SEPARATE OPINION OF VICE-PRESIDENT XUE

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

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

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

ticular circumstances from which the present case has arisen could not possibly suggest a case of genocide.

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

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

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

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

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

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

8. What Myanmar argued on this point reflects the existing rules of international law, *lex lata*, on State responsibility as codified by the International Law Commission (hereinafter the "ILC"). That is to say, under the rules of State responsibility, it is the injured State, which is specially affected by the alleged violations, that has the standing to invoke the responsibility of another State in the Court. The position taken by the Court in this Order, albeit provisional, would put to a test Article 48 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts. How far this unintended interpretation of the Convention can go in practice remains to be seen, as its repercussions on general international law and State practice would likely extend far beyond this particular case.

9. Notwithstanding my above reservations, I agree with the indication of the provisional measures for the following considerations. First, the two reports of the Independent International Fact-Finding Mission on Myanmar established by the Human Rights Council of the United Nations,

issued in 2018 and 2019 respectively, reveal, even prima facie, that there were serious violations of human rights and international humanitarian law against the Rohingya and other ethnic minorities in Rakhine State of Myanmar, particularly during the "clearance operations" carried out in 2016 and 2017. Although at this stage, the Court could not, and rightly need not, ascertain the facts, the weight of the said reports cannot be ignored. In other words, the human rights situation in Myanmar deserves serious attention from the Court. Considering the gravity and scale of the alleged offences, measures to ensure that Myanmar, as a State party to the Genocide Convention, observe its international obligations under the Convention, especially the obligation to prevent genocide, should not be deemed unwarranted under the circumstances.

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

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

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

(*Signed*) XUE Hanqin.