massive flows of persons to Bangladesh were not only intended by those who are responsible, but that they are also pursuant to or in furtherance of a State or organizational policy.

27. Let me make it clear that in discussing the work of the International Criminal Court, both the Prosecutor and the Pre-Trial Chamber, I intend no admission or acknowledgment. But to the extent that this serious and authoritative body provides an alternative explanation, the genocide hypothesis necessarily fails.

28. Only a few days after the Application in the present case was filed, a Pre-Trial Chamber of the International Criminal Court authorized the Prosecutor to proceed with an investigation. Referring specifically to the crime against humanity of deportation, the Pre-Trial Chamber concluded that "a reasonable prosecutor could believe that coercive acts towards the Rohingya forced them to flee to Bangladesh, which may amount to the crime against humanity of

---

[25] *Application under Regulation 46 (3)*, Prosecution's Request for a Ruling on Jurisdiction under Article 19 (3) of the Statute, 9 April 2018, para. 42 (available at https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF).

[26] *Application under Regulation 46 (3)*, Prosecution's Request for a Ruling on Jurisdiction under Article 19 (3) of the Statute, 9 April 2018, para. 9 (available at https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF).

[27] *Application under Regulation 46 (3)*, Prosecution's Request for a Ruling on Jurisdiction under Article 19 (3) of the Statute, 9 April 2018, para. 42, fn. 96 (available at https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF).

[28] Rome Statute of the International Criminal Court, (2002) 2187 *UNTS* 3, Art. 30 (available at https://treaties.un.org/doc/Publication/UNTS/Volume%202187/v2187.pdf).

[29] Rome Statute of the International Criminal Court, (2002) 2187 *UNTS* 3, Art. 7 (2) *(a)* (available at https://treaties.un.org/doc/Publication/UNTS/Volume%202187/v2187.pdf).

deportation"[30]. The Pre-Trial Chamber was confirming that an "alternative inference" for the massive population flows in late 2017 is deportation, carried out with the intent to deport and pursuant to a State or organizational policy.

29. This Court has confirmed that "[t]he forced displacement of a population, even if proved, would not in itself constitute the *actus reus* of genocide"[31]. Here I cite a sentence from *Croatia* v. *Serbia* on the screen. In the *Bosnia* case, the Court held that:

> "Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide . . . [the] deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group"[32].

The Court clearly distinguished between "the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, as distinct from its removal from the region"[33]. This is a quote from the judgment; the references will appear in the written transcript. Addressing Serbia's counter-claim in the *Croatia* Judgment, the Court said that "even if it were proved that it was the intention of the Croatian authorities to bring about the forced displacement of the Serb population of the Krajina, such displacement would only be capable of constituting the *actus reus* of genocide if it was calculated to bring about the physical destruction"[34].

The Applicant's authorities on genocidal intent

30. Mr. President, Your Excellencies, let me now turn to the materials advanced by the Applicant in support of the claim that there is genocidal intent.

31. In paragraph 5 of the Application, the Applicant explains that "facts are extensively documented by independent investigative efforts conducted under the auspices of the

---

[30] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, (ICC-01/19), Decision Pursuant to Art. 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 Nov. 2019, para. 108 (available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF).

[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 139, para. 477.

[32] *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. 123, para. 190; emphasis in the original.

[33] *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. 123, para. 190.

[34] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 140, para. 480.

United Nations and corroborated by international human rights organizations and other credible sources". This paragraph in the Application will be discussed, but bearing in mind of course Practice Direction XI.

32. In paragraph 6, the Application turns to the question of genocidal intent. Paragraph 6 of the Application begins with the following claim: "Multiple UN investigations have underscored the genocidal intent of these crimes." What follows are references to three sources, which I will discuss in turn.

33. The first is to the Special Rapporteur on the situation of human rights in Myanmar, Ms Yanghee Lee. The Application explains that she "carried out extensive fact finding" and, in a report to the Human Rights Council in March 2018 stated "I am becoming more convinced that the crimes committed [in Myanmar] bear the hallmarks of genocide"[35]. The Application also cites a news item from Reuters dated January 2019 where she is quoted saying that the commander-in-chief of Myanmar's military and other responsible individuals should be held accountable for genocide in Rakhine. The news report also said that her interview "marked the first time Lee has publicly called for the army chief to be prosecuted for genocide". She never made such statements in any of her reports to the United Nations. Indeed, in various submissions she never mentioned the term genocide other than in a general formulation about how certain acts "may amount to genocide, crimes against humanity and war crimes"[36]. In her 2019 report to the Human Rights Council, she did not even use the word genocide at all[37]. When she spoke to the Third Committee of the General Assembly in October of this year the only reference she made to genocide was observing that "the Gambia [is] considering commencing proceedings before the International Court of Justice"[38].

---

[35] Report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/37/70, para. 65 (available at https://undocs.org/en/A/HRC/37/70; https://undocs.org/fr/A/HRC/37/70).

[36] Report of the Special Rapporteur on the situation of human rights in Myanmar, A/73/332, paras. 36, 73 (available at https://undocs.org/en/A/73/332; https://undocs.org/fr/A/73/332).

[37] Report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/40/68 (available at https://undocs.org/en/A/HRC/40/68; https://undocs.org/fr/A/HRC/40/68); Report of the Special Rapporteur on the situation of human rights in Myanmar, A/74/342 (https://undocs.org/A/74/342; https://undocs.org/fr/A/74/342); Myanmar: UN human rights expert calls for targeted sanctions, Press release, 23 Oct. 2019 (available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25193&LangID=E).

[38] Statement by Ms Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 74th session of the General Assembly, Third Committee, 22 Oct. 2019 (available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25192&LangID=E).

34. In all of her writings, the Special Rapporteur provides no explanation for her employment of the phrase "hallmarks of genocide". She offers nothing whatsoever to suggest that she understands the legal issues relating to its use or that she appreciates the paramount significance of genocidal intent. Ms Lee is a developmental psychologist, not an international lawyer. When the Applicant says in paragraph 6 that "multiple UN investigations have underscored the genocidal intent of these crimes", describing the remarks of the Special Rapporteur, I submit ***that this*** should not be taken into account by this Court. They do not underscore the genocidal intent. They refer to genocide, not genocidal intent, and they constitute an opinion whose rationale is not explained, nothing more.

35. The second example of genocidal intent is a statement in March 2018 by the UN Special Adviser on the Prevention of Genocide. Speaking of the intent, he says it was "possibly even to destroy the Rohingya as such, which, if proven, would constitute the crime of genocide"[39]. A year later, he issued a statement concerning Myanmar that spoke of "conduct that could possibly amount to the crime of genocide"[40]. I draw your attention to Mr. Dieng's cautious use of the word "possibly". In other statements on Rakhine State, Mr. Dieng used the formulation "atrocity crimes" and not genocide[41]. It may not be without relevance to the issue of a risk of genocide in the future that, and according to his website, the Special Adviser has not made any statement about Rakhine State or Myanmar for 15 months. During that period, according to the website, he has issued statements about South Sudan, Cambodia, Guatemala, Bosnia and Herzegovina, Mali, Sri Lanka, Syria and the Democratic Republic of the Congo but not, apparently, Myanmar.

36. The Application considerably overstates the importance and significance of what Mr. Dieng has said. The Special Adviser plays a fundamental role in the genocide-prevention

---

[39] Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on his visit to Bangladesh to assess the situation of Rohingya refugees from Myanmar, 13 Mar. 2018 (available at https://www.un.org/en/genocideprevention/documents/2018-03-13%20Statement_visit%20Rohingya%20Bangladesh_FINAL.pdf).

[40] Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on the decision of the International Criminal Court Pre-Trial Chamber on the jurisdiction over the crime of deportation of the Rohingya population from Myanmar. 7 Sept. 2018 (available at https://www.un.org/en/genocideprevention/documents/20180907%20Statement_ICC%20decision%20deportation%20Rohingya_FINAL.pdf).

[41] Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide and Ivan Simonovic, United Nations Special Adviser on the Responsibility to Protect, on the situation in northern Rakhine state, Myanmar, 19 Oct. 2017 (available at https://www.un.org/sg/en/content/sg/note-correspondents/2017-10-18/note-correspondents-statement-adama-dieng-un-special).

activities of the United Nations. His function is early warning, not pronouncements on whether or not genocide has been committed. I think he would himself object to being cited as authority for the existence of genocidal intent.

37. The Application also did not mention the other UN bodies that have concerned themselves with the situation in Rakhine State over the past two years. For example, shortly after the events of August-September 2017, the High Commissioner for Human Rights described them as "a textbook example of ethnic cleansing"[42]. Some months later, he started using the term "genocide", but again with the caution and equivocation that we have already seen with the other mandate holders[43]. There are many other examples, some of them quite recent. The resolution on Myanmar adopted by the Human Rights Council in September 2019 refers to "the need for an urgent criminal investigation into alleged crimes against humanity and war crimes"[44]. It doesn't mention genocide. Nowhere is the word "genocide" used in the Human Rights Council resolution. Similarly, a resolution on Myanmar adopted by the Third Committee only a few weeks ago makes no reference to genocide[45]. In July of this year, the Deputy High Commissioner for Human Rights reported on Myanmar to the Human Rights Council without reference to "genocide"[46].

38. The most substantial discussion of genocidal intent, of course, and the one on which the Application largely relies, is that of the Fact-Finding Mission. It launched the genocide claim in its September 2018 report. The Mission concluded without equivocation that crimes against humanity and war crimes had been committed[47]. On genocide, it was somewhat more circumspect: it said that there was "sufficient information to warrant the investigation and prosecution of senior officials in

---

[42] "UN human rights chief points to 'textbook example of ethnic cleansing' in Myanmar", 11 Sept. 2017 (available at https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar).

[43] E.g., "U.N.'s Zeid toughens warning of 'genocide' in Myanmar", Reuters, 18 Dec. 2017 (available at https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-s-zeid-toughens-warning-of-genocide-in-myanmar-idUSKBN1EC007; "The U.N. Isn't Ruling Out 'Elements of Genocide' in Myanmar", *Time*, 6 Dec. 2017 (available at https://time.com/5051269/un-genocide-rohingya-zeid-raad-al-hussein/).

[44] Situation of human rights of Rohingya Muslims and other minorities in Myanmar, A/HRC/RES/42/3, para. 3 (available at https://undocs.org/en/A/hrc/res/42/3; https://undocs.org/fr/A/hrc/res/42/3).

[45] Situation of human rights of Rohingya Muslims and other minorities in Myanmar, A/C.3/74/L.29 (available at https://undocs.org/en/A/C.3/74/L.29; https://undocs.org/fr/A/C.3/74/L.29).

[46] Update on Myanmar at the 41st Session of the Human Rights Council Statement by UN Deputy High Commissioner for Human Rights, Kate Gilmore, 10 July 2019 (available at https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24811&LangID=E).

[47] Report of the independent international fact-finding mission on Myanmar, A/HRC/39/64, paras. 88-89 (available at https://undocs.org/en/A/HRC/39/64; https://undocs.org/fr/A/HRC/39/64).

the Tatmadaw chain of command, so that a competent court can determine their liability for genocide in relation to the situation in Rakhine State"[48].

39. The Mission briefly explains what it means by "reasonable grounds" in the introductory part of its long report[49]. But it also adds the following caveat: "This standard of proof is lower than that required in criminal proceedings"[50].

40. There is a summary discussion of the intent issue in the 440-page supplement to the Mission's 2018 report. It devotes 113 words in a 440-page supplement to considering whether the intent may have been "to displace the Rohingya population, but not to seek its ultimate destruction"[51]. One hundred and thirteen words. And this is the very hypothesis on which the Prosecutor of the International Criminal Court has based her activities. The Mission does a little bit of textual sleight of hand by referring to the "physical destruction of Rohingya life as it once was", a formulation that ever so slightly blurs an important distinction between physical and cultural genocide, one to which this Court has previously attached considerable significance[52].

41. Elsewhere, in words that are cited in the Application, the Fact-Finding Mission states: "The crimes in Rakhine State, and the manner in which they were perpetrated, are similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts"[53]. But, they do not provide any reference or examples to what those other contexts are. The Mission might just as well have said the opposite. Because in other contexts, similar in so many respects to the circumstances in Myanmar, this Court and the International Criminal Tribunal for the former Yugoslavia have concluded that genocidal intent was not established. The Fact-Finding Mission essentially ignores this dimension. With respect, it is campaigning for a case rather than assessing a

---

[48] Report of the independent international fact-finding mission on Myanmar, A/HRC/39/64, para. 87 (available at https://undocs.org/en/A/HRC/39/64; https://undocs.org/fr/A/HRC/39/64).

[49] A/HRC/39/CRP.2, para. 10; Detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/42/CRP.5, para. 31 (available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf).

[50] Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, para. 10 (available at https://undocs.org/en/A/HRC/39/CRP.2).

[51] Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, para. 1438 (available at https://undocs.org/en/A/HRC/39/CRP.2).

[52] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 63, para. 136.

[53] Report of the independent international fact-finding mission on Myanmar, A/HRC/39/64, para. 85 (available at https://undocs.org/en/A/HRC/39/64; https://undocs.org/fr/A/HRC/39/64).

situation in an objective and impartial manner, and it is indifferent as to factors that tend to prove the contrary.

42. That said, the Fact-Finding Mission is not entirely consistent on the subject of intent. For example, when it discusses what it calls a policy of "food starvation", the Mission says that such "targeted actions to deny access to food appear to constitute a policy of forcing Rohingya to flee through food deprivation"[54]. The Mission says that starvation is intended to force Rohingya to flee. That is not the same thing and does not necessarily point to physical destruction. Yesterday, counsel for The Gambia suggested a genocidal intent with respect to food deprivation without even addressing this alternative explanation, which is proposed by the Fact-Finding Mission[55].

43. Other statements in the Fact-Finding Mission report also point to an intent other than one to destroy. It speaks in the report of the so-called "Four Cuts" counter-insurgency policy, which has allegedly been practised since the 1960s. "The policy has been implemented through 'clearance operations', essentially scorched earth campaigns in which large numbers of civilians are killed and entire villages destroyed, leading to mass displacement", says the report[56]. But nobody is seriously alleging that there has been a policy driven by genocidal intent underway since the 1960s. Did something change? Why is a "clearance operation" in 2017 different from one in previous decades? This question is not addressed.

44. Counsel for the Applicant has attached significance to a statement by the Fact-Finding Mission in its more recent report of this year, issued a few months ago, in September, that genocidal intent has "strengthened"[57]. There were several references to this yesterday. Counsel did not tell us why the Mission reached such a conclusion. And I can explain why Counsel did not mention it: because the Mission did not mention it. It appears that the only thing that appears to have strengthened is the insistence of the Mission on using the term. There is no real evidence of any aggravation of the situation described in the report of the previous year; rather, the contrary. If

---

[54] Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, para. 1195 (available at https://undocs.org/en/A/HRC/39/CRP.2).

[55] CR 2019/18, pp. 39-41, paras. 13-19 (Pasipanodya).

[56] Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, para. 1367 (available at https://undocs.org/en/A/HRC/39/CRP.2).

[57] CR 2019/18, p. 37, para. 2 (Pasipanodya), p. 57, para. 5 and p. 59, para. 12 (Reichler); p. 60, para. 17 (Reichler), referring to A/HRC/42/CRP.5, paras. 9 and 58.

anything, the absence of allegations of significant numbers of killings in the second report ought to suggest the contrary to what the Mission concludes.

45. Mr. President, Your Excellencies, the fact-finding missions of the United Nations — I was the chairman of one of them — play a hugely important role in the protection and promotion of human rights. The same can be said of the Special Rapporteurs and the Special Adviser on the Prevention of Genocide. These comments are not meant to denigrate their work but only to show how very limited their contribution can be to the issues that are before this Court, especially when they go beyond their mandate of genuine fact-finding and begin to speculate on the elements of international crimes. The Fact-Finding Mission's mandate from the Human Rights Council was "to establish the facts and circumstances"[58], not to make legal findings. Its determinations, couched in phrases like "reasonable grounds" and "sufficient information", when the issue is genocidal intent cannot be of help here. Most importantly, the validity of the opinion of the Fact-Finding Mission about genocidal intent is undermined by its failure to consider, in any substantive manner, the issue of alternative explanations. Although the Fact-Finding Mission's reports may contain valuable factual information, it is suggested that its legal determination should simply be disregarded by the Court because of its flawed approach.

46. Mr. President, Your Excellencies, without the three sources invoked by the Applicant as authority for the existence of genocidal intent, the Application is devoid of any support for the existence of genocidal intent, beyond the implication that the Court infer the existence of genocidal intent from a pattern of conduct — an approach that it has rejected more than once. This is familiar territory for the Court, because it is not different in any meaningful way from what it heard from counsel during the *Bosnia* and the *Croatia* cases.

Numbers and their relevance

47. There are some other striking omissions in the Application. Nowhere does the Application specify the number of deaths, the total number of deaths, and compare this with the size of the population that was allegedly attacked, and that crossed the border into Bangladesh. Of course, the Application attaches considerable importance to the quantitative aspect, to numbers,

[58] Situation of human rights in Myanmar, A/HRC/RES/34/22, para. 11 (available at https://undocs.org/A/HRC/res/34/22; https://undocs.org/fr/A/HRC/res/34/22).

because on several occasions the Court is told how many buildings were destroyed[59]. The Court is also informed of the number of villages that were destroyed, totally or partially[60]. And yesterday, counsel for the Applicant told us of many hundreds of deaths in three villages, totalling a little more than 1,000. It tried to present this as a kind of representative sample, explaining that there was one village taken from each of the three townships. But in fact, these were three of the four worst cases described in the Fact-Finding Mission report[61]. But no total is proposed, either in the Application or in yesterday's submissions. Perhaps this is the first court proceeding anywhere involving the Genocide Convention where the total number of victims was not volunteered by the applicant. Information on this point can be found in the lengthy annex to the Report of the Fact-Finding Mission, where we are told that there were an estimated 10,000 deaths, with 725,000 refugees who fled to Bangladesh and 600,000 who remained in Myanmar[62]. The application by the Prosecutor of the International Criminal Court also alleges "the killing of up to 10,000 Rohingya" and "the deportation of over 700,000 Rohingya into Bangladesh"[63]. Is it possible, Mr. President, Your Excellencies, that the Applicant neglected to provide the Court with allegations and evidence of the estimated total number of deaths because it sees this as weakening its claim that the intent was physical destruction of the group?

48. If this case ever goes to the merits, Myanmar will produce evidence challenging the figure of 10,000 as an exaggeration. Any estimate, moreover, of the number of killings ought also to provide some indication of the number of combatant deaths, and those attributable to the Arakan Rohingya Salvation Army. The Fact-Finding Mission, moreover, provides numerous aerial photographs, yet nowhere does it point to any evidence of mass graves. Whatever the number,

---

[59] AG, paras. 54, 85.

[60] AG, paras. 84, 100.

[61] Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, paras. 774, 796, 895.

[62] On 10,000 deaths: Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, paras. 1008, 1275, 1395, 1437, 1482 (available at https://undocs.org/en/A/HRC/39/CRP.2). On 725,000 refugees: Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, paras. 751, 1174, 1404, 1437, 1489. On 600,000 remaining in Myanmar: Detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/42/CRP.5, paras. 4, 57, 107, 120, 158, 212 (available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf).

[63] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, (ICC-01/19), Request for authorisation of an investigation pursuant to article 15, 4 July 2019, para. 68 (available at https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF).

every death is tragic. Families have been devastated. Killing non-combatants in an armed conflict may violate the right to life. But 10,000 deaths out of a population of well over one million might suggest something other than an intent to physically destroy the group. This inconvenient fact is not addressed by the Fact-Finding Mission. I can already hear the objections from counsel for the Applicant, who will ***claim*** that genocide is not just about the numbers. But here is what this Court had to say in *Croatia* v. *Serbia,* four years ago:

> "The Court considers that it is also relevant to compare the size of the targeted part of the protected group with the number of Croat victims, in order to determine whether the JNA and Serb forces availed themselves of opportunities to destroy that part of the group. In this connection, [and the words are on the screen] Croatia put forward a figure of 12,500 Croat deaths, which is contested by Serbia. The Court notes that, even assuming that this figure is correct — an issue on which it will make no ruling — the number of victims alleged by Croatia is small in relation to the size of the targeted part of the group."[64]

49. The Court concluded that "Croatia has not established that the only reasonable inference that can be drawn from the pattern of conduct it relied upon was the intent to destroy, in whole or in part, the Croat group"[65]. Mr. President, Members of the Court, any reasonable consideration of the situation in Myanmar, if it is guided by the case law of this Court, will ask whether 10,000 deaths out of a population of well over a million raises the same doubts as it did for this Court in the *Croatia* case.

50. Numbers are important in other respects. The Fact-Finding Mission referred to the 600,000 Rohingya who stayed behind. It said, in the detailed findings to the 2019 report, the more recent one:

> "The Mission found that movement restrictions, applied to the Rohingya in a discriminatory and arbitrary manner, touch almost every aspect of the lives of the 600,000 Rohingya remaining in Rakhine State, affecting basic economic, social and cultural rights, including their ability to sustain themselves, obtain an education, seek medical assistance or even pray and congregate."[66]

This is a claim of human rights violations, of persecution, but not of destruction. Had there been a genocidal plan afoot, one would expect a more sinister fate. I think the same can be said of those

---

[64] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 127, para. 437.

[65] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 128, para. 440.

[66] Detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/42/CRP.5, para. 2 (available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf).

allegedly confined to displacement camps, reportedly numbering well over 100,000[67], who have been in the camps for seven years[68]. And the Mission, the Fact-Finding Mission, said that "[i]nsecurity levels in camps are high and many displaced persons have a sense of despair for the future"[69]. It said that the adverse conditions in these camps "in extreme cases lead[] to preventable deaths"[70], a comment that stands out because the report does not seem to contain any claim of intentional killing in the camps[71]. The Mission never attempts to explain why there appears to be no evidence of systematic physical destruction in the displacement camps, perhaps because this might provide a reasonable explanation that runs counter to the genocidal intent hypothesis.

51. The similarities with the situation in Myanmar, as alleged in the Application, and the findings of the Court in *Croatia* v. *Serbia*, are striking in other respects. In *Croatia*, the Court found that

> "In the present case, as emerges in particular from the findings of the ICTY, forced displacement was the instrument of a policy aimed at establishing an ethnically homogeneous Serb State. In that context, the expulsion of the Croats was brought about by the creation of a coercive atmosphere, generated by the commission of acts including some that constitute the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention. Those acts had an objective, namely the forced displacement of the Croats, which did not entail their physical destruction. . . . [And the final words are on the screen.] The Court finds that the acts committed by the JNA and Serb forces essentially had the effect of making the Croat population flee the territories concerned. It was not a question of systematically destroying that population, but of forcing it to leave the areas controlled by these armed forces."[72]

52. To conclude, Mr. President, Your Excellencies, the Application fails utterly to address the essential issue of the specific intent to perpetrate genocide. As the Court has said repeatedly in

---

[67] AG, para. 35; Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, paras. 312, 377, 519, 528, 689, 691, 1491 (available at https://undocs.org/en/A/HRC/39/CRP.2); Detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/42/CRP.5, para. 57 (available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf).

[68] Detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/42/CRP.5, paras. 111, 113; 2018 long report, paras. 528, 693, 1491 (available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf).

[69] Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, para. 378 (available at https://undocs.org/en/A/HRC/39/CRP.2).

[70] Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, para. 525 (available at https://undocs.org/en/A/HRC/39/CRP.2).

[71] There is one reference to shelling "in populated residential areas, including in IDP camps, killing and injuring villagers and destroying property". Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, para. 146 (available at https://undocs.org/en/A/HRC/39/CRP.2).

[72] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, pp. 126-127, para. 435.

its recent case law, where proof of genocidal intent depends upon inferences drawn from a pattern of conduct, other explanations for the mental element of the crime must be excluded. The Application, and the oral submissions by counsel, do not even speak to this essential point. For that reason alone, the request for provisional measures should be rejected.

Mr. President, Your Excellencies, that concludes my observations. I would ask, Mr. President, if you would be kind enough to give the floor to my colleague, Mr. Staker, although perhaps it is the right moment to take a break.

The PRESIDENT: I thank Professor Schabas for his statement. Before I give the floor to the next speaker, the Court will observe a coffee break of 10 minutes. The sitting is adjourned.

The Court adjourned from 11.20 to 11.30 a.m.

The PRESIDENT: Please be seated. The sitting is resumed. I will now give the floor to Mr. Staker. You have the floor.

Mr. STAKER:

LACK OF PRIMA FACIE JURISDICTION OF THE COURT; LACK OF PRIMA FACIE STANDING OF THE GAMBIA; INAPPROPRIATENESS OF THE PROVISIONAL MEASURES REQUESTED

Introduction

1. Mr. President, Members of the Court, it is an honour to appear before you again, now on behalf of Myanmar.

2. I will address you on two of the prerequisites for provisional measures: prima facie jurisdiction[73], and prima facie standing.

---

[73] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of* ***14 June 2019***, para. 15; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II),* p. 630, para. 24; ~~***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. 413, para. 14;** *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 236, para. 15; *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. 114, para. 17; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II),* p. 1155, para. 31; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 151, para. 18.

Factual background relevant to prima facie jurisdiction and prima facie standing

3. But I begin with some background facts, pertinent to both issues, taken from publicly available documents contained in the Judges' folder, under section 3, tabs 3.1 to tab 3.17.

4. The documents I will take you to show the following. Although The Gambia is the nominal Applicant, these proceedings are in fact brought on behalf of the Organisation of Islamic Cooperation, the "OIC". The Gambia has been tasked by the OIC to bring them, acting in its capacity as an OIC Member State and chair of an OIC organ, its *ad hoc* committee. Moreover, the proceedings are financed by a fund supervised by the OIC. While the OIC decided to bring this case as early as March this year, the earliest official reference we can find to the Genocide Convention as the basis of the claim is in August. And the Applicant's lawyers were instructed to initiate proceedings a week before The Gambia even sent its 11 October Note Verbale to Myanmar.

5. Time constraints require me to take you through these documents quickly, and I am confident that they will be given all due consideration. I will refer to tabs: within a tab, the French version, if available, follows the English version.

6. At tab 3.1[74] is a May 2018 OIC resolution establishing an *ad hoc* Ministerial Committee on Accountability for human rights violations against the Rohingya, to be chaired by The Gambia[75]. The Committee's functions include to "[e]ngage to ensure accountability and justice for gross violations of international human rights and humanitarian laws and principles"[76], and to "[m]obilize and coordinate international political support"[77]. A preambular paragraph states that "ensuring accountability and justice is the most crucial step towards preventing genocide and other mass atrocity crimes"[78]. It does not say that genocide has actually been committed. In fact, the very opposite is implied when this statement is contrasted with the previous preambular paragraph, expressing concern that "the Rohingyas taking shelter in Bangladesh had been victims of gross and

---

[74] Organisation of Islamic Cooperation, Res. No. 59/45-POL on The Establishment of an OIC *ad hoc* Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas, adopted at the Forty-fifth Session of the Council of Foreign Ministers, 5-6 May 2018, OIC/CFM-45/2018/POL/RES/FINAL (available at https://www.oic-oci.org/docdown/?docID=1868&refID=1078, p. 164 (English); https://www.oic-oci.org/docdown/?docID=1881&refID=1078, pp. 173-174 (French)).

[75] *Ibid*., para. 1.

[76] *Ibid*., para. 2 *(a)*.

[77] *Ibid*., para. 2 *(c)*.

[78] *Ibid*., seventh preambular paragraph.

systematic violations of human rights and atrocity crimes"[79], and an earlier preambular paragraph that refers to "ethnic cleansing and forced expulsions"[80].

7. That same session of the OIC Council of Foreign Ministers in May 2018 saw the adoption of the "Dhaka Declaration", which was referred to in the argument of The Gambia yesterday[81], found at tab 3.2. This document does not contain the word genocide. It does refer to "ethnic cleansing"[82] and to State-backed violence. The Government of Myanmar issued a press release after that, found at tab 3.3, which affirmed that no violations of human rights would be condoned, that allegations supported by evidence would be investigated and action taken in accordance with the law, and that there was an immediate need for repatriation of displaced persons from Rakhine in accordance with the bilateral MOU between Myanmar and Bangladesh.

8. On 25 September 2018, the President of The Gambia made a statement in the General Assembly, relied on in oral argument yesterday, in which he referred to "terrible crimes against the Rohingya Muslims"[83], but made no mention of the Genocide Convention, or of genocide at all.

9. At tab 3.4[84] is an OIC resolution from March this year, virtually identical to the one at tab 3.1, with the same preambular paragraphs. Then at tab 3.5[85] is another resolution adopted at the same session, in which Member States decide to "[e]ndorse the Ad Hoc Committee's plan of action to engage in international legal measures to fulfill the Ad Hoc Committee's mandate"[86], and to

---

[79] Organisation of Islamic Cooperation, Res. No. 59/45-POL on The Establishment of an OIC *ad hoc* Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas, adopted at the Forty-fifth Session of the Council of Foreign Ministers, 5-6 May 2018, OIC/CFM-45/2018/POL/RES/FINAL, sixth preambular paragraph.

[80] *Ibid*., third preambular paragraph.

[81] Organisation of Islamic Cooperation, The Dhaka Declaration, Forty-fifth Session of the Council of Foreign Ministers, 5-6 May 2018 (available at https://www.oic-oci.org/docdown/?docID=1907&refID=1078 (English); https://www.oic-oci.org/docdown/?docID=1908&refID=1078 (French)).

[82] *Ibid*., para. 14.

[83] CR 2019/18, p. 27, fn. 188, referring to UNGA, Seventy-third Session, 7th Plenary Meeting, *Address by Mr. Adama Barrow, President of the Republic of the Gambia*, UN doc. A/73/PV.7 (25 Sep. 2018), p. 29.

[84] Organisation of Islamic Cooperation, Res. No. 60/46-POL on The Establishment of an OIC *ad hoc* Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas, adopted at the Forty-Sixth Session of the Council of Foreign Ministers, 1-2 Mar. 2019, OIC/CFM-46/2019/POL/RES/FINAL (available at https://www.oic-oci.org/docdown/?docID=4444&refID=1250, p. 174 (English); https://www.oic-oci.org/docdown/?docID=4476&refID=1250, pp. 182-183 (French)).

[85] Organisation of Islamic Cooperation, Res. No. 61/46-POL on The Work of the OIC *ad hoc* Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas, adopted at the Forty-Sixth Session of the Council of Foreign Ministers, 1-2 Mar. 2019, OIC/CFM-46/2019/POL/RES/FINAL (available at https://www.oic-oci.org/docdown/?docID=4444&refID=1250, pp. 176-177 (English); https://www.oic-oci.org/docdown/?docID=4476&refID=1250, pp. 184-185 (French)).

[86] *Ibid*., para. 1.

"[c]all upon member states to contribute voluntarily to the budget of the plan of action"[87]. Contrary to what was suggested in oral argument yesterday[88], this resolution contains no specific reference to the International Court of Justice, but a media article, at tab 3.6[89], states that at this OIC session there was a "major diplomatic breakthrough" in that a resolution was adopted "to move the International Court of Justice (ICJ) for establishing the legal rights of Rohingya Muslims". According to this report, the Bangladesh Foreign Ministry announced that the resolution to pursue a case in this Court "came after a long series of negotiations".

10. An official press release at tab 3.7 then states that on 30 May, the Bangladesh Foreign Minister appreciated the "Gambia led initiative of taking legal recourse to establish Rohingya rights and address their justice question at the International Court of Justice against Myanmar". There is no mention of the legal basis of the claim.

11. At tab 3.8[90] is the 31 May Final Communiqué of the 14th Islamic Summit Conference, affirming support for using all international legal instruments to hold accountable the perpetrators of crimes against the Rohingya, and urging the *ad hoc* Ministerial Committee to launch the case at the International Court of Justice on behalf of the OIC. Still no mention of the legal basis.

12. This Final Communiqué is referred to in an undated item on the website of the Office of the President of The Gambia, at tab 3.9[91], except that the second paragraph of this page mistakenly refers to the International Criminal Court rather than the International Court of Justice. The Office of the President of The Gambia was possibly not clear on the details of this proposed court case.

---

[87] Organisation of Islamic Cooperation, Res. No. 61/46-POL on The Work of the OIC *ad hoc* Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas, adopted at the Forty-Sixth Session of the Council of Foreign Ministers, 1-2 Mar. 2019, OIC/CFM-46/2019/POL/RES/FINAL, para. 2.

[88] CR 2019/18, p. 48, fn. 189 and accompanying text.

[89] Anadolu Agency, 4 Mar. 2019, "Islamic bloc approves legal action against Myanmar" (available at https://www.aa.com.tr/en/asia-pacific/islamic-bloc-approves-legal-action-against-myanmar-/1408933).

[90] Final Communiqué of the 14th Islamic Summit Conference, 31 May 2019, OIC/SUM-14/2019/FC/FINAL (available at https://www.oic-oci.org/docdown/?docID=4496&refID=1251, pp. 10-11, para. 47 (English); available at https://www.oic-oci.org/docdown/?docID=4499&refID=1251, pp. 11-12, para. 47 (French)), referred to in the Application instituting proceedings of The Gambia, fn. 31 and accompanying text.

[91] Republic of The Gambia, Office of the President, "OIC tasks The Gambia to lead ICJ case against Myanmar" (available at http://www.statehouse.gm/oic-tasks-gambia-lead-icj-case-against-myanmar).

13. Tab 3.10[92] is a 6 July media article, indicating that the OIC then formally proposed that The Gambia lead proceedings in this Court, and that the Cabinet of The Gambia then approved that proposal.

14. Paragraph 107 of the 8 August Fact-Finding Mission Report, tab 3.11[93], then refers to "the efforts of States, in particular Bangladesh and the Gambia, and the . . . [OIC] to encourage and pursue a case against Myanmar before the International Court of Justice under the [Genocide Convention]". This is the earliest official document we are aware of referring to the Genocide Convention as the proposed basis of the claim. The absence of any earlier mention is striking. In oral argument yesterday, The Gambia relied on a press report stating that a decision to base the claim on the Genocide Convention had been taken in March[94], but did not refer to any official document prior to August stating that.

15. The document at tab 3.12[95] then says as follows. These proceedings are funded by voluntary donations from OIC Member States[96]. Supervision of the funds is entrusted to the Chair of the *ad hoc* Ministerial Committee and the OIC Secretary General[97]. Assistance has also been requested from the Islamic Development Bank and the Islamic Solidarity Fund[98].

16. At tab 3.13[99] is a 26 September statement in the General Assembly by The Gambia's Vice-President that these proceedings involve "*concerted* efforts . . . '*on behalf of the [OIC]* "'.

---

[92] Panapress, 6 July 2019, "Gambian gov't approves OIC proposal to lead legal action against Myanmar at ICJ" (available at https://www.panapress.com/Gambian-gov-t-approves-OiC-propo-a_630596262-lang2-free_news.html).

[93] UNGA, Human Rights Council (HRC), Report of the independent international fact-finding mission on Myanmar, UN doc. A/HRC/42/50, 8 Aug. 2019 (available at https://undocs.org/en/A/HRC/42/50, p. 17, para. 107 (English); https://undocs.org/fr/A/HRC/42/50, p. 19, para. 107 (French)).

[94] CR 2019/18, p. 48, fn. 190 and accompanying text, referring to Khin Khin Ei, "World Islamic Group Votes to Take Myanmar Rohingya Abuses to International Court of Justice", Radio Free Asia (5 Mar. 2019) (available at https://www.rfa.org/english/news/myanmar/world-islamic-group-votes-03052019165111.html).

[95] Organisation of Islamic Cooperation, Report of the *ad hoc* Ministerial Committee on Human Rights Violations Against the Rohingya, Held on the Sidelines of the Annual Coordination Meeting, 25 Sep. 2019, OIC/ACM/AD-HOC ACCOUNTABILITY/REPORT-2019/FINAL (available at https://www.oic-oci.org/docdown/?docID=4519&refID=1255 (English); https://www.oic-oci.org/docdown/?docID=4545&refID=1255 (French)).

[96] *Ibid*., paras. 9-12.

[97] *Ibid*., para. 10.

[98] *Ibid*., para. 13.

[99] UNGA, Seventy-fourth session, 8th plenary meeting, 26 Sep. 2019, A/74/PV.8 (available at https://undocs.org/en/A/74/PV.8, p. 31, columns 1-2 (English); https://undocs.org/fr/A/74/PV.8, p. 34, column 2 (French)), referred to in the Application instituting proceedings of The Gambia, fn. 36 and accompanying text.

17. Two weeks later, on 11 October, The Gambia sent to Myanmar the Note Verbale seen at Annexes 1 and 2 of the Observations of The Gambia[100].

18. Tab 3.14[101] is an internet article reporting a statement of The Gambia's Attorney General, now its Agent, that lawyers were instructed to bring these proceedings on 4 October. Thus, the instruction to issue these proceedings had in fact already been given to the Applicant's lawyers a week before the first Note Verbale was even sent to and received by Myanmar.

19. Tab 3.15[102] is an 11 November item on the website of the law firm representing The Gambia, confirming that "[t]he OIC appointed The Gambia, an OIC member, to bring the case *on its behalf*"[103].

20. Tab 3.16[104] is an article from the *Jakarta Post* on 19 November, an example of media confirming that this case is brought on behalf of the OIC.

21. At tab 3.17[105] the OIC confirms on 24 November that these proceedings have indeed been brought by "the Republic of The Gambia, as Chair of the OIC Ad Hoc Ministerial Committee", and that The Gambia has been "tasked with submitting the case to the ICJ, following a decision by the OIC Heads of State".

22. I note that, on 12 November, after this case had already been introduced, Myanmar sent the Note Verbale found at Annexes 3 and 4 of the Observations of The Gambia[106], to which The Gambia's response is at Annexes 5 and 6 of The Gambia's Observations[107].

---

[100] Observations of the Republic of The Gambia (hereinafter "OG"), 2 Dec. 2019, Anns. 1 and 2.

[101] The Organization for World Peace, "Why Is This Small African Nation Taking Myanmar To The ICJ And Where Is The Rest Of The World?", 31 Oct. 2019 (available at https://theowp.org/why-is-this-small-african-nation-taking-myanmar-to-the-icj-and-where-is-the-rest-of-the-world/).

[102] Foley Hoag LLP, "Foley Hoag Leads The Gambia's Legal Team in Historic Case to Stop Myanmar's Genocide Against the Rohingya", 11 Nov. 2019 (available at https://foleyhoag.com/news-and-events/news/2019/november/foley-hoag-leads-the-gambias-legal-team-in-case-to-stop-myanmar-genocide).

[103] Emphasis added.

[104] *Jakarta Post,* "RI defends approach to Rohingya problem", 19 Nov. 2019.

[105] OIC, press release, "OIC Welcomes first hearing of Legal Case on accountability for crimes against Rohingya", 24 November 2019 (available at https://www.oic-oci.org/topic/?t_id=22925&t_ref=13830&lan=en (English); https://www.oic-oci.org/topic/?t_id=22926&ref=13830&lan=fr (French)).

[106] OG, Anns. 3 and 4.

[107] *Ibid*., Anns. 5 and 6.

Lack of prima facie jurisdiction of the Court: acting on behalf of an international organization

23. Mr. President, Members of the Court, it is unprecedented for a State to invoke the Court's contentious jurisdiction as the proxy for an international organization. The actual seisin of the Court was performed by The Gambia as chair of the OIC Ad Hoc Ministerial Committee[108], as an organ of the OIC, *not* in its capacity as a contracting party to the Genocide Convention.

24. While The Gambia is said to be "leading" this OIC initiative, it is unknown who else is controlling it. It is unknown which States have donated what to the voluntary fund, or whether the donors are even confined to States.

25. This is a circumvention of the limitations of Article 34 of the Statute: only States may be parties in cases before the Court. An international organization without even a mandate to seek an advisory opinion from the Court is seeking to circumvent that restriction by nominating a State to act as its substitute and bring a contentious case. If permissible, this would allow "the restrictions on personal jurisdiction which are matters of public policy, to be evaded, virtually at will, simply by nominating a mandatory"[109]. Furthermore, Myanmar's consent to the Court's jurisdiction is valid only vis-à-vis another State accepting the same obligation; it must be inapplicable where the substantive applicant is an inter-governmental organization with no standing before the Court.

26. Indeed, of the OIC's Member States[110], 13 are not even parties to the Genocide Convention[111], while seven — including most importantly Bangladesh[112] — have made reservations to its Article IX that prevent them from bringing proceedings against Myanmar under Article IX of that Convention[113]. For this reason alone jurisdiction is lacking.

---

[108] Footnote 103 above.

[109] Robert Kolb, *The International Court of Justice* (2013), p. 271; judges' folder, tab 3.18.

[110] https://www.oic-oci.org/states/?lan=en (English); https://www.oic-oci.org/states/?lan=fr (French); judges' folder, tab 3.19.

[111] United Nations Treaty Centre, Status of the Convention on the Prevention and Punishment of the Crime of Genocide; judges' folder, tab 3.20 (Brunei-Darussalam, Cameroon, Chad, Djibouti, Guyana, Indonesia, Mauritania, Niger, Oman, Qatar, Sierra Leone, Somalia, Suriname).

[112] *Ibid.*

[113] *Ibid.* (Algeria, Bahrain, Bangladesh, Malaysia, Morocco, United Arab Emirates, Yemen).

Lack of prima facie jurisdiction of the Court: absence of a dispute

27. Mr. President, Members of the Court, a further requirement that is essential for the exercise of the Court's contentious jurisdiction is the existence of a dispute[114]. This is also expressly required by Article IX of the Genocide Convention[115] which provides only for the submission to this Court of disputes between contracting States. In the absence of a *dispute*, Article IX of the Genocide Convention simply does not apply[116].

28. The *erga omnes partes* character of obligations under the Genocide Convention does not mean that The Gambia can bring these proceedings in the absence of a dispute specifically between the two Parties now before the Court. In *Belgium* v. *Senegal*, while the Court accepted that the *erga omnes partes* character of a treaty obligation might be of some relevance to standing[117], the Court's consideration of jurisdiction proceeded on the obvious premise that there had to be a dispute between Belgium and Senegal for there to be jurisdiction under the Convention against Torture[118].

29. As Article IX of the Genocide Convention is the only basis of jurisdiction, the only dispute over which this Court could potentially have jurisdiction is one concerning obligations arising specifically under that Convention. The Court has no potential jurisdiction over disputes concerning customary international law obligations regarding genocide[119], or disputes concerning alleged breaches of other treaty or customary international law obligations, even if those alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*[120].

---

[114] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 849, para. 36; *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. 269, para. 33; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (II)*, p. 566, para. 33.

[115] Convention on the Prevention and Punishment of the Crime of Genocide. Paris, 9 Dec. 1948, *UNTS*, Vol. 78, p. 277.

[116] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 441, para. 45.

[117] *Ibid.*, pp. 448-450, paras. 64-70.

[118] *Ibid*., pp. 441-445, paras. 44-55.

[119] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I)*, pp. 48-49, para. 88.

[120] *Ibid.*, p. 46, para. 85, quoting *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. 104, para. 147.

30. For the Court to have jurisdiction, there must accordingly be *first*, a dispute, which *secondly* is specifically between The Gambia and Myanmar, and which *thirdly*, concerns specifically the interpretation, application or fulfilment of the Genocide Convention.

31. Beginning with the second of these requirements, there is no dispute between The Gambia and Myanmar because these proceedings are in fact brought on behalf of and funded by the OIC. We see that the Applicant delegation here in court includes several high ranking officials of the OIC. If any dispute has been brought before the Court, it is the OIC's, not The Gambia's.

32. But even aside from that, there is no dispute at all.

33. According to the established case law, the existence of a dispute is determined as at the date on which the application is submitted to the Court[121]. The allegations contained in The Gambia's Application, and the arguments within these proceedings, cannot generate a dispute *de novo* if one did not already exist at the date of Application[122]. For a dispute to exist, "it must be shown that the claim of one party is positively opposed by the other", and that "the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations"[123].

34. The Gambia relies on several matters to establish the existence of a dispute[124].

---

[121] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II),* pp. 444-445, paras. 54-55; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 851, para. 42; *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. 272, para. 40; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (II)*, p. 568, para. 39.

[122] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 851, para. 43, pp. 854-855, para. 54; *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. 272, para. 40, p. 275, para. 50; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (II)*, p. 566, para. 34, p. 568, para. 40.

[123] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 849, para. 37; *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)*, pp. 269-270, para. 34; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (II)*, pp. 571-572, para. 50; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia) Preliminary Objections, Judgment, ICJ Reports 2016 (I)*, p. 26, para. 50.

[124] AG, paras. 21 and 23.

35. First, The Gambia relies on various OIC documents[125]. These clearly do not give rise to a relevant dispute between The Gambia and Myanmar. They contain no positive statement that Myanmar is in breach of its obligations under the Genocide Convention. Indeed, as I have explained, the preamble to two OIC resolutions implies the opposite. In any event, this Court has affirmed that a State's vote on a resolution of an international organization is not of itself indicative of that State's position on each proposition within the resolution, let alone of the existence of a legal dispute with another State regarding one of those propositions[126]. Furthermore, Myanmar is not a member of the OIC and there is nothing to indicate that Myanmar was put on notice of all of its resolutions.

36. Secondly, The Gambia relies on reports of the Fact-Finding Mission[127]. However, statements in reports of the Fact-Finding Mission do not constitute claims by The Gambia or the OIC or its Member States. Statements by the Fact-Finding Mission do not put Myanmar on notice of what particular claims those States and the OIC might be intending to make in Court proceedings.

37. Thirdly, the general statement by the Vice-President of The Gambia that The Gambia is "ready to lead concerted efforts" to bring this case[128] does not even mention the Genocide Convention.

38. Similarly, the statement by Myanmar's Union Minister for the Office of the State Counsellor[129] does not mention the Genocide Convention.

39. In short, these documents do not amount to allegations against Myanmar of violations of the Genocide Convention, and are not otherwise sufficient to found a justiciable dispute between the Parties[130].

---

[125] AG, para. 21, bullet points 2 and 3.

[126] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 855, para. 56; *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. 276, para. 53; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (II)*, p. 572, para. 53.

[127] AG, para. 21, bullet points 1, 4 and 5.

[128] AG, para. 21, bullet point 6.

[129] AG, para. 21, bullet point 7.

40. There is then the 11 October Note Verbale[131]. The Gambia's case is that because Myanmar failed to respond to it within a month, by 11 November a dispute between the Parties concerning the matters set out in that document had suddenly arisen.

41. However, the existence of a dispute can be inferred from a failure to respond to a claim only in circumstances where a response is called for[132], and where an acceptable time for any response has expired.

42. This Note Verbale did not call for a response. It contained only a sweepingly general claim that Myanmar had "responsibility for the ongoing genocide against Myanmar's Rohingya population". It contained no particulars. It does not specify which particular facts are relied on in support of the assertion of that responsibility. It does not specify which provisions of the Convention are claimed to have been violated by which facts. It provides no particulars of the facts that are alleged to constitute "Myanmar's refusal to acknowledge and remedy its responsibility". It refers only in the most general way to the reports and findings of the Fact-Finding Mission and to OIC resolutions (but specifies only one of each), and generically to obligations under the Genocide Convention, customary international law and human rights covenants. It does not make any particular legal or factual claim that could be positively opposed by Myanmar. It merely states a legal conclusion — that there is an ongoing genocide for which Myanmar is responsible — without stating any claim that is said to justify that conclusion.

43. It cannot be sufficient, for there to be a "dispute" under Article IX of the Genocide Convention, that the Applicant has referred the Respondent to a report of an international organization, or an NGO, or anyone else, suggesting that the latter is in breach of its obligations under that Convention, and that the latter has not responded.

44. A failure to respond to the Note Verbale therefore could not give rise to a dispute. However, even if it could, it cannot possibly be argued that the response was called for in the space

---

[130] Compare *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)*, pp. 101-102, 105, 108-112, paras. 65, 67, 77, 84, 86-87, 89 and 92.

[131] AG, para. 21, bullet point 8; OG, Anns. 1 and 2.

[132] Compare *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. 84, para. 30; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 850, para. 40.

of a single month, given that the detailed findings of the Fact-Finding Mission are some 180 pages long, and the Note Verbale contains no more than an unparticularized conclusion[133]. Furthermore, as the Agent of Myanmar observed earlier this morning, allegations of the most serious crimes need to be considered and determined in the course of the criminal justice process. These are not matters on which political representatives of countries can be required to take firm positions in short spaces of time — and even less so where the State making such a claim does not provide any timeline for any such response in the first place.

45. The second Gambian Note Verbale of 24 November[134] adds nothing. It was sent *after* this case had already been brought, and cannot *ex post facto* bring about a relevant dispute. In any event, it does nothing further to identify a legal claim.

46. Furthermore, the OIC, on whose behalf the proceedings are brought, has never directly accused Myanmar of violations of the Genocide Convention. Rather, the OIC has expressed support more generally for "using all international legal instruments to hold accountable the perpetrators of crimes"[135]. These proceedings are the initiative of an OIC subcommittee whose task is generally to "[e]ngage to ensure accountability and justice for gross violations of international human rights and humanitarian laws and principles"[136]. The impression is that the OIC wanted to bring "a" case before the Court, but was not particularly concerned with the legal basis of the claim, that Article IX of the Genocide Convention was simply identified at some point by someone as a vehicle for invoking the Court's jurisdiction, and that the OIC would have been equally prepared to use any other treaty it could identify for that purpose.

47. If The Gambia had a genuine dispute with Myanmar concerning the interpretation, application or fulfilment of the Genocide Convention, why did it not give notice of this claim to Myanmar in March, when a decision to bring these proceedings was made — or in August when the 2019 Fact-Finding Mission report noted that it was intended to bring a claim based on the Genocide Convention? Why did it not give notice of this claim to Myanmar *before* instructing

---

[133] UNGA, HRC, Detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/42/CRP.5, 16 Sept. 2019 (available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf).

[134] OG, Anns. 3 and 4.

[135] See paragraph 10 above.

[136] See paragraph 6 above.

lawyers on 4 October to institute proceedings? The inference is that the Note Verbale was sent as a legal formality, considered necessary to enable proceedings to be issued, once all preparations for the proceedings were already in place.

Mr. President, Members of the Court,

48. Myanmar's position is that for all these reasons, the lack of jurisdiction is manifest, and that even at the provisional measures stage, it is clear that the proceedings should not continue further. The appropriate course would be to strike the case from the Court's General List. As the Court said in two[137] of the previous cases[138] where it adopted such a course at this stage, it would most assuredly not contribute to the sound administration of justice to keep a case on the General List when it appears certain that the Court cannot adjudicate on the merits.

Lack of prima facie standing of The Gambia

Mr. President, Members of the Court,

49. I now turn to the issue of prima facie standing.

50. The Gambia says it has standing to bring the case, even though it is not specially affected by the subject-matter of the claim, because of the *erga omnes* and *erga omnes partes* character of obligations owed under the Genocide Convention[139].

51. At the outset, I note that *erga omnes* and *erga omnes partes* are not the same thing.

52. The term *erga omnes* refers to obligations under customary international law owed to the international community as a whole. Thus, in the *Barcelona Traction* Judgment[140], the Court referred to rights that had entered "into the body of general international law"[141], with

---

[137] *Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J Reports 1999 (II)*, p. 773, para. 35; *Legality of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J Reports 1999 (II)*, p. 925, para. 29.

[138] See also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case (New Zealand* v. *France), Order of 22 September 1995, I.C.J Reports 1995*, p. 288.

[139] AG, paras. 15, 120, 123-125, 127.

[140] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain) (Second Phase), Judgment , I.C.J. Reports 1970*, p. 32, paras. 33-35.

[141] *Ibid.*, para. 34, quoting *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

corresponding obligations of States owed to "the international community as a whole" being labelled obligations *erga omnes*[142].

53. On the other hand, the term *erga omnes partes* refers to multilateral treaty obligations. Such obligations are owed only to the community of States parties to that particular treaty. As this Court said in *Belgium* v. *Senegal*[143], each *State party* has an interest in compliance with such obligations.

54. Myanmar accepts that at least some obligations under the Genocide Convention are *erga omnes partes*[144].

55. However, even if The Gambia has an interest in Myanmar's compliance with *erga omnes partes* obligations under that Convention, it does not follow without more that The Gambia also has standing to bring a case before the Court in respect of a claimed breach by Myanmar, without being specially affected.

56. A State that *is* specially affected by the events the subject-matter of these proceedings is obviously Bangladesh. However, Bangladesh could not have instituted these proceedings without the consent of Myanmar because of a reservation that it has made to Article IX of the Genocide Convention[145]. In fact, none of Myanmar's neighbours, with the exception of Laos. could have done so, since each of the others is either not a party to the Genocide Convention[146] or has made a reservation that Article IX applies either not at all[147], or only with the consent of all parties to the dispute[148]. If a State such as The Gambia that is *not* specially affected by an alleged breach of a treaty could bring a case, in circumstances where a State that *is* specially affected cannot, this would represent a major inroad into fundamental principles concerning the consensual nature of this Court's jurisdiction.

---

[142] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain) (Second Phase), Judgment , I.C.J. Reports 1970*, p. 32, para. 33.

[143] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 449-450, paras. 68-69.

[144] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 47, para. 87.

[145] United Nations Treaty Centre, Status of the Convention on the Prevention and Punishment of the Crime of Genocide; judges' folder, tab 3.20.

[146] *Ibid*. (Thailand).

[147] *Ibid*. (China).

[148] *Ibid*. (Bangladesh, India).

57. Indeed, the implications are far wider than this. If a State not specially affected can seek enforcement of *erga omnes partes* obligations by bringing a claim in this Court, there would be no reason why it could not seek enforcement of those obligations by other means permitted under international law, such as by taking countermeasures. Yet, in the course of its work on its draft Articles on State Responsibility, the International Law Commission (ILC) noted, in the context of countermeasures, that "even accepting the proposition, on the basis of the *Barcelona Traction* case, that States at large had a legal interest in respect of violations of certain obligations, it did not necessarily follow that all States could vindicate those interests in the same way as directly injured States"[149]. A subsequent 2001 report by the then special rapporteur observed, in relation to the then draft Article providing that any State could take countermeasures in cases of an internationally wrongful act that constitutes a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests that "[t]he thrust of Government comments is that [the provision], has no basis in international law and would be destabilizing"[150].

58. In *Barcelona Traction* the Court did not address this specific question of standing because the case as such was not concerned with obligations *erga omnes* and even less with obligations *erga omnes partes*. It was only Judge Ammoun who *did* expressly accept the right of any State to enforce obligations *erga omnes* by way of bringing a case before the Court[151], making the omission of any other judge or the Judgment itself to do so significant.

---

[149] UNGA, *Report of the International Law Commission on the work of its fifty-second session (2000)*, UN doc. A/CN.4./513 of 15 Feb. 2001 (available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/251/22/PDF/N0125122.pdf?OpenElement, para. 181,(English); https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/251/23/PDF/N0125123.pdf?OpenElement (French)).

[150] UNGA, *Fourth report on State responsibility by Mr. James Crawford, Special Rapporteur*, UN doc A/CN.4/517 of 2 Apr. 2001, para. 72 (available at https://undocs.org/en/A/CN.4/517, (English); https://undocs.org/fr/A/CN.4/517 (French)); read in conjunction with the Draft articles provisionally adopted by the Drafting Committee on second reading, UN doc. A/CN.4/L.600 of 21 August 2000 (available at https://legal.un.org/docs/?symbol=A/CN.4/L.600 (English)), draft Articles 41 and 52.

[151] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain) (Second Phase), Judgment, I.C.J. Reports 1970*; separate opinion of Judge Ammoun, pp. 325-327.

59. Moreover, in all other cases brought before the Court involving the Genocide Convention, the Applicant was a specially affected State and thus the proceedings did not involve any kind of *actio popularis*[152].

60. In the *Bosnia Genocide* case, Judge Oda in fact expressed the view that while legal obligations arising under the Genocide Convention are "borne in a general manner *erga omnes* by the Contracting Parties", a failure to comply with such obligations cannot be rectified by an inter-State dispute before this Court[153], while the late Roberto Ago had previously taken the same view[154].

61. It is true that in *Belgium* v. *Senegal*[155], the Court held that Belgium had standing as a State party to the Convention against Torture to bring a case against Senegal for alleged breaches of that Convention. The Court therefore declined to pronounce on whether Belgium also had a special interest with respect to Senegal's compliance[156]. However, I would emphasize:

62. First, this one case does not amount to established jurisprudence of the Court, and Judge Skotnikov[157] and Judge Xue[158] disagreed with the Court's decision on standing.

63. Secondly, Belgium itself did in fact claim to be an "injured State" under Article 42 *(b)* (i) of the ILC Articles on State Responsibility[159].

64. And thirdly, Belgium was indeed affected by the outcome of that case. The Convention against Torture contained an *aut dedere aut judicare* obligation, and Belgium had availed itself of

---

[152] *Trial of Pakistani Prisoners of War (Pakistan* v. *India)*, application instituting proceedings, 11 May 1973; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, application instituting proceedings, 20 March 1993, para. 133; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, application instituting proceedings, 2 July 1999, p. 2; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, application instituting proceedings, 28 May 2002, p. 2.

[153] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*; declaration of Judge Oda, p. 626, para. 4.

[154] Roberto Ago, "Obligations *Erga Omnes* and the International Community", in J. Weiler et al. (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989), p. 238; judges' folder, tab 3.21.

[155] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 422.

[156] *Ibid.*, p. 450, para. 70.

[157] *Ibid.*; separate opinion of Judge Skotnikov, p. 481.

[158] *Ibid.*; dissenting opinion of Judge Xue, pp. 574-577, paras. 12-23.

[159] *Questions relating to the Obligation to Prosecute and to Extradite (Belgium* v. *Senegal)*, CR 2012/6, p. 54, para. 60 (Wood).

the specific right under Article 5 to exercise jurisdiction and to request extradition[160]. This case was thus not a genuine *actio popularis*, brought by a State that was individually completely unaffected by the subject-matter of the claim. In contrast, the Genocide Convention contains no *aut dedere aut judicare* obligation, and indeed, Myanmar has made a reservation to Article VI of the Genocide Convention that prevents the courts of any other State from exercising jurisdiction over genocide allegedly committed in its territory[161].

65. Ultimately, no decided case is precedent for standing for a pure *actio popularis* of this kind. While every State to whom an *erga omnes partes* obligation is owed may have an interest in compliance with that obligation, and may even be entitled to *invoke* the claimed breach in international relations, when it comes to standing to bring a claim before *this Court*, a balance has to be achieved. Allowing a pure *actio popularis* would open potential floodgates, to use a hackneyed but apt expression.

66. Normally, it is States most specially affected by international crises who are involved in diplomatic negotiations and practical initiatives to seek a resolution of the situation. It is those States who are best placed to judge when the bringing of a case before this Court would help or hinder those efforts. Allowing any State party to a major international treaty like the Genocide Convention, no matter how far removed from events they are, to bring a case such as this at any time of its own choosing against any other contracting party, could well prove counterproductive to such diplomatic negotiations and practical initiatives.

67. Furthermore, even if, contrary to my submissions, such an *actio popularis* was possible, this would not mean that the Court could order provisional measures in such a case. Under Article 41, paragraph 1, of the Statute, the Court only has power to indicate provisional measures "to preserve the respective rights of either party".

68. There is also one further reason why The Gambia has no standing.

69. Myanmar has made a reservation to Article VIII of the Genocide Convention. As the Court is aware, Article VIII states that "[a]ny Contracting Party may call upon — "saisir" in

---

[160] *Questions relating to the Obligation to Prosecute and to Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 448-449, para. 65.

[161] United Nations Treaty Centre, Status of the Convention on the Prevention and Punishment of the Crime of Genocide; judges' folder, tab 3.20.

French — 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"[162]. However, Myanmar's reservation means that Article VIII does not apply to it[163].

70. Article IX of the Convention, to which Myanmar has made no reservation, clearly confers *jurisdiction* on the Court in the circumstances described. However, this Court can only *exercise* jurisdiction if it is first validly *seised* of a case. Valid seisin of the Court — "saisine de la Cour" — thus constitutes a necessary condition precedent to the exercise of the Court's contentious jurisdiction[164]. We submit that Article VIII, as confirmed by its wording, deals with seisin. It permits *any* of the contracting parties of the Convention to seise *any* competent organ of the United Nations with *any* alleged situation of genocide, and to request it to take action under the Charter of the United Nations, of which the Court's Statute forms an integral part. The reference in Article VIII to competent organs of the United Nations must include this Court,[165] which, to state the obvious, is one of its principal organs[166]. Even if the conclusion were to be reached that a genuine *actio popularis* is possible under the Genocide Convention, *sed quod non*, this would be the result of Article VIII rather than the result of Article IX. By contrast, Article IX does not refer to *any* dispute; it is confined to "disputes between the Contracting Parties in relation to the interpretation, application or fulfilment of the present Convention". Nor does Article IX speak of *any* contracting party; it applies only to "the Contracting Parties" and "the parties to the dispute". These linguistic differences make clear that Article IX has a narrower remit than Article VIII.

71. Thus, where, as here, the respondent State has made a valid reservation to Article VIII, the effect is that the Court cannot be seised of this case, even though there is no reservation to Article IX.

---

[162] Convention on the Prevention and Punishment of the Crime of Genocide. Paris, 9 Dec. 1948, *UNTS*, Vol. 78, p. 277.

[163] United Nations Treaty Centre, Status of the Convention on the Prevention and Punishment of the Crime of Genocide; judges' folder, tab 3.20.

[164] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment, I.C.J. Reports 1995*, p. 23, para. 43; see also dissenting opinion of Judge Shahabuddeen, p. 60.

[165] For such a possibility, see *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*, pp. 22-23, para. 47; Giorgio Gaja, "The Protection of General Interests in the International Community: General Course on Public International Law (2011)", *Collected Courses of the Hague Academy of International Law (2012)*, Vol. 364, p. 83; judges' folder, tab 3.22.

[166] Article 7 of the United Nations Charter.

72. As this Court has said, "[t]he consent allowing for the Court to assume jurisdiction must be certain"; "whatever the basis of consent, the attitude of the respondent State must 'be capable of being regarded as "an unequivocal indication" of the desire of that State to accept the Court's jurisdiction in a "voluntary and indisputable" manner'"[167]. On any view, it is evident from the fact of Myanmar's reservation to Article VIII that it has not given any such unequivocal indication in an indisputable manner.

73. For all these reasons, Myanmar submits that The Gambia has no prima facie standing.

Inappropriateness of the provisional measures requested

74. Mr. President, Members of the Court, as a prelude to Ms Okowa's observations, I will finally address you on the wording of the six provisional measures requested by The Gambia.

75. The first two provisional measures, requested by The Gambia in paragraph 132 *(a)* and *(b)* of the Application, are essentially the same as the first two orders that it seeks by way of final relief in paragraph 112. It seeks provisional measures requiring Myanmar to comply with the Genocide Convention, and final relief finding that it has breached the Genocide Convention.

76. Now it may be that there is a precedent for this, in that these first two requested provisional measures are very similar to the first two provisional measures indicated in the *Bosnia Genocide* case[168]. But that does not mean that the Court should now follow a 26-year-old precedent given before such developments as the recognition since *LaGrand* that orders for provisional measures are legally binding[169].

---

[167] *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti* v *France*), *Judgment, I.C.J. Reports 2008*, p. 204, para. 62. See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 18, para. 21.

[168] *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. 3.

[169] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, pp. 502-506, paras. 102-109, p. 516, para. 128 (5); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, I.C.J. Reports 2008*, p. 397, para. 147; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, I.C.J. Reports 2015*, p. 160, para. 53; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France*), *Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1171, para. 97; *Jadhav (India* v. *Pakistan), Order of 18 May 2017, I.C.J. Reports 2017*, p. 245, para. 59; *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. 433, para. 77; *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. 652, para. 100.

77. If a Court makes an order — legally binding on a party, and non-compliance with which is a breach of international law — then justice requires that that party be able to know, from the time that the order is made until the time that it ceases to apply, what that party is required to do in order to comply. That is plainly impossible if the content of the obligations imposed by the provisional measures can only be known after the Court has given any judgment on the merits.

78. For instance, in the *LaGrand*, *Breard*, *Avena* and *Jadhav* cases, the Court indicated provisional measures in terms requiring the respondent State to take all means at its disposal to ensure that named individuals were not executed pending the final decision of the Court. These provisional measures were stated in objective language, with genuine non-prejudice to the merits. But, imagine if those provisional measures had instead stated as follows: "pending a decision on the merits, the respondent is required to take all measures within its power to prevent all acts that constitute a violation of the Vienna Convention on Consular Relations". What would a respondent State be expected to do?

79. Well, if the Respondent thinks that its conduct does not violate the treaty, it would see no need to change to its conduct. Indeed, its lawyers would no doubt advise it *not* to cease its conduct unless and until a judgment on the merits requires it to do so, since any earlier change in conduct in response to a provisional measures order would be perceived as tacit acceptance that the conduct *is* in breach of the treaty.

80. On the other hand, the public will undoubtedly perceive the provisional measures as some kind of Court pronouncement on the merits, and the applicant State is unlikely to discourage that. If the Respondent does not change its conduct, the Applicant will now accuse it of breaches of the provisional measures order as well. There will now be two disputes instead of one. Provisional measures orders of this kind will do little to "preserve the respective rights of either party" or to avoid an aggravation of the dispute, which is what they are meant to do.

81. And indeed, there is a further problem. Suppose that the Court were to indicate provisional measures in the terms requested, and were then to find later that it lacks jurisdiction to determine the merits. That would not prevent The Gambia from alleging that the Court still has jurisdiction to determine whether or not Myanmar has violated the provisional measures order. However, to determine compliance with the provisional measures order, the Court would have to

determine whether Myanmar had, after the provisional measures were indicated, failed to "prevent . . . acts which amount to or contribute to the crime of genocide". In other words, in order to determine compliance with the provisional measures order, the Court would need to determine the merits of the case, despite having found that it lacks jurisdiction to do so.

82. Provisional measures in such terms serve no useful purpose. Myanmar, as a party to the Genocide Convention, is bound to comply with its terms in any event, and an order from this Court requiring it to do so does not in any way add to its obligations. But if granted by the Court, politicians, activists and journalists will herald the ruling as a first step in condemnation of the Respondent. For instance, a press release of The Gambia's representatives[170], reported in the media[171], states that the purpose of provisional measures in this case would be "to stop Myanmar's genocidal conduct immediately". Also, in oral argument yesterday, Mr. Sands said that the effect of the first and second requested provisional measures is "to prevent the *further* genocide of the Rohingya group"[172]. Both thereby suggest that a grant of provisional measures would be an acknowledgment that the Applicant's claim on the merits had already been established.

83. For this reason, judges of the Court have sometimes pointed to the danger of prejudgment of the merits in the award of provisional measures[173]. Indeed, commentators have warned of the danger of requests for provisional measures being made for this very purpose, as part of a political or litigation strategy. It has been said that in some cases the applicant may see the

---

[170] Foley Hoag LLP, "Foley Hoag Leads The Gambia's Legal Team in Historic Case to Stop Myanmar's Genocide Against the Rohingya", 11 Nov. 2019 (available at https://foleyhoag.com/news-and-events/news/2019/november/foley-hoag-leads-the-gambias-legal-team-in-case-to-stop-myanmar-genocide); judges' folder, tab 3.15.

[171] Bloomberg, "Foley Hoag Leads The Gambia's Legal Team in Historic Case to Stop Myanmar's Genocide Against the Rohingya", 11 Nov. 2019 (available at https://www.bloomberg.com/press-releases/2019-11-11/foley-hoag-leads-the-gambia-s-legal-team-in-historic-case-to-stop-myanmar-s-genocide-against-the-rohingya); judges' folder, tab 3.23.

[172] CR 2019/18, p. 66, para. 9 (Sands).

[173] *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*; separate opinion of Judge Owada, pp. 144-145, 148-149, paras. 9, 10, 25, 27; *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)*; dissenting opinion of Judge *ad hoc* Cot; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*; declaration of Judge Xue; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*; separate opinion of Judge *ad hoc* Dugard, p. 61, para. 2; *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*; separate opinion of Judge Shahabuddeen, pp. 29, 30, 36; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*; declaration of Judge Buergenthal, p. 257, para. 9.

request for provisional measures as more important than the proceedings on the merits, brought in the hope that the Court will make statements that the applicant can use to its advantage before world public opinion even if the Court subsequently finds that it lacks jurisdiction in the main proceedings[174].

84. Furthermore, and apart from anything else, it is impossible to know what precise conduct might be within provisional measures worded in such broad terms. The Gambia has suggested that these provisional measures might affect, for instance, restrictions on movement in Rakhine State, or the process for applying for national verification cards. How would Myanmar know if, or how, that was so? If there is currently an armed conflict in Rakhine State, will it be suggested that measures taken to deal with this are a breach of these provisional measures if they are indicated?

85. As to the third provisional measure requested in paragraph 132 *(c)* of the Application, for similar reasons, if Myanmar is to be directed not to destroy evidence, it is required to know what that evidence might be. Of what consists "any evidence related to the events described in the Application"?

86. The fourth provisional measure requested in paragraph 132 *(d)* of the Application is that "no action [be] taken which may aggravate or extend the existing dispute". However, any dispute — even if the Court finds there to be one — consists of the sending by one party to the other of a single Note Verbale. It is difficult to see that being aggravated or extended in a way requiring provisional measures. Furthermore, this kind of provisional measure is only indicated in conjunction with other concrete measures[175].

87. The fifth provisional measure, requested in paragraph 132 *(e)* of the Application, would require both Myanmar and The Gambia to report to this Court on measures taken. Such a provisional measure would be akin to the reporting obligation under, say, Article 40 of the

---

[174] Tullio Treves, "The Political Use of Unilateral Applications and Provisional Measures Proceedings", in Frowein, Schariot, Winkelmann and Wolfrum, (eds.), *Verhandeln fuer den Frieden, Negotiating for Peace, Liber Amicorum Tono Eitel* (2003), pp. 463-481; judges' folder, tab 3.24; Karin Oellers-Frahm, "Use and Abuse of Interim Protection before International Courts and Tribunals", in Hestermeyer, König, Matz-Lück, Röben, Seibert-Fohr, Stoll and Vöneky (eds.), *Coexistence, Cooperation and Solidarity, Liber Amicorum Rüdiger Wolfrum* (2011), p. 1685 ("the request for interim protection becomes part of the litigation strategy . . . it may be used because it offers a forum for addressing the international public"); judges' folder, tab 3.25.

[175] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 21, para. 62; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 16, para. 49.

International Covenant on Civil and Political Rights, or Article 19 of the Torture Convention. However, the Genocide Convention contains no such reporting obligation nor any specific supervisory body, and if it did, this Court would not be the body to which such reports would be submitted. It is not the role of the Court to create human rights monitoring machinery through provisional measures not foreseen in the treaty that allegedly provides for the Court's jurisdiction.

88. The sixth provisional measure was requested only on 9 December, and would require Myanmar to grant access to and co-operate with United Nations fact-finding bodies that are engaged in investigating alleged genocidal acts. This is not a provisional measure. This is not a measure that would preserve existing rights of the parties pending a final decision by the Court. Myanmar is at present under no obligation under international law to permit access to its territory to, for instance, the Fact-Finding Mission or the Special Rapporteur on Myanmar. Furthermore, even if such an obligation did exist, the basis of any such obligation would not be the Genocide Convention. This provisional measure goes well beyond preservation of any existing rights. It would create entirely new substantive obligations of Myanmar vis-à-vis certain United Nations bodies. Such obligations would have nothing to do with The Gambia, unless The Gambia is contending that such a reporting obligation would be *erga omnes*. There is no principled basis for this requested provisional measure.

89. Furthermore, this provisional measure would be a circumvention of Myanmar's reservation to Article VIII of the Genocide Convention, to which I have referred. By virtue of that reservation, other contracting parties may not call upon the United Nations organs to take action under the Charter. The Court cannot impose an obligation which Myanmar has expressly excluded by way of a reservation to which The Gambia has not objected.

90. Mr. President, Members of the Court, that concludes my observations. I would invite you, Mr. President, to call on Ms Okowa to complete the first round of our oral observations.

The PRESIDENT: I thank Mr. Staker for his statement. I will now invite Ms Okowa to address the Court. You have the floor, Madam.

Ms OKOWA:

LACK OF REAL AND IMMINENT RISK OF IRREPARABLE PREJUDICE TO THE RIGHTS IN DISPUTE

LACK OF REAL RISK OF IRREPARABLE PREJUDICE TO SPECIFIC RIGHTS AND LACK OF URGENCY

A. Introduction

1. Mr. President, Madam Vice-President, Members of the Court, I appear before the Court for the first time. It is a great honour for me to do so on behalf of the Union of Myanmar.

2. I will address you on the last of the prerequisites for the indication of provisional measures, namely the requirement that there must be a real and imminent risk of irreparable prejudice to the rights in dispute before the Court gives its final decision[176]. In four cases in which a request for provisional measures was not granted, the applicant State had failed to demonstrate urgency of the measures sought[177]. We argue that notwithstanding what you heard from Mr. Reichler yesterday[178], the case for ordering provisional measures in this case is not blindingly obvious. We argue that The Gambia's request fails to meet the threshold for provisional measures as developed in the Court's jurisprudence and fails to satisfy the requirement of urgency.

3. I will develop four points in these submissions:

---

[176] *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. 645-656, para. 78; *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. 428, para. 61; *Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 231 para. 50; *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. 136, para. 89; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1168, para. 83; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 154, para. 32; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 360-362, paras. 25 and 35; *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)*, p. 548 para. 47.

[177] *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, pp. 17-18, paras. 23-27; *Trial of Pakistani Prisoners of War, Interim Protection, Order of 13 July 1973, I.C.J. Reports 1973*, p. 330, para. 14; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 201, para. 72; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, pp. 13-14, para. 42.

[178] CR 2019/18, p. 56, para. 3 (Reichler).

(a) The first is that in order to meet the final requirement, The Gambia needs to satisfy the Court that there is a real and imminent risk of Myanmar committing breaches of the Genocide Convention prior to the conclusion of these proceedings.

(b) Secondly, the current situation in Myanmar is inconsistent with the existence of an imminent risk of genocide. Myanmar is currently engaged in repatriation initiatives to support the return of displaced persons presently in Bangladesh. These have the support of a range of regional and international actors, support which would not be forthcoming if there was there an imminent or ongoing risk of genocide.

(c) Thirdly, Myanmar is currently engaged in a range of initiatives aimed at bringing stability to Rakhine State, protecting those who are there or who will return there, and bringing to account those responsible for past violence, actions which are inconsistent with it harbouring genocidal intent, as alleged by The Gambia yesterday.

(d) Finally, The Gambia has failed to provide any evidence to support its claim that the recent instability in Rakhine State is attributable to Myanmar and fails to acknowledge the role of insurgent groups in the region.

B. Legal principles relevant to provisional measures

4. I will now turn to the legal principles relevant to provisional measures. The requirements of irreparable prejudice and urgency are well established in the Court's jurisprudence[179]. However, it is useful to make two brief observations on how these principles apply to The Gambia's request.

5. The first is that provisional measures are indicated only where there is a risk that irreparable prejudice could be caused to the rights *sub judice*[180]. The Court would therefore need to be satisfied that there is a real and imminent risk of Myanmar committing breaches of the Genocide Convention prior to the conclusion of these proceedings. All this, of course, is assuming that the Court is satisfied that it has jurisdiction, that The Gambia has standing to bring this claim and that

---

[179] See *Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 143; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 128, para. 43, *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. 138, para. 96.

[180] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 152, para. 62.

there is a plausible case that breaches of the Genocide Convention might occur — which for the reasons given by Professor Schabas and Mr. Staker is not the case.

6. The second is that provisional measures are concerned with future threats, not past events. The Court must be satisfied that there exists *today* a real and imminent risk of irreparable prejudice to the claimed right[181].

C. The application of the legal principles in the circumstances of this case

7. I turn now to address the application of these principles in the circumstances of the case at hand. There are four submissions that I would like to develop in that regard.

8. My first point goes to urgency. The decision to launch these proceedings was taken as early as March 2019[182]. The Application was then filed as late as November 2019, more than half a year later. So, was there something that happened in November or October that made them "urgent"? If The Gambia really believed that there was an urgent need to protect, would it not have shown greater diligence in bringing its case and its request for provisional measures? The Gambia's request fails to advance a change in circumstances necessitating this application.

9. The second submission is that a number of regional and international actors are currently supporting the repatriation to Rakhine State of displaced persons currently in Bangladesh.

(a) The United Nations High Commission for Refugees (UNHCR) has been at the forefront of supporting repatriation efforts. Together with the United Nations Development Programme (UNDP), it entered into a Memorandum of Understanding (MoU) with Myanmar regarding the repatriation process in June 2018[183]. In May of this year, the MoU was extended until 5 June 2020[184] and in August, the UNCHR confirmed its continuing support for the repatriation

---

[181] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 16, para. 25.

[182] OIC, "Resolution No. 61/46-POL The Work of the OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas" p. 177 (available at https://www.oic-oci.org/docdown/?docID=4444&refID=1250); See also "Final Communiqué of The 14th Islamic Summit Conference, Makkah Al-Mukarramah, Kingdom Of Saudi Arabia" (31 May 2019) OIC/SUM-14/2019/FC/FINAL para.47 (available at https://www.oic-oci.org/docdown/?docID=4496&refID=1251) .

[183] "Memorandum of Understanding between The Ministry of Labour, Immigration and Population of the Government of the Republic of the Union Myanmar and The United Nations Development Programme and The Office of the United Nations High Commissioner for Refugees"; judges folder, tab 4.1.

[184] UNDP, "UNHCR, UNDP and Government of the Union of Myanmar extend MoU" (28 May 2019) (available at https://www.mm.undp.org/content/myanmar/en/home/presscenter/pressreleases/2019/unhcr-undp-government-of-the-union-of-myanmar-extend-mou.html).

effort[185]. The UNDP and the UNHCR are currently implementing a total of 43 "quick impact projects" in Rakhine State[186]. As part of a confidence building exercise we know that senior officials from Myanmar have met with displaced persons in Bangladesh with the support of the United Nations High Commission for Refugees[187]. Mr. President, Members of the Court, it is improbable to say the least that the United Nations High Commission for Refugees — an organization with eyes and ears on the ground — would be facilitating meetings between displaced persons with a view to their repatriation to Myanmar . . .

The PRESIDENT: Ms Okowa, would you kindly speak more slowly for the interpreters?

Ms OK***O***WA: I will just go over the last sentence again.

Mr. President, Members of the Court, it is improbable to say the least that the United Nations High Commission for Refugees — an organization with eyes and ears on the ground — would be facilitating meetings between displaced persons with a view to their repatriation to Myanmar if there were any reason to believe that those who would return are at imminent risk of genocide. The unequivocal and continuing support of both, UNHCR and UNDP for Myanmar's repatriation programme cannot be reconciled with the suggestion of such a risk.

(b) What is more, in November this year, the Association of Southeast Asian Nations (ASEAN) expressed their support for a "more visible ~~***and enhanced presence***~~ and enhanced role for ASEAN to support Myanmar in providing humanitarian assistance, in facilitating the repatriation process and promoting sustainable development of Rakhine State"[188]. This was the position reached following the deployment of the ASEAN Emergency Response and Assessment Team (ASEAN-ERAT) from Indonesia, Malaysia, Singapore and Thailand to

[185] "UNHCR Statement on Voluntary Repatriation to Myanmar", (22 Aug. 2019) (available at https://www.unhcr.org/news/press/2019/8/5d5e720a4/unhcr-statement-voluntary-repatriation-myanmar.html).

[186] "Update on the Operationalization of the Tripartite Memorandum of Understanding in Rakhine State September-October 2019" p. 1; judges' folder, tab 4.2.

[187] *Supra*, fn. 185.

[188] "Chairman's Statement of The 35th ASEAN Summit Bangkok/Nonthaburi," (3 Nov. 2019) para. 37 (available at https://asean.org/storage/2019/11/Chairs-Statement-of-the-35th-ASEAN-Summit-FINAL.pdf).

Myanmar in March 2019 to assess the readiness of the transit and reception centres[189]. In their assessment, ASEAN team found that systems prepared by the Myanmar Government for the repatriation of returnees are all in place and operational, noting that "it is evident that significant efforts have been made by the Government of Myanmar to facilitate a smooth repatriation process"[190].

(c) Bangladesh, the country that has borne the brunt of the crisis, has also entered into a MoU with Myanmar to provide an organized framework for repatriation of displaced persons[191]. Under the Memorandum, there shall be "no restrictions on the number of persons to be repatriated, as long as they can establish bona fide evidence of their residence in Myanmar"[192]. This is proof of the fact that Bangladesh, as Myanmar's close neighbour, is not of the view that Muslims are at risk of imminent genocide should they return[193].

(d) Mr. President, Members of the Court, neighbouring States have also provided practical support for the repatriation effort. For example, in February of this year, China donated 20 trucks to the Committee on Repatriation and Resettlement of Displaced People[194] and Japan provided US$ 37 million to cover the humanitarian and development projects in Rakhine State throughout 2019[195].

---

[189] Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine (UEHRD), "2nd High Level meeting on ASEAN cooperation to repatriate displaced persons from Rakhine" (28 May 2019) (available at https://rakhine.unionenterprise.org/index.php/latest-news-en/738-2nd-high-level-meeting-on-asean-cooperation-to-repatriate-displaced-persons-from-rakhine).

[190] ASEAN-ERAT, "Preliminary Needs Assessment for Repatriation in Rakhine State, Myanmar" (May 2019); judges' folder, tab 4.3, p. 24.

[191] "Arrangement on Return of the Displaced Persons from Rakhine State" (23 Nov. 2017); judges' folder, tab 4.4; "Meeting Minutes of the First Meeting of the Joint Working Group on the Repatriation of Displaced Myanmar Residents from Bangladesh, Nay Pyi Taw, Myanmar" (15-16 Jan. 2018); judges' folder, tab 4.5; see also "Agreed Minutes of the Fourth Meeting of the Joint Working Group on the Repatriation of Displaced Myanmar Residents from Bangladesh, Nay Pyi Taw" (3 May 2019); judges' folder, tab 4.6.

[192] *Ibid*, "Arrangement on Return of the Displaced Persons from Rakhine State", para. 9.

[193] Yusof Ishak Institute, "Repatriating the Rohingya: What Regional Cooperation Can and Cannot Do" (13 Sept. 2019), *ISEAS* 2019 (73) (available at https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2019_73.pdf).

[194] The Republic of the Union of Myanmar- Ministry of Information, "PRC donates 20 Sinotruck Howo cars to Rakhine State for repatriation, resettlement processes" (available at https://www.moi.gov.mm/moi:eng/?q=news/28/02/2019/id-16828U).

[195] UNICEF, "Ongoing UN and Japan Cooperation on Rakhine extended in 2019 to also support communities in Kachin and Shan" (26 Feb. 2019) (available at https://www.unicef.org/myanmar/press-releases/ongoing-un-and-japan-cooperation-rakhine-extended-2019-also-support-communities).

(e) At a meeting on 4 November 2019 between India's Prime Minister Narendra Modi and Myanmar's State Counsellor, Mr. Modi confirmed his unequivocal support for the repatriation of refugees from Bangladesh as being in the best interests of the three neighbouring States[196].

(f) In November 2019, the United Nations Secretary-General's Special Envoy to Myanmar, Christine Shraner-Burgener met with government officials of Myanmar and discussed, amongst other things, the return of the displaced persons and the potential use of third-party mediation to reduce the fighting in Rakhine State[197]. Mr. President, Members of the Court, these arrangements are repeatedly referred to by these agencies as the only uncontested solution to the humanitarian crisis in Rakhine State.

10. It is true that few displaced persons have returned. A number of factors may account for this. There is the continuing insurgency in Rakhine between Myanmar's armed forces and the Arakan Army[198]. Secondly, the displaced Muslim residents of Rakhine have made their return conditional on a number of demands including the grant of full citizenship, their recognition as a distinct ethnic group, return of land and compensation for past injustices[199]. These demands sit uneasily with the suggestion that they are at risk of imminent death. Both the requirements of citizenship and ethnicity remain contested and as yet there is no consensus on the issue. There is no doubt that instability is deterring many from returning. But — and this is significant — it is a concern shared by displaced persons of a number of ethnicities. The fact is that the insurgency in Rakhine State has led to the displacement of people of varied ethnic and religious backgrounds, including ethnic Buddhist Rakhine, Hindus and Muslims. It is not the case that the region is

---

[196] *The Economic Times*, "India attaches importance to Myanmar's Co-operation against Insurgent Groups" (4 Nov. 2019) (available at https://economictimes.indiatimes.com/news/politics-and-nation/india-attaches-importance-to-myanmars-cooperation-against-insurgent-groups-pm-modi-to-suu-kyi/articleshow/71895007.cms?from=mdr).

[197] Thar Shwe Oo, "UN Special Envoy meets with displaced persons in Maungdaw" (Eleven Media Group Ltd., 20 Nov. 2019) (available at https://elevenmyanmar.com/news/un-special-envoy-meets-with-displaced-persons-in-maungdaw); Khin Myat Myat Wai, "Burgener suggests third-party mediation in Rakhine strife" (*Myanmar Times*, 19 Nov. 2019) (available at https://www.mmtimes.com/news/burgener-suggests-third-party-mediation-rakhine-strife.html).

[198] "UNDP-UNHCR, Rapid Needs Assessment in Rakhine State, Round 1 to 5, Operationalization of the UNDP-UNHCR-GoM MoU" (Nov. 2019); judges' folder, tab 4.7, p. 15.

[199] Strategic Executive Group, **"**2019 Joint Response Plan For Rohingya Humanitarian Crisis: January-December" p. 13, para. 14 (available at https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/2019_jrp_for_rohingya_humanitarian_crisis_compressed.pdf); Agreed Minutes of the Fourth Meeting of the Joint Working Group (*supra*, fn. ***191***); Yusof Ishak Institute (*supra*, fn. 193).

dangerous for Muslims but safe for other ethnic groups[200]. Yet you heard not one word yesterday about the plight of other communities in Rakhine.

11. The key point is that the support for these repatriation initiatives from these sources and the broader international community[201] evidences a shared understanding that their return does not present imminent danger; and is obviously inconsistent with the existence of an imminent risk of genocide occurring in Myanmar.

12. The third point that tells against the existence of any imminent risk of genocide is that Myanmar is currently engaged in a wide range of initiatives aimed at bringing stability to Rakhine province, protecting those who are there or who return there, and bringing to account those responsible for past violence. It is not possible in the short time available to provide a comprehensive list of the actions which Myanmar has taken so far. I will confine myself to highlighting initiatives taken in two key areas.

13. First, Myanmar has taken a full range of initiatives to improve the overall stability and enhance the development of Rakhine State. These have included the establishment of the Central Committee on the Implementation of Peace, Stability and Development of Rakhine State, led by the State Counsellor, Myanmar's Agent in these proceedings[202]; the Rakhine State Investment Committee, tasked with enabling local communities to derive benefit from investment as well as to promote participation by the local population[203]; the Committee for Supporting Peace and Stability in Rakhine[204]; and, the Advisory Commission on the Rakhine State, then chaired by the late United Nations Secretary-General Kofi Annan, to advise on how best to achieve stability, development

---

[200] Agreed Minutes of the Fourth Meeting of the Joint Working Group (*supra*, fn. 191); Arrangement on Return of the Displaced Persons from Rakhine State (*supra*, fn. 191).

[201] Strategic Executive Group, (*supra*, fn. 199) para. 15, p. 13; "EU Introductory Statement — United Nations 3rd Committee: human rights of Rohingya Muslims and other minorities in Myanmar" (14 Nov. 2019) (available at https://eeas.europa.eu/headquarters/headquarters-homepage/70464/eu-introductory-statement-%E2%80%93-united-nations-3rd-committee-human-rights-rohingya-muslims-and_en).

[202] Republic of the Union of Myanmar-Office of the President, "Govt forms committee to implement peace, stability, development in Rakhine State" (31 May 2016) (available at http://www.president-office.gov.mm/en/?q=issues/rakhine-state-peace-and-stability/id 6391&__cf_chl_captcha_tk__=e98e482cd27d24b8ff5cd8d063124f7d17224628-1575619035-0-AVPiyrKLeNP8lkWhP2m0_sNlYs-59e9nJ-sz5qXeZWselfNYThoMZBmtylmywMLItgZp5aWeiHj8-NntdDpw7Xl1Z).

[203] The Republic of the Union of Myanmar- Ministry of Information, "Rakhine investment fair can pave way for JVs with foreign investor" (available at https://www.moi.gov.mm/moi:eng/?q=news/19/02/2019/id-16703).

[204] Xinhua, "Myanmar gov't forms supportive committee for Rakhine state's peace, stability" (15 Mar. 2019) (available at http://www.xinhuanet.com/english/2019-03/15/c_137898273.htm).

and meaningful coexistence between the different groups in Rakhine province[205]. In a recent report, progress was recorded in implementing recommendations by the Commission. This included significant investment in transport infrastructure, with the construction of nine industrial roads nearing completion and 49 bridges in progress, as well as the implementation of 100 new houses for the relocation of Taung Paw Internally Displaced Persons' camp[206].

14. Secondly, the Government of Myanmar has undertaken several initiatives to investigate the violence that occurred since the regrettable events of 2016 and 2017. This has included:

(a) The establishment (in December 2016) of the Investigation Commission on Maungdaw to probe into the background causes of the attacks on 9 October and 12 to 13 ***November*** 2016[207];

(b) In January 2018, a military court established in Mansi Township sentenced six soldiers to ten years imprisonment for their role in the killing of three men[208];

(c) The establishment (in July 2018) of the Independent Commission of Enquiry (ICOE) to investigate the allegations of human rights violations and related issues in Rakhine State[209]; also worth noting,

(d) We also have the establishment (in March 2019) of a Military Court of Inquiry to investigate incidents related to the terrorist attacks which occurred in Buthidaung-Maungdaw region[210]. The Court of Inquiry has conducted investigations in Buthidaung and Maungdaw townships. On 25 November 2019, it was announced that the military court will begin court martial proceedings against a group of soldiers involved in fighting against the Arkan Rohingya

---

[205] Advisory Commission on Rakhine State, "Final Report of The Advisory Commission On Rakhine State-Towards a Peaceful, Fair And Prosperous Future For The People Of Rakhine" (Aug. 2017) (available at http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf).

[206] "Report to the people on the progress of the Implementation committee on recommendations on Rakhine State between January and August 2019" (Report to the People, Jan.-Aug. 2019); judges' folder, tab 4.8, p. 16.

[207] Republic of the Union of Myanmar-President's Office, "Notification 89/2016—Formation of Investigation Commission" (1 Dec. 2016) (available at http://www.president-office.gov.mm/en/?q=briefing-room/news/2016/12/05/id-6883).

[208] "Military Court Gives Soldiers 10 Years for Murder of 3 Kachin" (22 Jan. 2018) (available at https://www.legal-tools.org/doc/623bd1/pdf/).

[209] Republic of the Union of Myanmar-Office of the President, "Government of the Republic of the Union of Myanmar Establishes the Independent Commission of Enquiry" (Press Release, 30 July 2018) (available at https://www.icoe-myanmar.org/).

[210] Office of the Commander in Chief of Defence Services, "Information released on formation of investigation court to further scrutinize and approve incidents related to terror attacks of extremist Bengali terrorists which occurred in Buthidaung-Maungtaw region of Rakhine State" (available at http://cincds.gov.mm/node/2135).

Salvation Army in Gu Dar Pyin village, in Buthidaung township[211]. Regional and international bodies, including the Association of Southeast Asian Nations, have expressed support for these measures aimed at accountability[212].

15. Mr. President, Members of the Court, these initiatives, as well as the international effort to repatriate displaced peoples, are completely at odds with the case presented by The Gambia. If The Gambia's allegations were to be taken at face value, it would have to follow that in all of the aforementioned initiatives, Myanmar is acting in bad faith, participating in all these initiatives, whilst in truth harbouring an entirely inconsistent genocidal intent. Such bad faith on the part of a State cannot be assumed by the Court, even at the provisional measures stage, in the absence of sound evidential basis to that effect.

16. Turning to The Gambia's case[213], it is worth noting what is omitted from the portrayal of the current situation-no doubt quite deliberately. Conspicuously absent is any acknowledgment of the complexity of the situation in Rakhine State. There is no mention of the ongoing insurgency in Rakhine by militant Muslim groups (Arakan Rohingya Salvation Army (ARSA)) and separatist Rakhine groups, like the Arakan Army (AA), opposed to the union with Myanmar[214]. Significantly, The Gambia does not cite any material which conclusively attributes recent attacks against homes and villages to the organs of the State of Myanmar. What is more, no State in the region, not even Bangladesh, has asserted that the displaced persons, if returning to Myanmar, would be at risk of genocide.

17. For example, the International Crisis Group in its most recent report noted the role of the ethnic armed groups, such as the Arakan Army, the separatist group excluded from the peace talks,

---

[211] Office of the Commander in Chief of Defence Services, "Court-Martial Trial on Incident of Gutapyin Commences" (available at http://cincds.gov.mm/node/5471).

[212] Chairman's Statement of The 35th ASEAN Summit (*supra*, fn. 188), para. 38; Strategic Executive Group (*supra*, fn. 199), para. 15, p. 13.

[213] AG, paras. 99-110.

[214] International Crisis Group, "A new Dimension of Violence in Myanmar's Rakhine State" (24 Jan. 2019) (available at https://d2071andvip0wj.cloudfront.net/b154-myanmar-s-rakhine-state.pdf.; See also Yusof Ishak Institute (*supra*, fn. 193). ; "Security Council Briefing on Myanmar, Special Envoy Christine Schraner-Burgener" (28 Feb. 2019) (available at https://dppa.un.org/en/security-council-briefing-myanmar-special-envoy-christine-schraner-burgener).

in aggravating conflict[215]. And just last week the Arakan Army claimed responsibility for an attack on a ferry carrying government officials[216].

18. Much is made in the Application[217] of the alleged restrictions on the freedom of movement of Muslim groups in Rakhine, who are confined in "displacement camps" — where access is strictly controlled by the Myanmar Military Police. But The Gambia does not mention that the deployment of the police is due to security considerations. It fails to indicate that these restrictions on movement have affected access of all communities, Muslims and non-Muslims alike, to education and also to health services[218]. In fact, a 2019 "Preliminary Needs Assessment" done by the Association of Southeast Asian Nations found that the local community in Rakhine view the presence of border guards as a critical element in rebuilding public confidence and deterring potential conflicts[219].

19. The allegation of a State-sponsored policy of starvation is not supported either. The Application instituting proceedings[220] cites only three documents, at footnotes 197 to 198, one of which is the Fact-Finding Mission's detailed findings merely referring to two other documents. One of these other documents does not refer to any deliberate State policy of forced starvation, but merely refers to "concerns" of people "reportedly experiencing conditions of forced starvation"[221]. The other is a statement by Ms Yanghee Lee, who says that there "appears" to be a policy of forced starvation in place, but does not give any further particulars.

20. The region, it is acknowledged, is facing a period of great instability. There is no doubt that this is having consequences for civilians caught up in the unrest. At Myanmar's request the Red Cross and the Red Crescent Movement — comprised of the ICRC and the Red Crescent

---

[215] International Crisis Group, " Myanmar: A violent Push to Shake up Ceasefire Negotiations" (24 Sept. 2019) (available at https://d2071andvip0wj.cloudfront.net/b158-myanmar-a-violent-push_0.pdf).

[216] Ei Ei Toe Lwin, Myanmar Times, "Arakan Army claims responsibility for ferry attack in Rakhine" (2 Dec. 2019) (available at https://www.mmtimes.com/news/arakan-army-claims-responsibility-ferry-attack-rakhine.html).

[217] CR 2019/18, p. 37, paras. 5 and 6 (Pasipanodya).

[218] UNDP-UNHCR Rapid Needs Assessment in Rakhine State, Nov. 2019, 15 and 19; judges' folder ***4.7***.

[219] ASEAN-ERAT, "Preliminary Needs Assessment for Repatriation in Rakhine State, Myanmar" (*supra*, fn. 190), p. 52.

[220] CR 2019/18, p. 41, paras. 17 and 19 (Pasipanodya).

[221] CEDAW, "Concluding observations on the report of Myanmar submitted under the exceptional reporting procedure" (18 Mar. 2019) UN doc. CEDAW/C/MMR/CO/EP/1 (available at https://undocs.org/en/CEDAW/C/MMR/CO/EP/1), para. 45 (quoted in AG, fn. 198.)

Societies (IFRC) — have been providing humanitarian assistance in Maungdaw and Sittwe districts[222]. The World Food Programme ("WFP") has been present with Myanmar's support[223], since 2017. It is significant that the WFP, in its monthly briefings, has made no suggestion of a policy of starvation. In fact, what it reports is food shortages affecting non-Muslim ethnic groups, attributable to ongoing fighting with insurgent groups[224].

21. Again, the various States and organizations who are supportive of the repatriation process have not suggested that there is any State policy of ***forced*** starvation in place, and it is hardly likely that they would be promoting repatriation efforts if they considered that there was any such risk.

22. To summarize, the ongoing causes and consequences of the hostilities in Rakhine State are complex and difficult to disentangle. The Court is not in a position to work through the disputes of fact in the context of a provisional measure's application. What is clear is that there is simply no evidence that the Muslim community is at risk of acts deliberately aimed at them by Myanmar's organs at their destruction as a group "in whole or in part".

Conclusion

23. Mr. President, Members of the Court, in our submission the request provides no factual basis for the conclusion that there is an imminent risk of Myanmar committing breaches of the Genocide Convention. On the contrary, Myanmar has made, and continues to make, great efforts to de-escalate the conflict that affects Rakhine State, and to advance peace, stability, and reconciliation in the region.

24. Myanmar's efforts have been endorsed by the international actors at the highest level[225]. Importantly, they are recognized by regional and international players, including China, Indonesia,

---

[222] Red Cross Movement, "Rakhine Operational Response" (Jan. 2018) (available at https://www.icrc.org/sites/default/files/wysiwyg/Worldwide/asia/Myanmar/red_cross_movement_rakhine_operational_response_-_jan_2018.pdf); ICRC, "Myanmar Conflict: Rakhine State, Myanmar" (available at https://www.icrc.org/en/where-we-work/asia-pacific/myanmar/myanmar-conflict).

[223] WFP, "Myanmar Country Brief" (Oct. 2017) p. 1 (available at https://reliefweb.int/sites/reliefweb.int/files/resources/wfp273246_1.pdf).

[224] WFP, "Myanmar Country Brief" (Oct. 2019) p. 1 (available at https://reliefweb.int/sites/reliefweb.int/files/resources/WFP-0000110696.pdf).

[225] See paragraph 9 above.

and Japan, as the only realistic solution to a humanitarian crisis against the backdrop of an on-going insurgency in Rakhine.

25. It is on this note that I turn briefly to the Court's discretion whether or not to order provisional measures, even if it considers that the criteria of Article 41 are met. In this case, there is a powerful factor that goes to discretion. To quote the late United Nations Secretary-General, Mr. Kofi Annan, speaking at the time of the publication of the Advisory Commission's Interim Report: "the challenges facing Rakhine State and its peoples are complex and the search for lasting solutions will require determination, perseverance and trust"[226]. If this Court were to find that there is an imminent risk of genocide in Myanmar, it would create an immediate and insurmountable obstacle to the current repatriation efforts underway. This is a highly relevant factor for the Court to consider when determining whether or not to grant provisional measures.

26. However, I do stress again that Myanmar firmly and emphatically denies that the criteria in Article 41 are met in this case.

27. This concludes the first round of oral pleading of Myanmar. I would like to thank you very much for your kind attention.

The PRESIDENT: I thank Ms Okowa. Your statement indeed brings to an end the first round of oral observations of Myanmar. The Court will meet again tomorrow, 12 December 2019, at 10 a.m. to hear the second round of oral observations of The Gambia. Myanmar will also present its second round of oral observations tomorrow, at 4.30 p.m. I recall that for the second round, each Party will have a maximum of 90 minutes to present its observations. Today's sitting is now adjourned.

The Court rose at 12.50 p.m.

---

[226] Press Release, "Statement by Kofi Annan, Chair of the Advisory Commission on Rakhine State (Interim Report)" (16 Mar. 2017) (available at http://www.rakhinecommission.org/statement-kofi-annan-chair-advisory-commission-rakhine-state-interim-report/).