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THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Thursday 12 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 jeudi 12 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

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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,

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The PRESIDENT: Please be seated. The sitting is open. The Court meets this morning to hear the second round of oral observations of The Gambia on its request for the indication of provisional measures. I see that Mr. Reichler is already at the lectern. I will give him the floor. You have the floor.

MR. REICHLER:

I. URGENCY AND IRREPARABLE HARM

1. Thank you, Mr. President. Good morning, Mr. President, good morning, Members of the Court.

2. Myanmar made two arguments about genocidal intent. First, they denied that they acted with genocidal intent in their treatment of the Rohingya. Second, they argued that, even if genocidal intent can be inferred from their conduct, it is not the only plausible inference that can be drawn. I will respond to the first argument. Professor Sands will answer the second.

3. What is most striking, Mr. President, is what Myanmar has *not* denied. So I will begin there. Myanmar has not denied that the United Nations Fact-Finding Mission reached this conclusion: "there is no reasonable conclusion to draw, other than the inference of genocidal intent, from the State's pattern of conduct"[1].

4. Nor has Myanmar denied that the Fact-Finding Mission reached this conclusion based on seven specific indicators, which it found to be "indicators of genocidal intent in international case law"[2]. Nor has Myanmar challenged the propriety of the Fact-Finding Mission's use of these seven indicators, or any one of them, for inferring genocidal intent. Professor Akhavan identified them on Tuesday. I call them to your attention today, only for the purpose of considering what Myanmar said, or failed to say, about them yesterday. This is the first indicator of genocidal intent.

"[F]irst, the Tatmadaw's extreme brutality during its attacks on the Rohingya."[3]

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[1] UN Human Rights Council (UN HRC), *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 225.

[2] *Ibid.*, para. 224.

[3] *Ibid.*

5. Professor Akhavan and Mr. Loewenstein gave you many heart-rending examples of this, from the reports of the UN Fact-Finding Mission. Myanmar did not deny any of it. In fact, its Agent admitted that "it cannot be ruled out that disproportionate force was used by members of the Defence Services"[4].

> "[S]econd, the organized nature of the Tatmadaw's destruction."[5]

6. Mr. Loewenstein showed you how the Tatmadaw employed the same brutal tactics in each Rohingya village, in "clearance operations" that were planned and ordered by senior military staff. Myanmar did not deny this. Nor did they deny that 392 Rohingya villages were systematically destroyed, either totally or partially, during these operations.

> "[T]hird, the enormity and nature of the sexual violence perpetrated against women and girls during the 'clearance operations'."[6]

7. We heard nothing about sexual violence from Myanmar yesterday. Not a single word about it. Not from the Agent. Not from any of their counsel. Because it is undeniable — and unspeakable — they chose to ignore it completely. I cannot really blame them; I would hate to be the one having to defend it.

> "[F]ourth, the insulting, derogatory, racist and exclusionary utterances of Myanmar officials and others prior, during and after the 'clearance operations'."[7]

8. Myanmar did not deny any of this, either. Nor could it. The Agent even underscored its significance: "Hate narratives are not simply confined to hate speech — language that contributes to extreme polarization also amounts to hate narratives.[8]"

9. And here is such a narrative, from the Facebook page of Senior General Min Aung Hlaing, the Commander-in-Chief of the Tatmadaw, before Facebook took his page down. Posted at the height of the 2017 "clearance operations", it described "[t]he Bengali problem" as an, as yet,

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[4] CR 2019/19, p. 15, para. 15 (Aung San Suu Kyi).

[5] UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 224.

[6] *Ibid.*

[7] *Ibid.*

[8] CR 2019/19, p. 19, para. 29 (Aung San Suu Kyi).

"unfinished job" that the "government in office is taking great care in solving"[9]; he added: "[W]e openly declare that 'absolutely, our country has no Rohingya race'."[10]

10. Returning to the seven indicators of genocidal intent:

> "[F]ifth, the existence of discriminatory plans and policies, such as the Citizenship Law and the [national verification card] process, as well as the Government's efforts to clear, raze, confiscate and build on land in a manner that sought to change the demographic and ethnic composition of Rakhine State"[11].

11. Again, no denial by Myanmar. How could it? Myanmar's laws and policies overtly and expressly discriminate against the Rohingya. All the Agent could say was that "birth certificates" would now be issued "regardless of religious background"[12]. But not citizenship — and nothing about the confiscation of Rohingya lands.

> "[S]ixth, the Government's tolerance for public rhetoric of hatred and contempt for the Rohingya"[13].

12. Myanmar did not deny this either.

13. And,

> "[S]eventh, the State's failure to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law"[14].

14. This is the only indicator of genocidal intent, the only one of the seven, that Myanmar has disputed. The Agent herself asked: "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?"[15]

15. Mr. President, we could not help but ask ourselves, what State is she talking about? It is certainly not Myanmar. The Agent herself made this perfectly clear: "Under its 2008 Constitution,

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[9] UN HRC, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 Sept. 2018), para. 753.

[10] *Ibid.*, para. 1330.

[11] UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 224.

[12] CR 2019/19, pp. 19-20, para. 32 (Aung San Suu Kyi).

[13] UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 224.

[14] *Ibid.*

[15] CR 2019/19, p. 17, para. 23 (Aung San Suu Kyi).

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."[16]

16. To her credit, the Agent acknowledged the difficulties with such a system: "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."[17]

17. It certainly is not easy in Myanmar. How can anyone possibly expect the Tatmadaw to hold itself accountable for genocidal acts against the Rohingya when six of its top generals — including the Commander-in-Chief, Senior General Min Aung Hlaing — have all been accused of genocide by the UN Fact-Finding Mission and recommended for criminal prosecution?[18]

18. In addition to Senior General Min Aung Hlaing, these include the Deputy Commander in Chief, Vice Senior General Soe Win, and the Commanders of the two Light Infantry Divisions, the 33rd and the 99th, which were primarily responsible for carrying out the "clearance operations" against the Rohingya: Brigadier-General Aung Aung, and Brigadier-General Than Oo[19].

19. Two days ago, on 10 December, International Human Rights Day, the United States Government imposed sanctions on all of them[20]. The official announcement by the United States Department of the Treasury, at tab 25 of your folders, described the crimes of which they are accused. When you read this document, you will see under the name of each of these generals that these are the same genocidal acts that the UN Fact-Finding Mission reported, and that Professor Akhavan and Mr. Loewenstein described on Tuesday. Of particular interest, in light of the Agent's comment on accountability, the United States Government warned that: "Such abuses and the continuing impunity must stop . . . Burma's military must address the climate of impunity and cease abuses and violations of universally accepted human rights."[21]

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[16] CR 2019/19, p. 16, para. 17 (Aung San Suu Kyi).

[17] CR 2019/19, p. 16, para. 19 (Aung San Suu Kyi).

[18] UN HRC, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 Sept. 2018), para. 1555.

[19] *Ibid.*

[20] US Department of the Treasury, *Treasury Sanctions Individuals for Roles in Atrocities and Other Abuses* (10 Dec. 2019), available at https://home.treasury.gov/news/press-releases/sm852.

[21] *Ibid.*

20. It should come as no surprise, then, that the Tatmadaw has not been willing to investigate, prosecute or punish its own members for crimes against the Rohingya. There has been just one prosecution, which was initiated only in response to an international outcry, and ended with full pardons issued to the perpetrators[22]. I beg the Court's forgiveness for displaying these photographs, at tab 26, which are difficult to look at, and some in the courtroom might wish to look away, but the extreme brutality of the Tatmadaw toward the Rohingya is part of the evidence of genocidal intent. Even Myanmar has not denied this.

21. This is a photo, obtained by Reuters reporters, of ten Rohingya men in Tatmadaw custody, with their wrists tied behind their backs, at Inn Din in Rakhine State.

22. This is a photo, obtained by the same reporters, immediately after they were executed at point-blank range.

23. After the photos were published worldwide, the Tatmadaw made an arrest. Not of the soldiers who committed these brutal murders. But of the Reuters reporters[23]. They were tried by a military court, convicted of violating the Official Secrets Act, and sentenced to seven years of imprisonment[24]. The international community came down hard on Myanmar for this, and the Tatmadaw eventually put the killers on trial and sentenced them, but gave them full military pardon after serving only seven months. The message was not that soldiers would be held accountable for crimes against the Rohingya, but exactly the opposite. Even the Agent admitted: "Many of us in Myanmar were unhappy with the pardons."[25] Unhappy? Perhaps. But absolutely unable, or unwilling, to do anything about it.

24. The Agent and Professor Okowa mentioned one other prosecution by the Tatmadaw[26]. What they neglected to tell you was that the victims were not Rohingya, and the crime was not committed in Rakhine State. It had nothing to do with the Rohingya. We were also told about the initiation of a new court martial proceeding, on 25 November 2019, two weeks after The Gambia's

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[22] UN HRC, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 Sept. 2018), para. 232.

[23] *Ibid.*, para. 1296.

[24] *Ibid.*, para. 1296.

[25] CR 2019/19, p. 17, para. 20 (Aung San Suu Kyi).

[26] CR 2019/19, p. 17, para. 21 (Aung San Suu Kyi); CR 2019/19, p. 70, para. 14 (Okowa).

Application was filed, and two weeks before these hearings began[27]. Could there be any connection?

25. Reference was made yesterday to an ***Independent*** Commission of Enquiry, created by Myanmar to investigate events in Rakhine State. We were told by the Agent that it might lead to new prosecutions[28]. But that is not how the Chair of the Commission sees it. She stated very clearly that "there will be no blaming of anybody, no finger-pointing of anybody because we don't achieve anything by that procedure"[29].

26. On Tuesday, we called your attention to the observations of the UN Special Rapporteur for human rights in Myanmar. She wrote, as you will recall: "[t]hose responsible for these violations enjoy impunity which perpetuates the devastating cycle of abuse", and that Myanmar is "incapable of delivering accountability"[30]. Now perhaps you can better appreciate how well founded these observations are.

27. Mr. President, Myanmar's Agent told you that Myanmar is "committed to the voluntary, safe and dignified repatriation of displaced persons from Rakhine under the framework agreement reached between Bangladesh and Myanmar"[31]. She then asked another rhetorical question: "how can there be an ongoing genocide or genocidal intent when these concrete steps are being taken in Rakhine"[32]? Professor Okowa spent much of her time extolling the virtues of this supposedly wonderful repatriation programme[33].

28. In fact, it is a complete fraud. Even Professor Okowa admitted: "It is true that few displaced persons have returned."[34] The UN Fact-Finding Mission explained why, in its September 2018 report: "While the Myanmar Government has, in principle, committed to

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[27] 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.

[28] CR 2019/18, p. 20, para. 17 (Tambadou).

[29] UN HRC, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 Sept. 2018), para. 1619.

[30] Yanghee Lee & Isabel Todd, "Myanmar's military companies should be sanctioned", *Al Jazeera* (26 Nov. 2019), available at https://www.aljazeera.com/indepth/opinion/myanmar-military-sanctioned-191120120104014.html.

[31] CR 2019/19, p. 20, para. 32 (Aung San Suu Kyi).

[32] CR 2019/19, p. 20, para. 33 (Aung San Suu Kyi).

[33] See CR 2019/19, pp. 65-69, paras. 9-11 (Okowa).

[34] CR 2019/19, p. 68, para. 10 (Okowa).

Rohingya repatriation, nothing thus far indicates this will be in a manner ensuring respect for human rights, essential for a safe, dignified and sustainable return."[35]

29. The Fact-Finding report continues:

> "on the contrary, Myanmar is making active efforts to prevent this return, through the consolidation of the destruction of Rohingya villages, through appropriation of vacated land and terrain clearance, erasing every trace of the Rohingya communities, and the construction on this land of houses for other ethnic groups"[36].

30. This deplorable situation did not change as of the Fact-Finding Mission's September 2019 report: "Conditions in Myanmar are unsafe, unsustainable and impossible for approximately one million displaced Rohingya to return to their homes and lands."[37]

31. The Fact-Finding report continues: "the Government is able but unwilling to change conditions in Rakhine State to ensure the Rohingya are able to enjoy all of their human rights. This is perhaps the strongest indication of why Rohingya justifiably insist that they are not prepared to return at this time.[38]"

32. Professor Okowa claimed that Myanmar's lack of genocidal intent is proven by UNHCR's collaboration with the Government on repatriation of displaced Rohingya. But she failed to quote from any of UNHCR's actual reports, including this one, to the Security Council:

> "Conditions are not yet conducive to the voluntary repatriation of Rohingya refugees. The causes of their flight have not been addressed, and we have yet to see substantive progress on addressing the exclusion and denial of rights that has deepened over the last decades, rooted in their lack of citizenship."[39]

33. Nor did she quote from this UNHCR report:

> "UNHCR and UNDP, as was mentioned, have committed to helping Myanmar create conditions inside Rakhine State that would be conducive to the voluntary and sustainable return of refugees, meaning freedom of movement and a pathway to citizenship for those who remain . . . These conditions were stipulated in the MOU, but are not yet in place. We are still waiting for access to carry out our work."[40]

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[35] UN HRC, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 Sept. 2018), para. 1181.

[36] *Ibid.*, para. 1182.

[37] UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 213.

[38] *Ibid.*, para. 248.

[39] UN Security Council, *8179th Meeting*, UN doc. S/PV.8179, 13 Feb. 2018, p. 4.

[40] UNHCR, *Statement to the Seventh Ministerial Conference of the Bali Process* (7 Aug. 2018) available at https://www.unhcr.org/en-us/admin/hcspeeches/5b69a6e47/statement-seventh-ministerial-conference-bali-process.html?query=Rohingya.

34. These conditions are still not in place, Mr. President. Senior Myanmar government and military officials refuse even to use the word "Rohingya" in order to preserve their racist myth that no such group exists. The Court will have noted that the Agent, as is her custom, refused to refer to the Muslims of Rakhine State as "Rohingya"; she uttered the word only in reciting the full formal name of the ARSA insurgent group[41].

35. Myanmar's rejection of the Rohingya, and its failure to carry out its commitments to UNHCR and UNDP, demonstrate that it has no intention of allowing the displaced Rohingya to return. This is the view of Bangladesh, which Professor Okowa mistakenly depicted as having a favourable view of Myanmar's commitment to repatriation. On 9 June 2019, the Ministry of Foreign Affairs issued the following statement:

> "The Government of Myanmar failed to restore normalcy in northern Rakhine and make any visible progress in creating an environment conducive for return, which is an essential precondition for the commencement of repatriation . . . Other than making hollow promises, Myanmar has so far made hardly any progress in fulfilling its obligations."[42]

36. Professor Okowa misconstrues the willingness of Bangladesh and other States to promote repatriation of the Rohingya as endorsement of Myanmar's actions. China and Japan are to be commended for contributing to infrastructure and transportation to facilitate repatriation. And India, too, is to be applauded for its encouragement of repatriation. But it is up to Myanmar to create the conditions conducive for voluntary return — as UNHCR has repeatedly reminded it — and it has stubbornly refused to do so, as both UNHCR and the UN Fact-Finding Mission have reported. And, as a result, as even Myanmar's counsel now admits, no significant repatriation has occurred.

37. Reference was made to a commission headed by former Secretary-General Kofi Annan, which presented a report in August 2017. It is of no assistance to Myanmar in these proceedings, because, as the UN Fact-Finding Mission observed, the Annan Commission's mandate "was focused on proposing concrete measures for improving the welfare of all people in Rakhine State.

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[41] See CR 2019/19, p. 13, para. 6 (Aung San Suu Kyi); CR 2019/19, p. 18, para. 27 (Aung San Suu Kyi).

[42] People's Republic of Bangladesh, Ministry of Foreign Affairs, untitled press release (9 June 2019) (Observations of The Gambia (OG), Ann. 7).

It was not mandated to investigate specific cases of alleged human rights violations."[43] And it did not make any such investigation or finding.

38. Mr. President, Myanmar has told us that its "clearance operations" were not aimed at destroying the Rohingya, but were actually intended, to quote the Agent, "to clear an area of insurgents or terrorists"[44].

39. By deliberately killing Rohingya children? Slaughtered mercilessly by the Tatmadaw in these "clearance operations". Many were infants, beaten to death or torn from their mothers' arms and thrown into a river to drown. How many of them were terrorists?

40. By raping and gang raping and savagely mutilating women and girls? Is that indicative of fighting terrorism, or of committing genocide against a hated group?

41. By burning to the ground hundreds of villages, and thousands of homes, with entire families forced to remain inside?

42. Where is the evidence that the Tatmadaw's "clearance operations" were primarily directed at insurgents or terrorists, and not at the Rohingya population? There is very little. We have been told that the trigger for the 2017 "clearance operation" was an attack by ARSA on 25 August of that year. But contemporaneous reporting from Myanmar shows that the Tatmadaw deployed its notorious light infantry divisions to northern Rakhine State two weeks earlier, as of 11 August, as reflected in this article in *The Irawaddy*, at tab 27, complete with photograph of arriving troops, and quotes from senior military officers[45]. The evidence is more consistent with Senior General Min Aung Hlaing's Facebook post that the troops were deployed because it was time to solve "the Bengali problem" once and for all[46].

43. Mr. President, we do not contend that there were no insurgents, or that Myanmar did not have the right to take military action against them. But we do contend that armed conflict can never be an excuse for genocide.

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[43] UN HRC, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 Sep. 2018), para. 1605 and fn. 3364.

[44] CR 2019/19, p. 15, para. 12 (Aung San Suu Kyi).

[45] "ANALYSIS: Myanmar Army Deployed in Maungdaw", *The Irrawaddy* (11 Aug. 2017), available at https://www.irrawaddy.com/news/burma/analysis-myanmar-army-deployed-maungdaw.html.

[46] UN HRC, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 Sep. 2018), para. 753.

44. As the UN Fact-Finding Mission observed, regarding the Tatmadaw's conduct of these "clearance operations",

> "There was not the least effort on their part to make any distinction between ARSA fighters and civilians, or to specifically target a military objective or identify and repel an immediate threat. Everyone was a target and no one was spared: mothers, infants, pregnant women, the old and infirmed all fell victim to this ruthless campaign."[47]

45. Professor Schabas helpfully confirmed that reports of fact-finding missions like this one "may contain valuable information"[48]. However, he criticized the UN Mission's conclusions, in its September 2019 report, that evidence of Myanmar's genocidal intentions had "strengthened" over the past year, on the ground that the Mission did not mention how, or on what basis, it reached that conclusion[49]. He must have skipped over all the relevant paragraphs. Paragraph 9, for example, summarizes the evidence the Mission considered in reaching its conclusion. It includes:

> "the Government's hostile policies toward the Rohingya, including its continued denial of citizenship and ethnic identity, the living conditions to which it subjects them, its failure to reform laws that subjugate the Rohingya people, the continuation of hate speech directed at the Rohingya, its prior commission of genocide and its disregard for accountability in relation to the 'clearance operations' of 2016 and 2017"[50].

Much of the report consists of extensive details supporting all of these findings.

46. Professor Schabas was also mistaken in asserting that there are no mass graves[51]. To be sure, Myanmar has not made it easy to find them. It has systematically denied independent fact finders and human rights organizations, as well as journalists, access to areas of Rakhine State where its "clearance operations" were carried out. Nevertheless, the Associated Press located at least five mass graves of Rohingya. The report is located at tab 28 of your judges' folders[52].

47. Professor Okowa told you that the requirement of urgency is not met, and that provisional measures should be denied, because, allegedly, the decision to sue Myanmar was made

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[47] UN HRC, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 Sep. 2018), para. 1433.

[48] CR 2019/19, p. 36, para. 45 (Schabas).

[49] CR 2019/19, p. 36, para. 45 (Schabas).

[50] UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sep. 2019), para. 9.

[51] CR 2019/19, p. 37, para. 48 (Schabas).

[52] Foster Klug, "AP finds evidence for graves, Rohingya massacre in Myanmar", Associated Press (1 Feb. 2018), available at: https://apnews.com/ef46719c5d1d4bf98cfefcc4031a5434/AP-finds-evidence-for-graves,-Rohingya-massacre-in-Myanmar.

in March 2019 and the Application was not filed until November[53]. She asked, somewhat sarcastically it appeared, "was there something that happened" in the interim that gave urgency to the request for provisional measures?[54] The answer is "yes", the submission of the UN Fact-Finding Mission's report, in September 2019, which concluded that evidence of Myanmar's genocidal intent had "strengthened" in the past year, and that "there is a serious risk that genocidal actions may occur or recur"[55]. That prompted The Gambia to proceed as quickly as possible to retain counsel and file the Application.

48. I would also refer Professor Okowa to her colleague, Professor Zimmermann, who is listed as counsel to Myanmar in these proceedings. In his commentary on Article 41 of the Court's Statute, he states: "Under the aspect of urgency, it is not relevant whether the situation complained of had already existed for a considerable time when the request was filed, for what is important is only the imminence of action prejudicial to the rights at stake."[56]

49. Mr. President, we demonstrated on Tuesday that there is an urgent need for provisional measures to prevent irreparable harm to the rights of The Gambia that are at issue in this case, and that the case for provisional measures here is among the most compelling that have ever been presented to the Court. Nothing Myanmar said yesterday contradicts this. The Fact-Finding Mission's conclusion that the only reasonable inference to be drawn from Myanmar's pattern of conduct is genocidal intent still stands. Indeed, as we have seen this morning, Myanmar either admits, or fails to deny, what the extensive evidence we submitted makes perfectly clear: there is an urgent need for provisional measures to prevent irreparable harm to The Gambia's rights as a State party to the Genocide Convention.

50. Mr. President, Members of the Court, this concludes my presentation. I thank you again for your kind courtesy and patient attention, and I ask that you call my colleague, Professor d'Argent, to the podium.

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[53] CR 2019/19, p. 65, para. 8 (Okowa).

[54] CR 2019/19, p. 65, para. 8 (Okowa).

[55] UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sep. 2019), para. 9.

[56] Karin Oellers-Frahm & Andreas Zimmermann, "Article 41", in Andreas Zimmermann et al., *The Statute of the International Court of Justice: A Commentary* (3rd ed. 2019), para. 57.

The PRESIDENT: I thank Mr. Reichler for his statement. I now give the floor to Professor Pierre d'Argent. You have the floor.

M. d'ARGENT : Merci, Monsieur le président.

II. COMPÉTENCE *PRIMA FACIE*

1. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les juges, il me revient de répondre aux arguments qui vous ont été présentés hier par M[e] Staker autour du thème de votre compétence *prima facie*.

1. Le différend bilatéral porté devant la Cour oppose la Gambie au Myanmar

2. M[e] Staker a d'abord soutenu que la Gambie a agi «as the proxy for an international organization» et que la Gambie a saisi la Cour, non pas en tant qu'Etat partie à la convention, mais en sa qualité de président du comité ministériel *ad hoc* de l'OCI, c'est-à-dire en tant qu'organe de cette organisation internationale[57]. M[e] Staker en a déduit que votre compétence *ratione personae* ferait défaut et que concevoir les choses autrement reviendrait à contourner l'article 34 du Statut[58].

3. La proposition fait fi de la réalité. En effet, c'est la Gambie qui a proposé à l'OCI d'adopter la résolution 59/45 de mai 2018. Ce n'est pas l'OCI qui a mandaté la Gambie, c'est la Gambie qui a été chercher au sein de l'OCI le soutien de ses Etats membres. Tel est assurément son droit, de même que rien n'interdit à la Gambie de recevoir le soutien financier d'autres Etats.

4. Par ailleurs, M[e] Staker oscille en pleine contradiction juridique lorsqu'il vous dit dans le même moment que la Gambie aurait agi en tant qu'organe de l'OCI *et* en tant que mandataire. Bien entendu, en droit, cela ne peut être que l'un *ou* l'autre. En réalité, ce n'est ni l'un, ni l'autre.

5. La présidence du comité ministériel *ad hoc* qui est revenue à la Gambie du fait de son initiative ne transforme pas la Gambie en organe ou agent de l'OCI. Ce n'est d'ailleurs pas en cette qualité que la Gambie a saisi la Cour.

6. En effet, lorsque la Gambie soumet à la Cour sa requête introductive d'instance, cet acte juridique est incontestablement attribuable à la Gambie en tant qu'Etat Membre des Nations Unies

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[57] CR 2019/19, p. 46, par. 23 (Staker).

[58] *Ibid*., par. 25.

lié par le Statut de la Cour et y ayant accès. L'agent de la Gambie qui signe la requête est le ministre de la justice de ce pays. Il en est l'organe ; il n'a pas été mis à la disposition de l'OCI et n'a pas agi sous le contrôle effectif de cette organisation[59], pas plus qu'il n'en est le mandataire. Aucun document vous ayant été soumis ne permet de soutenir que l'OCI est en droit de confier des mandats («proxy») à l'un de ses membres, ni qu'elle l'aurait fait en l'espèce.

7. Les Etats membres de l'OCI n'ont fait qu'encourager la Gambie à agir devant la Cour. Monsieur le président, il n'y a aucun contournement de l'article 34 du Statut lorsqu'un Etat ayant accès à la Cour agit avec le soutien et les encouragements politiques de 56 autres Etats, fussent-ils réunis au sein d'une organisation internationale.

8. Il est à cet égard totalement indifférent que 13 des 57 Etats membres de l'OCI ne sont pas liés par la convention ou son article IX. Le lien d'instance formé par la requête du 11 novembre dernier a été établi entre la Gambie et le Myanmar. Ce n'est qu'au regard de ces deux Etats que la compétence *prima facie* de la Cour doit être établie.

9. Monsieur le président, Mesdames et Messieurs les juges, le différend judiciaire dont vous êtes saisis oppose bien la Gambie au Myanmar et non l'OCI et le Myanmar.

10. M[e] Staker a recyclé son argument *ratione personae* lors de l'examen de la compétence *ratione materiae* de la Cour[60], mais, pour les mêmes raisons, cet argument doit être rejeté.

2. Le différend bilatéral entre la Gambie et le Myanmar existait avant le dépôt de la requête introductive d'instance

11. M[e] Staker a ensuite soutenu qu'aucun différend au sujet de la convention sur le génocide n'aurait existé entre les Parties avant le 11 novembre 2019, jour du dépôt de la requête introductive d'instance. Mon collègue M[e] Suleman vous a exposé très clairement mardi que le différend entre les Parties existait bien avant la saisine de la Cour.

12. En réponse, M[e] Staker soutient d'abord que les résolutions de l'OCI sont sans pertinence pour établir l'existence préalable d'un différend car le Myanmar n'en serait pas membre et que ces résolutions ne contiendraient aucune affirmation positive selon laquelle le Myanmar aurait violé la

[59] CDI, Projet d'articles sur la responsabilité des organisations internationales (2011), art. 7.

[60] CR 2019/19, p. 48, par. 31 (Staker).

convention, tandis que, s'appuyant sur l'affaire des *Iles Marshall*[61], il a mis en doute la signification du vote positif de la Gambie.

13. Le fait que le Myanmar ne soit pas membre de l'OCI est indifférent car ces résolutions ont été portées à sa connaissance, ce que le Myanmar n'a pas contesté puisqu'il y a réagi[62].

14. Par ailleurs, ces résolutions visent explicitement le Myanmar et la situation des Rohingya, tandis qu'elles font référence à la nécessité de prévenir le génocide. Tel est notamment le cas de la résolution de mai 2018 qui crée le comité ministériel *ad hoc*. La résolution 4/46 de mars 2019 qui n'était pas jointe au dossier que le Myanmar vous a transmis hier — mais qui fut bien visée dans la requête introductive d'instance et jointe aux observations de la Gambie — appelle le Myanmar à honorer ses obligations «under international law and human rights covenants, and to take all necessary measures to immediately halt all vestiges and manifestations of … genocide … against Rohingya Muslims»[63]. Peut-on, en langage diplomatique, être plus clair ? Pourquoi appeler au respect d'obligations si ce n'est parce qu'on les considère violées ?

15. Quant aux votes de la Gambie au soutien de ces résolutions, je rappellerai qu'elles ne contenaient pas «nombre de propositions différentes»[64] et qu'elles étaient monothématiques, de telle manière que la signification de ces habitudes de vote est limpide.

16. M[e] Staker a également contesté que les rapports de la mission d'établissement des faits du Conseil des droits de l'homme pouvaient servir de base pour identifier un différend préalable entre la Gambie et le Myanmar. Certes, la Gambie n'est pas l'auteure de ces rapports, mais il est incontestable qu'en saluant l'intention de la Gambie de déférer à votre compétence le présent différend, le rapport onusien en a nécessairement averti le Myanmar, d'autant que l'Etat défendeur

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[61] *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (II)*, p. 855, par. 56.

[62] CR 2019/18, p. 47-48, par. 18, 20 (Suleman).

[63] OIC, résolution n[o] 4/46-MM sur la situation de la communauté musulmane du Myanmar, doc. OIC/CFM-46/2019/MM/RES/FINAL (1[er]-2 mars 2019), disponible à l'adresse : https://www.oic-oci.org/docdown/?docID=4447&refID=1250.

[64] *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (II)*, p. 855, par. 56.

a catégoriquement rejeté ce rapport[65]. Le Myanmar ne pouvait pas ne pas être conscient de l'existence du différend.

17. M[e] Staker a considéré que la déclaration de la Gambie à l'Assemblée générale des Nations Unies serait sans importance car le vice-président gambien qui a alors parlé avait omis de viser spécifiquement la convention sur le génocide. La déclaration gambienne à l'Assemblée générale date du 26 septembre[66], soit dix jours après le rapport d'enquête visant explicitement la convention sur le génocide et saluant l'intention de la Gambie de porter son différend devant la Cour et trois jours avant son rejet catégorique par le Myanmar[67]. M[e] Staker soutient-il sérieusement que le Myanmar pouvait légitimement penser que l'objet du différend que la Gambie s'est déclarée prête à soumettre à la Cour avait changé du tout au tout en l'espace de quelques jours ?

18. Au sujet de la note verbale gambienne du 11 octobre 2019, M[e] Staker a formulé plusieurs objections, mais il n'a pas contesté que le Myanmar l'avait reçue.

19. Selon M[e] Staker, la note verbale n'aurait appelé aucune réponse car elle ne spécifiait aucun fait particulier au soutien des accusations qui y sont contenues[68].

20. M[e] Staker confond manifestement les exigences de l'article 38 du Règlement au sujet du contenu de la requête introductive d'instance avec la simple nécessité de manifester avant celle-ci que les Parties sont en désaccord au sujet du respect de certaines obligations internationales. Par ailleurs, dans la mesure où, à la différence d'autres clauses compromissoires, l'article IX de la convention ne subordonne pas la compétence de la Cour à l'existence de négociations préalables, les exigences formulées par M[e] Staker sont déplacées.

21. La Cour ne manquera pas de contraster les affirmations de M[e] Staker selon lesquelles le Myanmar aurait sans doute répondu à la note verbale de la Gambie si elle avait été plus élaborée, avec l'attitude du Myanmar qui, lorsque le rapport détaillé de la commission d'établissement des faits lui est transmis, le rejette en bloc et très rapidement.

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[65] CR 2019/18, p. 48, par. 21 (Suleman).

[66] Assemblée générale des Nations Unies, soixante-quatorzième session, 8[e] réunion plénière, Discours de Mme Isatou Touray, Vice-présidente de la République de la Gambie, doc. A/74/PV.8 (26 septembre 2019), p. 31.

[67] République de l'Union du Myanmar, Bureau du Conseiller d'État, U Kyaw Tint Swe, Ministre de l'Union pour le Bureau du Conseiller d'État et Chef de la délégation du Myanmar à la soixante-quatorzième session de l'Assemblée générale des Nations Unies prononce une déclaration au débat général de haut niveau, New York, 29 septembre 2019, (30 septembre 2019), disponible à l'adresse : https://www.statecounsellor.gov.mm/en/node/2551, p. 11.

[68] CR 2019/19, p. 50, par. 42 (Staker).

22. Ce simple fait permet également de rejeter l'affirmation selon laquelle le mois s'étant écoulé entre la note verbale et la requête du 11 novembre fut trop bref pour permettre au Myanmar de prendre position[69]. L'Etat défendeur n'a pourtant eu besoin que de treize jours pour rejeter d'une phrase le rapport de 190 pages du 16 septembre. M[e] Staker peut-il éclairer la Cour sur la durée convenable qu'un Etat accusé de génocide serait, selon lui, en droit d'attendre avant que l'Etat auteur de cette accusation déjà maintes fois repoussée par ailleurs puisse saisir la Cour ?

23. M[e] Staker s'est aussi interrogé sur la raison pour laquelle la note verbale a été envoyée une semaine après que la Gambie ***se soit*** adjoint les services de ses conseils, et non avant. Il en a déduit que l'envoi de la note verbale aurait été «a legal formality»[70].

24. Si par «legal formality», M[e] Staker vise un acte confirmant l'existence d'un différend préexistant, il aura correctement identifié la nature de la note verbale du 11 octobre. Sauf à considérer que le silence du Myanmar vaut acceptation de responsabilité, la note verbale a simplement confirmé l'existence d'un différend entre les Parties au sujet de la convention sur le génocide avant la saisine de la Cour. D'ailleurs, le porte-parole du Gouvernement birman déclara le 16 novembre 2019, cinq jours *après* la requête introductive d'instance, que le Myanmar s'y attendait depuis plus d'un mois[71].

3. La Gambie peut invoquer la responsabilité du Myanmar pour violation de la convention et saisir la Cour de son différend

25. Monsieur le président, tandis que le professeur Schabas a contesté la plausibilité des demandes («plausibility of claims») qui est une question distincte sur laquelle le professeur Sands reviendra, M[e] Staker n'a *pas* contesté la plausibilité des droits en litige dont la Gambie sollicite la protection. Il a toutefois estimé qu'à défaut d'avoir été lésée par les actes qu'elle dénonce, la Gambie n'aurait pas de «standing» dans la présente procédure.

26. M[e] Staker n'a pas contesté que la Gambie était en droit d'invoquer la responsabilité du Myanmar en tant qu'Etat «autre qu'un Etat lésé» au sens de l'article 48 des articles sur la

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[69] CR 2019/19, p. 50-51, par. 44 (Staker).

[70] CR 2019/19, p. 52, par. 47 (Staker).

[71] ***Min Naing Soe, "Myanmar to respond to Gambia lawsuit at ICJ in line with international laws", Eleven News (16 November 2019), available at https://elevenmyanmar.com/news/myanmar-to-respond-to-gambia-lawsuit-at-icj-in-line-with-international-laws.***

responsabilité internationale des Etats, mais il a considéré que cette invocation de responsabilité ne pouvait être faite que dans les relations internationales et non devant un juge[72]. Il a également soutenu que l'affaire *Belgique c. Sénégal* devait être distinguée de la présente instance car, dans ce cas, la Belgique aurait été un Etat lésé. Il a enfin brandi le spectre de l'*actio popularis*. Sur ce dernier point, le professeur Sands répondra à M[e] Staker ; je me limiterai à quelques brèves observations sur les autres points relatifs au prétendu défaut de «standing».

27. S'agissant de l'arrêt *Belgique c. Sénégal*, M[e] Staker n'a pas expliqué la raison pour laquelle 1) la Cour n'a pas jugé nécessaire d'identifier si la Belgique avait été spécialement atteinte et 2) la Cour a au contraire affirmé de manière plus générale que, face à des obligations *erga omnes partes*, l'exigence d'un intérêt particulier aurait pour conséquence qu'aucun Etat ne serait, dans bien des cas, en mesure de présenter une demande contre l'Etat auteur du fait illicite.

28. S'agissant de la distinction entre l'invocation de la responsabilité dans les relations internationales ou devant la Cour, elle paraît particulièrement obscure et injustifiée. Invoquer la responsabilité devant un juge ou dans des rapports diplomatiques a toujours pour but de dénoncer un manquement au droit. La distinction suggérée par M[e] Staker n'apparaît pas dans les travaux de la Commission du droit international. Elle est également contredite par l'Institut de droit international[73] lorsqu'il existe comme en l'espèce un lien juridictionnel entre les parties.

29. M[e] Staker a encore soutenu que la demande de mesures conservatoires se heurtait à l'article 41 du Statut qui dispose qu'elles visent à préserver le «droit de chacun». Il ne s'est toutefois pas expliqué à cet égard et n'a en rien contesté que cette formule vise tous les «droits en litige devant le juge»[74].

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[72] CR 2019/19, p. 56, par. 65 (Staker).

[73] G. Gaja, «Les obligations *erga omnes* en droit international», *Justitia et pace*, Institut de droit international, résolution de Cracovie (2005), Cinquième Commission : Les obligations et les droits *erga omnes* en droit international, art. 3, disponible à l'adresse : http://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_fr.pdf.

[74] CR 2019/18, p. 55, par. 17 (d'Argent).

4. La réserve birmane relative à l'article VIII de la convention ne prive pas la Cour de sa compétence, pas plus qu'elle n'empêche son exercice

30. Enfin, M[e] Staker a soutenu que, par la réserve birmane relative à l'article VIII de la convention, la Cour ne pourrait être valablement saisie et devrait décliner l'exercice de sa compétence.

31. Parce que le Myanmar n'a pas accepté l'article VIII de la convention, aucun Etat partie ne pourrait valablement *saisir* la Cour, alors même que, de l'aveu de l'Etat défendeur, celui-ci a donné compétence à son égard en consentant à l'article IX. Le Myanmar vide l'article IX de son contenu et M[e] Staker n'a pas expliqué ce que le consentement de l'Etat défendeur à l'article IX et à votre compétence pouvait en ce cas signifier.

32. Au stade conservatoire où sa compétence doit s'apprécier *prima facie*, la Cour ne devra guère s'attarder sur cet argument qui, disons-le franchement, est fort éloigné de la bonne foi qui devrait présider à l'interprétation des traités.

33. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les juges, je vous remercie de votre attention. Puis-je vous demander, Monsieur le président, de bien vouloir inviter le professeur Philippe Sands à prendre la parole ?

Le PRESIDENT : Je remercie le professeur d'Argent pour sa présentation. Je donne à présent la parole au professeur Sands. Vous avez la parole, Monsieur.

M. SANDS : Merci, Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs de la Cour.

III. THE LAW

1. I will address the legal arguments made by Myanmar in the first round, in six points.

2. I have to say, at the outset it was hard not to be struck by Myanmar's first round arguments, a sort of "Back to the Future" of legal submissions.

3. My first point. Mr. Staker addressed the Court at length on the issue of *legal interest and standing*. His position, in short, was that The Gambia has no legal interest in the question of whether Myanmar is treating its citizens in accordance with the requirements of the 1948 Convention. He cited numerous cases in support of that contention, but there was one that he

did not mention. As he addressed the Court, in dulcet Australian tones, I shut my eyes and suddenly wondered if I was not hearing the voice of Sir Percy Spender, back in 1966, as he explained why he cast the decisive President's vote in favour of the Court's conclusion: you will recall that decision, that Ethiopia and Liberia "cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims", namely the question of whether South Africa was treating the inhabitants of the territory of South West Africa in accordance with obligations incumbent upon it under international law[75]. That Judgment caused a scandal, it cast the Court into a wilderness for nearly two decades. This Court could, I suppose, if it wishes, rule that The Gambia has no legal interest in the case, but you will surely be aware that to take that approach will cast the Court into an incomparably more bleak wilderness, given that the overwhelming majority of the Members of the United Nations, having endorsed the reports of the UN Fact-Finding Mission, and other UN supported activities, will be truly shocked if this Court, 53 years after South West Africa, declines to indicate provisional measures in this case. But of course we trust that that will not be the case.

4. Indeed, I can direct Mr. Staker's attention to a paragraph of that dismal Judgment: paragraph 66. Even Sir Percy Spender — even Sir Percy Spender — was willing to accept that if Ethiopia and Liberia had been parties to a treaty to which South Africa was also a party, which provided basic rights for the inhabitants of South West Africa, they would have had standing. Substantive rights, the Court ruled,

> "may be derived from participation in an international instrument by a State which has signed and ratified, or has acceded, or has in some other manner become a party to it; and which in consequence, and subject to any exceptions expressly indicated, is entitled to enjoy rights under all the provisions of the instrument concerned"[76].

In the South West Africa case, back in 1966, the three countries were not all parties to an international instrument like the Genocide Convention and hence, Sir Percy ruled, they did not have legal standing. By contrast, The Gambia is a party to such a treaty, and so is Myanmar. The Gambia has a legal interest, and it has legal standing.

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[75] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 51, para. 99.

[76] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, pp. 39-40, para. 66.

5. My second point, the *conditions* governing an order for provisional measures. Mr. Staker asserted that, on the facts before you, the claim that a genocide has occurred is not "plausible". Indeed, he went on, it is so manifestly lacking that the case should not even be inscribed on the Court's List. Reject the application *in limine*, he basically said[77].

6. He followed the submissions of Professor Schabas, who made much of the Court's jurisprudence on proving genocidal intent. Understandably, he took you to paragraph 510 of the Court's merits Judgment in the *Croatia* case. This states that "for a pattern of conduct . . . to be accepted as evidence of genocidal intent, 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"[78]. Let me be clear, The Gambia's Application is based squarely on that standard. So are the conclusions of the UN Fact-Finding Mission and of the Special Rapporteur and the US Holocaust Memorial Museum[79].

7. Professor Schabas said the question you must ask yourselves, at this preliminary phase, is: "whether it is plausible that genocidal intent is the only inference that can be drawn"[80]. It is a reasonable question, provided of course that the question is posed in relation to some of the acts alleged, but not necessarily all of them. After all, it is possible for some acts to be characterized as genocidal (such as rape and killing), while others are characterized as "crimes against humanity" (such as the forcible displacement of human beings or their deportation). If the answer to the question posed by Professor Schabas is yes, in relation to some of the acts that are before you, then you order provisional measures. Moreover, the fact that it is also plausible that another inference could be drawn in relation to those acts does not mean that you cannot order provisional measures. Plausibility is not a zero-sum game. The plausibility of one explanation does not exclude the

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[77] CR 2019/19, p. 52, para. 48 (Staker).

[78] *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.

[79] UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 225; "Museum Finds Compelling Evidence Genocide was Committed Against Rohingya, Warns of Continued Threat", United States Holocaust Memorial Museum (3 Dec. 2018), available at https://www.ushmm.org/information/press/press-releases/museum-finds-compelling-evidence-genocide-was-committed-against-rohingya-wa; "Prosecute Myanmar army chief for Rohingya 'genocide': UN Envoy", *Al Jazeera* (25 Jan. 2019), available at https://www.aljazeera.com/news/2019/01/prosecute-myanmar-army-chief-rohingya-genocide-envoy-190125112535665.html; judges' folder, tab 4.

[80] CR 2019/19, p. 27, para. 19 (Schabas).

plausibility of another[81]. Two explanations can be simultaneously plausible. That is a difference between the provisional measures phase and the merits phase. Professor Schabas's attempt to create a new and onerous legal standard at the provisional measures stage, one that imports the test that applies at the merits stage, has no legal basis.

8. Indeed, neither Professor Schabas nor any of Myanmar's other counsel addressed the obligation on Myanmar to *prevent* genocide under Article I, and how that interacts with the findings of genocidal intent. As this Court is well aware, Myanmar is not only under an obligation not to commit genocide, but also to *prevent it*, a duty which arises "at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed"[82]. The UN Fact-Finding Mission reports amply demonstrate the existence of a serious risk. Can this Court really conclude otherwise? That seems, frankly, a bit of a stretch, one that would be manifestly inconsistent with the obligation to prevent, an obligation that arises from the first moment of awareness. Yet Professor Schabas tells you that now, today, next week and thereafter, you are required to apply a standard that requires a conclusive finding of solely genocidal intent simply to be able to order provisional measures.

9. In short, the test at this stage is not whether genocidal intent is the only plausible inference to be drawn, as Professor Schabas argues. If that was the test, it would be hard to see how this Court could ever order provisional measures under the Genocide Convention in relation to Article I, since such a conclusion can hardly be reached without descending deeply into the merits, and that is something the parties agree this Court cannot do at this stage. The Court did not apply that test back in 1993 in the *Bosnia* case, although it seems that Myanmar wants you to abandon the approach it then adopted.

10. The thrust of the Convention and this Court's Statute is to require you to act protectively, to err on the side of caution. If it is plausible that a finding of genocide might be made, on the basis of the evidence and material that is before you, then you have to order provisional measures. If it is not plausible, then you don't. Given the reports that are on the record, we do not see how the Court

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[81] *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. 19, para. 58.

[82] *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. 222, para. 431.

can possibly conclude that genocidal intent is to be excluded. The Agent for Myanmar told you that "invoking the 1948 Genocide Convention is a matter of utmost gravity"[83]. Indeed it is. States do not lightly invoke or allege genocide. The fact that 56 members of the OIC have decided to lend their support to this case — along with Canada and the Netherlands[84] and more will no doubt surely follow — speaks clearly as to the gravity of the current situation. It strengthens the case for provisional measures, rather than weakens it, exactly contrary to Myanmar's argument[85]. It is equally telling that a United States federal institution — the US Holocaust Memorial Museum, with a Board of Trustees that includes four members of the US Senate and five members of the US House of Representatives[86] — has found "compelling evidence that the Burmese military committed ethnic cleansing, crimes against humanity, and genocide against the Rohingya"[87]. An institution like this, a venerable institution, does not tend to make public statements that are easily characterized as implausible.

11. Nor, might I add, does Professor Schabas, at least when he is speaking in an academic capacity, rather than as Counsel for Myanmar. Let us look at what he told *Al Jazeera* back in 2013, about the term "genocide":

> "We're moving into a zone where the word can be used (in the case of the Rohingya). When you see measures preventing births, trying to deny the identity of the people, hoping to see that they really are eventually, that they no longer exist, denying their history, denying the legitimacy of the right to live where they live, these are all warning signs that mean that it is not frivolous to envisage the use of the term genocide."

12. You can watch him on video for yourselves, it is publicly available on the web and the citation is in the footnotes to this speech[88]. Of course, everyone is allowed to change their mind, but the obvious question is: how could that which was "not frivolous" in 2013, before the "clearance

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[83] CR 2019/19, p. 12, para. 2 (Aung San Suu Kyi).

[84] Joint Statement of Canada and the Kingdom of the Netherlands regarding the Gambia's action to address accountability in Myanmar (9 Dec. 2019), available at https://www.canada.ca/en/global-affairs/news/2019/12/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-the-gambias-action-to-address-accountability-in-myanmar.html.

[85] CR 2019/19, p. 46, paras. 23-26 (Staker).

[86] Available at https://www.ushmm.org/information/about-the-museum/council.

[87] "Museum Finds Compelling Evidence Genocide was Committed Against Rohingya, Warns of Continued Threat", 3 Dec. 2018, available at https://www.ushmm.org/information/press/press-releases/museum-finds-compelling-evidence-genocide-was-committed-against-rohingya-wa.

[88] "Myanmar: The Hidden Genocide", *Al Jazeera* (30 Oct. 2013), available at https://www.youtube.com/watch?v=dSkZlgk76-E, from 44:06; judges' folder, tab 29.

operations", before the killings, before the rapes, somehow become implausible in 2019? The path to implausibility is eased, of course, if you simply take certain categories of acts out of the equation: Myanmar has been conspicuously silent, for example, about all the sexual violence that has occurred on a wide and systematic basis, a clear reflection, we say, as do the UN bodies that have considered the matter, of genocidal intent. Yet the word "rape" — *rape* — did not once pass the lips of the Agent, or any of Myanmar's counsel. There was no commitment to co-operate with UN bodies, no commitment to investigate this crime on its own account, no commitment to prosecute. We heard much from Myanmar's Agent about the vital importance of domestic accountability[89], but not a word — *not a word* — about the women and the girls of her country, Myanmar, who have been subjected to these awful serial violations. Madam Agent, your silence said far more than your words.

13. I turn briefly to another point made by Myanmar — the third of my points. You were taken to the recent decision of the ICC Pre-Trial Chamber to authorize an investigation of the deportation of Rohingya from Myanmar to Bangladesh, as a crime against humanity, not genocide[90]. You see, counsel suggested, how can it possibly be a genocide if the ICC has not said it is a genocide? The explanation is rather prosaic: Myanmar is not a party to the Statute of the ICC, but Bangladesh is, and the ICC's jurisdiction only extends to acts occurring on the territory of a State party. No element of the crime of genocide has been committed on the territory of Bangladesh. The crime of deportation, however, which is a crime against humanity, might have been committed on the territory of Bangladesh, as it is a transboundary crime. It is in no way inconsistent with the existence of a genocidal intent in respect of other acts. Indeed, the ICTY genocide cases relating to Srebrenica all also included the crime against humanity of deportation, and Professor Schabas is well aware of their co-existence[91]. Such co-existence of distinct crimes is readily recognized in the jurisprudence of the ICTY, the ICTR, and the ICC. Myanmar suggested that the observations of various bodies — including the High Commissioner for Human Rights and

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[89] CR 2019/19, p. 18, para. 26 (Aung San Suu Kyi).

[90] "ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar", press release, 14 Nov. 2019, available at https://www.icc-cpi.int/Pages/item.aspx?name=pr1495.

[91] *Prosecutor* v. *Vujadin Popovic (Judgement)*, IT-05-88-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 June 2010; *Prosecutor* v. *Momir Nikolic (Sentencing Judgement)*, IT-02-60/1-S, ICTY, 2 Dec. 2003.

the UN Human Rights Council[92] — that there is "ethnic cleansing" in Rakhine somehow precludes the plausibility of a simultaneous finding of genocide. That suggestion is wrong in fact and in law. As this Court made clear in its *Bosnia* v. *Serbia* Judgment, "it is clear that acts of 'ethnic cleansing' may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts"[93]. In 2015, the Court reaffirmed in its *Croatia* v. *Serbia* Judgment that, "[a]cts of 'ethnic cleansing' can indeed be elements in the implementation of a genocidal plan"[94].

14. My fourth point: Myanmar made a number of claims about the 1993 Orders in the *Bosnia* case, presumably in response to our argument that those Orders are instructive and offer an appropriate starting-point for what the Court should do in this case. It seems that Myanmar does not like the 1993 Orders very much. Mr. Staker told you they were merely "a 26-year-old precedent"[95], and that they predate the Court's "important ruling on binding provisional measures" in *LaGrand*[96]. But he seems to have missed paragraph 452 of your 2007 *Bosnia* Judgment, where the Court stated explicitly that the fact that the 1993 Orders predated *LaGrand* "does not affect the binding nature of those Orders", which "created legal obligations which both Parties were required to satisfy"[97].

15. Mr. Staker also submitted that the 1993 Orders were, in effect, useless, which is my fifth point. "Provisional measures in such terms serve no useful purpose", he told you[98]. We are grateful to him for reinforcing the point we made on Tuesday, when I reminded you that the 1993 Orders failed to prevent the genocide at Srebrenica, two years later. "[P]rovisional measures worded in such broad terms", Mr. Staker explained, make it "impossible to know what the precise conduct

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[92] CR 2019/19, p. 33, para. 37 (Schabas).

[93] *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.

[94] *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. 150-151, para. 510.

[95] CR 2019/19, p. 58, para. 76 (Staker).

[96] *Ibid.*, p. 21, para. 2 (Staker).

[97] *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. 230, para. 452.

[98] CR 2019/19, p. 60, para. 83 (Staker).

might be within provisional measures"[99]. We agree. The Court must go further on the first and second provisional measures and specify, with as much precision as possible and on the basis of what has already occurred, the kind of acts that Myanmar must refrain from and prevent.

16. Indeed, to the list we have already provided to you, we would have no objection if you added the acts identified by Professor Schabas in his 2013 interview, like the prevention of births, the right to live where you live, and the denial of the identity of the Rohingya people. On the last point, we noted that the Agent said that "[a]ll children born in Rakhine, regardless of religious background, are issued with birth certificates". Notwithstanding the UN Fact-Finding Mission's conclusion that this has *not* been the case[100], the Agent's comment seems to imply, at the very least, a recognition that the Rohingya are human beings, which seems like a concession. But she did not recognize their right to citizenship and, as you will have noted, and Mr. Reichler reminded you, did not feel able to mention the word "Rohingya".

17. We noted, incidentally, that the Agent, like her counsel, passed in total silence over the genocide at Srebrenica, one recognized by this Court. Perhaps this was because the numbers killed — 8,000 — are, in the view of Myanmar, simply too small to merit recognition. After all, as Professor Schabas put it in the case of the Rohingya, "10,000 deaths out of a population of well over one million might suggest something other than an intent to physically destroy the group"[101]. Genocide is not just a numbers game, Mr. President, and the Convention makes clear that the intention to destroy a group "in part" is sufficient. You have evidence before you that entire Rohingya villages have been destroyed, and most, if not all, of the inhabitants have been killed[102]. There is ample authority in the jurisprudence on genocide to support the view that such destruction of an entire community, in a limited geographic area, on grounds of ethnicity or religion or race,

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[99] CR 2019/19, p. 61, para. 64 (Staker).

[100] UN HRC, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 Sep. 2018), para. 463.

[101] CR 2019/19, p. 38, para. 48 (Schabas).

[102] UN HRC, *Report of the independent international fact-finding mission on Myanmar*, UN doc. A/HRC/39/64 (12 Sep. 2018), para. 36.

and even where it is not the whole protected group, can properly be characterized as an act of genocide[103].

18. My sixth submission concerns the other provisional measures we have requested, on which Myanmar had very little to say. On the third measure, they wondered what "evidence related to the events described in the Application" might mean. With respect, Myanmar is assisted by a team of experienced international counsel, who can advise them on exactly what this means. It starts with the preservation of mass graves, the preservation of bodies of victims, the preservation of destroyed villages, and it continues to all the other evidence which, presumably, is of the kind Myanmar now says it will be gathering for the investigations which they have told the Court they are committed to undertaking.

19. The fourth provisional measure — not aggravating or extending the dispute — is standard in the practice of this Court. Again, if Myanmar is in doubt, it can obtain advice from its experienced counsel.

20. The fifth provisional measure would impose a reporting requirement. As Mr. Staker well knows, it is not intended to create some sort of "human rights monitoring machinery", but simply require the Parties to inform the Court as to the steps they are taking to give effect to the provisional measures Order indicated by the Court. This is routine, for example, in matters relating to the law of the sea which, while of very great importance, cannot be said to be as grave as the issues that arise in this case[104]. If reporting is good enough for the law of the sea, it is certainly good enough for this case.

21. As to the sixth provisional measure, we say it is proper and appropriate for a number of compelling reasons. First, it is intrinsically linked to the obligation under Article I of the Genocide Convention to "prevent and to punish" genocide. Effective investigation, and the preservation of evidence, are fundamental to preventing impunity for genocide and thus complying with the Article I obligation. Yet the consistent picture before the Court is that Myanmar is refusing to

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[103] *Prosecutor* v. *Radovan Karadžić (Judgment),* IT-95-5/18-AR98bis.1, Appeals Chamber of the ICTY, 11 July 2013, paras. 61-70; *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. 166, para. 297.

[104] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures Order of 25 April 2015, ITLOS Reports 2015*, p. 146.

co-operate with or provide access to investigative bodies to collect evidence, thereby creating a material impediment to the eventual punishment of genocide, and that it is itself destroying evidence, including by bulldozing destroyed Rohingya villages[105]. Since Myanmar has proved itself to be unwilling to investigate what has occurred, in any real sense, it is only by ordering it to co-operate with independent UN investigators (currently in the form of the Independent Investigative Mechanism) that this Court might be able to assure itself that The Gambia's right to have other parties to the Convention comply with their Article I obligation will be protected pending the resolution of this case.

22. Second, the sixth provisional measure is consistent with the jurisprudence of the Court. It builds on the Order that was made, for example, in the *Frontier Dispute* case that the parties "should refrain from any act likely to impede the gathering of evidence material to the present case"[106]. Myanmar's persistent refusal to co-operate with the UN Fact-Finding Mission has already impeded the gathering of evidence material to the present case, and it is only by indicating the requested provisional measures that further impediment can be avoided. The requested measure is not, as I have said, novel: it is the same in substance as the Order made in the *Frontier Dispute* case, adapted to the specific circumstances pertaining to this case. Further, it is directly linked to the Article 41 requirement of preserving the respective rights of the parties: it is necessary to preserve the integrity of these proceedings, and The Gambia's right to have its claim fairly adjudicated, because this claim will in due course depend on the evidence that can be collected. Myanmar's non-co-operation with international investigative bodies threatens that right, and a provisional measure in the form requested is necessary in order to protect it.

23. Mr. President, Members of the Court, I will conclude. As I mentioned in my first-round statement, genocide is not a single act. From its very genesis, it has been recognized to be a continuum — that was the only point I made in invoking the spirit of Dr. Lemkin — and it is comprised of different actions which individually and together, and over stages and time, amount to

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[105] UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sep. 2019), para. 117.

[106] *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 12, para. 32 (1) (B).

this most heinous crime. With genocide, one thing always leads to another. That was the point of invoking the spirit of Primo Levi.

24. The situation the Court is confronted with today is a delicate one: unlike in the *Bosnia* case, there is no international criminal tribunal with special responsibility for the crimes committed in this case. Today, the hopes of The Gambia and of the Rohingya people — some of whom are in the Great Hall today — rest entirely with you — to exercise the power vested in you by Article 41 of the Statute, and to grant specific, protective provisional measures to interrupt and prevent the continuum of genocide — break the chain — that has already occurred, and is continuing to occur today in Rakhine.

25. Myanmar urges you to take a different path. Peace and harmony is best assured by doing nothing, the Agent told you yesterday. Forget about the 1993 Orders, counsel said yesterday, they are useless. Go back to the glory days of 1966 and the *South West Africa* Judgment counsel, in effect, pleaded, but not its paragraph 66. Forget about the Genocide Convention of 1948. Just give Myanmar the space and the freedom to act unfettered by the unfortunate distraction that is international law. Perhaps — perhaps — some of you might be tempted to do that, but we trust that the Court will exercise its judicial function, that it will apply the law, that it will give effect to the requirements that the drafters of the 1948 Convention entrusted upon you, that you will not abdicate your judicial functions and responsibilities.

26. Mr. President, Madam Vice-President, Members of the Court, the eyes of the world, of individuals and of groups, of countries and of the United Nations bodies, are upon this Court. That concludes my submissions. I would like to express my thanks to all my colleagues for their assistance, in particular Ms Jessica Jones. I thank you again for your kind and patient attention, and invite you to ask the Agent of The Gambia to the Bar.

The PRESIDENT: I thank Professor Sands. I shall now give the floor to the Agent of The Gambia, His Excellency Mr. Abubacarr Marie Tambadou. You have the floor, sir.

Mr. TAMBADOU:

IV. AGENT'S CLOSING REMARKS

1. Mr. President, honourable Judges, it is an honour to address you once again as the Agent of the Republic of The Gambia.

2. As you heard on Tuesday and this morning, the situation of the Rohingya in Myanmar is dire. The evidence from various United Nations bodies and independent human rights organizations clearly establishes the urgent and imminent risk of the recurrence of genocide that they face.

3. The lives of these human beings are at risk. The Gambia may not be a neighbouring State, but The Gambia has a keen and special interest in seeing that no group of people, including the Rohingya, suffer genocide.

4. As a State party to the Genocide Convention, The Gambia has come to this Court to protect its rights under the Convention to ensure that the *erga omnes partes* obligations undertaken by Myanmar under the Convention are fulfilled. Those obligations — not to commit genocide and to prevent and punish genocide — are owed to The Gambia and indeed to all other States parties to the Convention.

5. Mr. President, honourable Judges, The Gambia has been open about its dispute with Myanmar. We openly raised this dispute at successive sessions of the United Nations General Assembly. We have openly welcomed support for this effort from other States, including member States of the Organisation of Islamic Cooperation. Indeed, it was, from beginning to end, The Gambia's initiative to table resolutions and form a committee and seek the broader support of the other 56 member States of the Organisation of Islamic Cooperation. The Gambia is proud to have the diplomatic and political support of the other 56 member States of the OIC — and of other supportive States, like Canada and the Netherlands — as The Gambia, in its sovereign capacity, pursues this case against Myanmar.

6. It was The Gambia alone that sent the Note Verbale to Myanmar to clearly spell out the nature of this dispute and put Myanmar on notice. And it was The Gambia alone that has filed the Application and Request for provisional measures that is now before the Court.

7. Mr. President, honourable Judges, The Gambia's request for provisional measures falls squarely within the Genocide Convention. We have shown that the rights of The Gambia that we

are seeking to protect are plausibly connected to the measures requested. And we have amply demonstrated urgency and risk of irreparable harm.

8. The Gambia urges this Court, as the guardians of our moral and legal compass under the Convention, to indicate the requested provisional measures.

9. Mr. President, in accordance with Article 60 of the Rules of Court, I shall now read out The Gambia's final submissions:

> "Pursuant to Article 41 of the Statute of the Court, The Gambia, as a State party to the Genocide Convention, respectfully requests the Court, as a matter of extreme urgency, to indicate the following provisional measures, which are directly linked to the rights that form the subject matter of the dispute, pending its determination of this case on the merits:
>
> *(a)* Myanmar shall immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent all acts that amount to or contribute to the crime of genocide, including taking all measures within its power to prevent the following acts from being committed against any member of the Rohingya group: extrajudicial killings or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part;
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> *(b)* Myanmar shall, in particular, ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any act of genocide, of conspiracy to commit genocide, or direct and public incitement to commit genocide, or of complicity in genocide, against the Rohingya group, including: extrajudicial killing or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part;
>
> *(c)* Myanmar shall not destroy or render inaccessible any evidence related to the events described in the Application, including without limitation by destroying or rendering inaccessible the remains of any member of the Rohingya group who is a victim of alleged genocidal acts, or altering the physical locations where such acts are alleged to have occurred in such a manner as to render the evidence of such acts, if any, inaccessible;
>
> *(d)* Myanmar and The Gambia shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of this Application, or render it more difficult of resolution;
>
> *(e)* Myanmar and The Gambia shall each provide a report to the Court on all measures taken to give effect to this Order for provisional measures, no later than four months from its issuance; and

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

10. Mr. President, honourable Judges, this concludes The Gambia's second round of observations. I wish to take this opportunity to thank you, once again, for your kind attention. I would also like to take the opportunity to thank all members of the Registry, the Court staff and security, and the interpreters for their dedicated work throughout the hearings. I thank you. With your permission, Mr. President, I would like to take my seat.

The PRESIDENT: You have my permission. I thank the Agent of The Gambia. The Court takes note of the provisional measures requested by The Gambia, that you have just read out on behalf of your Government. The Court will meet again this afternoon, at 4.30 p.m., to hear the second round of oral observations of Myanmar. The sitting is adjourned.

The Court rose at 11.30 a.m.