INTERNATIONAL COURT OF JUSTICE

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

Request for the indication of provisional measures

The Court begins by recalling that, on 11 November 2019, The Gambia filed in the Registry of the Court an Application instituting proceedings against Myanmar concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter the "Genocide Convention" or the "Convention"). The Application contained a Request for the indication of provisional measures, submitted pursuant to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court with a view to preserving the rights The Gambia claims under the Convention, pending the Court's final decision in the case.

I. PRIMA FACIE JURISDICTION (PARAS. 16-38)

1. General introduction (paras. 16-19)

The Court recalls that, when a request for the indication of provisional measures is submitted to it, it must examine whether the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. In the present case, The Gambia seeks to found the Court's jurisdiction on Article IX of the Genocide Convention[1]. The Court notes that The Gambia and Myanmar are parties to the Convention and that neither has made any reservation to Article IX.

2. Existence of a dispute relating to the interpretation, application or fulfilment of the Genocide Convention (paras. 20-31)

The Court notes that Article IX of the Genocide Convention makes its jurisdiction conditional on the existence of a dispute relating to the interpretation, application or fulfilment of the said instrument, and that it must therefore determine prima facie the existence of such a dispute

[1] Article IX of the Genocide Convention reads:

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

between the Parties. It observes that, in principle, the date for determining the existence of a dispute is the date on which the application is submitted.

First, Myanmar having argued that there was no dispute between the Parties in view of the fact that the proceedings before the Court were instituted by The Gambia not on its own behalf but rather as a "proxy" and "on behalf of" the Organisation of Islamic Cooperation ("OIC"), in circumvention of Article 34 of the Statute, the Court notes that the Applicant instituted proceedings in its own name, and that it maintains that it has a dispute with Myanmar regarding its own rights under the Convention. In the view of the Court, the fact that The Gambia may have sought and obtained the support of other States or international organizations in its endeavour to seise the Court does not preclude the existence between the Parties of a dispute relating to the Genocide Convention.

Turning to the question of whether there was a dispute between the Parties at the time of the filing of the Application, the Court notes that, on 8 August 2019, the Independent International Fact-Finding Mission on Myanmar established by the Human Rights Council of the United Nations (hereinafter the "Fact-Finding Mission") published a report which affirmed its previous conclusion "that Myanmar incurs State responsibility under the prohibition against genocide" and welcomed the efforts of The Gambia, Bangladesh and the OIC to pursue a case against Myanmar before the Court under the Genocide Convention. The Court further notes that, on 26 September 2019, The Gambia stated during the general debate of the seventy-fourth session of the General Assembly of the United Nations that it was ready to lead concerted efforts to take the Rohingya issue to the International Court of Justice, and that Myanmar delivered an address two days later, characterizing the Fact-Finding Mission reports as "biased and flawed, based not on facts but on narratives". In the Court's view, these statements suggested the existence of a divergence of views concerning the events which allegedly took place in Rakhine State in relation to the Rohingya. In addition, the Court takes into account The Gambia's Note Verbale of 11 October 2019, in which it stated that it understood Myanmar to be in ongoing breach of its obligations under the Genocide Convention and under customary international law and insisted that Myanmar take all necessary actions to comply with these obligations. In light of the gravity of the allegations made in this Note Verbale, the Court considers that the lack of response may be another indication of the existence of a dispute between the Parties.

Finally, as to whether the acts complained of by the Applicant are capable of falling within the provisions of the Genocide Convention, the Court observes that The Gambia contends, in particular, that Myanmar's military and security forces have been responsible, *inter alia*, for killings, rape and other forms of sexual violence, torture, beatings, cruel treatment, and for the destruction of or denial of access to food, shelter and other essentials of life, all with the intent to destroy the Rohingya group, in whole or in part. The Court notes that The Gambia considers Myanmar to be responsible for committing genocide and to have violated other obligations under the Genocide Convention, and that Myanmar, for its part, has denied committing any of the violations of the Genocide Convention alleged by The Gambia. The Court recalls that, at this stage of the proceedings, it is not required to ascertain whether any violations of Myanmar's obligations under the Genocide Convention have occurred, which it could do only at the stage of the examination of the merits of the case. In the Court's view, at least some of the acts alleged by The Gambia are capable of falling within the provisions of the Convention.

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

3. The reservation of Myanmar to Article VIII of the Convention (paras. 32-36)

The Court then turns to Myanmar's argument that The Gambia cannot validly seise the Court as a result of Myanmar's reservation to Article VIII of the Genocide Convention. By this reservation, the Respondent declared that "the said article shall not apply to the Union [of Burma]". Article VIII provides that

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

The Court considers that the terms used in this provision suggest that Article VIII does not apply to the Court. In particular, it notes that this provision only addresses in general terms the possibility for any Contracting Party to "call upon" the competent organs of the United Nations to take "action" which is "appropriate" for the prevention and suppression of acts of genocide. The Court observes that the matter of the submission of disputes between Contracting Parties to the Genocide Convention to the Court for adjudication is specifically addressed in Article IX of the Convention, to which Myanmar has not made any reservation. It considers that only this Article is relevant to the seisin of the Court in the present case. In view of the above, the Court concludes, Myanmar's reservation to Article VIII of the Genocide Convention does not appear to deprive The Gambia of the possibility to seise the Court of a dispute with Myanmar under Article IX of the Convention.

4. Conclusion as to prima facie jurisdiction (paras. 37-38)

In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article IX of the Genocide Convention to deal with the case. Given the above conclusion, the Court considers that it cannot accede to Myanmar's request that the case be removed from the General List for manifest lack of jurisdiction.

II. QUESTION OF THE STANDING OF THE GAMBIA (PARAS. 39-42)

The Court next examines the Respondent's argument that The Gambia does not have standing to bring a case before the Court in relation to Myanmar's alleged breaches of the Genocide Convention without being specially affected by such alleged violations. The Court begins by observing that, in light of the high ideals which inspired the Convention, and in view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. It adds that this common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. As the Court observed in its Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, regarding similar provisions in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the relevant provisions of the Genocide Convention may be defined as obligations *erga omnes partes* in the sense that each State party has an interest in compliance with them in any given case. It follows, the Court adds, that any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end. The Court concludes that The Gambia has prima facie standing to submit to it the dispute with Myanmar on the basis of alleged violations of obligations under the Genocide Convention.

III. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED (PARAS. 43-63)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

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

> "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> *(a)* Killing members of the group;
>
> *(b)* Causing serious bodily or mental harm to members of the group;
>
> *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> *(d)* Imposing measures intended to prevent births within the group;
>
> *(e)* Forcibly transferring children of the group to another group."

The Court notes that, pursuant to Article III of the Genocide Convention, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are also prohibited.

The Court observes that the provisions of the Convention are intended to protect the members of a national, ethnical, racial or religious group from acts of genocide or any other punishable acts enumerated in Article III. In the Court's view, the Rohingya in Myanmar appear to constitute a protected group within the meaning of Article II of the Genocide Convention.

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

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

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

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

and that, by that same resolution, the General Assembly condemned

> "all violations and abuses of human rights in Myanmar, as set out in the report of the fact-finding mission, including the widespread, systematic and gross human rights violations and abuses committed in Rakhine State".

In this connection, the Court recalls that, in its report of 12 September 2018, the Fact-Finding Mission stated that it had "reasonable grounds to conclude that serious crimes under international law ha[d] been committed that warrant[ed] criminal investigation and prosecution", including the crime of genocide, against the Rohingya in Myanmar. The Court also notes that, regarding the acts perpetrated against the Rohingya in Rakhine State, the Fact-Finding Mission concluded that "on reasonable grounds . . . the factors allowing the inference of genocidal intent [were] present". It further notes that the Fact-Finding Mission asserted that the extreme levels of violence perpetrated against the Rohingya in 2016 and 2017 resulted from the "systemic oppression and persecution of the Rohingya", including the denial of their legal status, identity and citizenship, and followed the instigation of hatred against the Rohingya on ethnic, racial or religious grounds. The Court also recalls that, following the events which occurred in Rakhine State in 2016 and 2017, hundreds of thousands of Rohingya have fled to Bangladesh.

The Court observes that, in view of the function of provisional measures, the exceptional gravity of the allegations is not a decisive factor warranting the determination, at the present stage of the proceedings, of the existence of a genocidal intent. In its view, all the facts and circumstances mentioned above are sufficient to conclude that the rights claimed by The Gambia and for which it is seeking protection — namely the right of the Rohingya group in Myanmar and of its members to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of The Gambia to seek compliance by Myanmar with its obligations not to commit, and to prevent and punish genocide in accordance with the Convention — are plausible.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested. The Court considers that, by their very nature, the first three provisional measures sought by The Gambia are aimed at preserving the rights it asserts on the basis of the Genocide Convention in the present case, namely the right of the Rohingya group in Myanmar and of its members to be protected from acts of genocide and other acts mentioned in Article III, and the right of The Gambia to have Myanmar comply with its obligations under the Convention to prevent and punish acts identified and prohibited under Articles II and III of the Convention, including by ensuring the preservation of evidence. Given the purpose of the fourth and fifth provisional measures requested by The Gambia, the Court considers that the question of their link with the rights for which The Gambia seeks protection does not arise. As to the sixth provisional measure requested by The Gambia, the Court does not consider that its indication is necessary in the circumstances of the case.

IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY (PARAS. 64-75)

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences, and that this power is exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision.

The Court further recalls, as it observed in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, that the Convention "was manifestly adopted for a purely humanitarian and civilizing purpose", since "its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality". In view of the fundamental values sought to be protected by the Genocide Convention, the Court considers that the rights in question in these

proceedings, in particular the right of the Rohingya group in Myanmar and of its members to be protected from killings and other acts threatening their existence as a group, are of such a nature that prejudice to them is capable of causing irreparable harm.

The Court notes that the reports of the Fact-Finding Mission have indicated that, since October 2016, the Rohingya in Myanmar have been subjected to acts which are capable of affecting their right of existence as a protected group under the Genocide Convention, such as mass killings, widespread rape and other forms of sexual violence, as well as beatings, the destruction of villages and homes, denial of access to food, shelter and other essentials of life. The Court is also of the opinion that the Rohingya in Myanmar remain extremely vulnerable. In this respect, the Court notes that, in its resolution 74/246 of 27 December 2019, the General Assembly reiterated

> "that, in spite of the fact that Rohingya Muslims lived in Myanmar for generations prior to the independence of Myanmar, they were made stateless by the enactment of the 1982 Citizenship Law and were eventually disenfranchised, in 2015, from the electoral process".

The Court also takes note of the detailed findings of the Fact-Finding Mission on Myanmar submitted to the Human Rights Council in September 2019, which refer to the risk of violations of the Genocide Convention, and in which it is "conclude[d] on reasonable grounds that the Rohingya people remain at serious risk of genocide under the terms of the Genocide Convention".

Moreover, the Court is of the view that the steps which the Respondent claimed to have taken to facilitate the return of Rohingya refugees present in Bangladesh, to promote ethnic reconciliation, peace and stability in Rakhine State, and to make its military accountable for violations of international humanitarian and human rights law, do not appear sufficient in themselves to remove the possibility that acts causing irreparable prejudice to the rights invoked by The Gambia for the protection of the Rohingya in Myanmar could occur. In particular, the Court notes that Myanmar has not presented to the Court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention. Moreover, the Court notes that, in its resolution 74/246 of 27 December 2019, the General Assembly expressed its regret that

> "the situation has not improved in Rakhine State to create the conditions necessary for refugees and other forcibly displaced persons to return to their places of origin voluntarily, safely and with dignity",

and reiterated

> "its deep distress at reports that unarmed individuals in Rakhine State have been and continue to be subjected to the excessive use of force and violations of human rights and international humanitarian law by the military and security and armed forces".

Finally, the Court observes that, irrespective of the situation that the Myanmar Government is facing in Rakhine State, including the fact that there may be an ongoing internal conflict between armed groups and the Myanmar military and that security measures are in place, Myanmar remains under the obligations incumbent upon it as a State party to the Genocide Convention. The Court recalls that, in accordance with the terms of Article I of the Convention, States parties expressly confirmed their willingness to consider genocide as a crime under international law which they must prevent and punish independently of the context "of peace" or "of war" in which it takes place. The context invoked by Myanmar does not stand in the way of the Court's assessment of the existence of a real and imminent risk of irreparable prejudice to the rights protected under the Convention.

The Court finds that there is a real and imminent risk of irreparable prejudice to the rights invoked by The Gambia, as specified by the Court.

V. CONCLUSION AND MEASURES TO BE ADOPTED (PARAS. 76-85)

The Court concludes that the conditions required by its Statute for it to indicate provisional measures are met, and that it is necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by The Gambia.

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

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

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

Finally, the Court considers that Myanmar must submit a report to it on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court.

VI. OPERATIVE CLAUSE (PARA. 86)

The full text of the final paragraph of the Order reads as follows:

"For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) Unanimously,

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

(a) killing members of the group;

(b) causing serious bodily or mental harm to the members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and

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

(2) Unanimously,

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

(3) Unanimously,

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

(4) Unanimously,

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

*

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

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Separate opinion of Vice-President Xue

Vice-President Xue voted in favour of the operative paragraph of the Order. In explaining her vote, she expresses certain reservations to the reasoning in the Order.

First, she maintains serious reservations with regard to the plausibility of the present case under the Genocide Convention. She is of the view that, even if the Court does not have to make a determination of the existence of genocidal intent, at least, 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. 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. The gravity of the matter does not change the nature of its subject, namely, the issue of national reconciliation and equality of ethnic minorities in Myanmar.

On the question of the standing of The Gambia, Vice-President Xue disagrees with the Court that by virtue of its Judgment in *Belgium* v. *Senegal*, The Gambia has standing in the present case. She emphasizes that the facts in the *The Gambia* v. *Myanmar* case are entirely different: in *Belgium* v. *Senegal*, Belgium instituted the case against Senegal in the Court not merely because it had an interest, as shared by all the States parties, in compliance with 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, Belgium was supposedly an injured State under the rules of State responsibility.

In Vice-President Xue's view, 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.

Moreover — Vice-President Xue emphasizes — 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 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. The extent to which 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.

Vice-President Xue further notes that 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. 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.

Vice-President Xue takes the view that under the rules of State responsibility, it is the injured State, the one 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.

Notwithstanding her reservations, Vice-President Xue agrees with the indication of the provisional measures on a number of considerations. First, the two reports of the United Nations Fact-Finding Mission on Myanmar 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. 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. 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. As internal armed conflicts in Rakhine State may erupt again, the provisional measures as indicated by the Court would, in Vice-President Xue's view, enhance the control of the situation. 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.

In light of the foregoing considerations, Vice-President Xue concurs with the indication of the provisional measures. She points out that the issues she has raised in this opinion should be further considered in due course.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of seven parts, Judge Cançado Trindade presents the foundations of his own personal position, pertaining to the Court's decision in the present case of *Application of the Convention against Genocide (The Gambia* v. *Myanmar)*. He begins with some introductory considerations in historical perspective (part I), pointing out that the present Order has just been adopted by the International Court of Justice (ICJ), significantly by unanimity: the provisional measures are intended to bring the necessary protection to human beings who have been suffering for a long time in a situation of extreme vulnerability.

2. From the start, in his support to the Order, he rejects a voluntarist outlook of the matter, given the prevalence of human conscience over the will of States (para. 5). He then proceeds to a review of provisional measures of protection in ICJ cases under the Convention against Genocide (part II). Bearing that in mind, he concentrates attention on the contents of international fact-finding in the *cas d'espèce*.

3. Judge Cançado Trindade presents a detailed examination (parts III and IV) of relevant passages, first, of United Nations Reports of the Independent International Fact-Finding Mission on Myanmar (of 12 September 2018, of 8 August 2019 and of16 September 2019), and secondly, of Reports of the United Nations Special Rapporteur on Human Rights in Myanmar (of 30 August 2019, of 2 May 2019, and of 20 August 2018), disclosing the sufferings imposed upon the Rohingya in the situation in Myanmar (paras. 15-52).

4. Judge Cançado Trindade points out that those United Nations reports indeed give accounts of

> "great suffering on the part of the numerous victims of the tragedy in Myanmar; further to those who were killed or died, the surviving ones remain in a situation of extreme vulnerability. I ascribe considerable importance to human vulnerability, to which I have always been attentive, and I shall address this point further in the following paragraphs of the present part V of the Separate Opinion.
>
> The Provisional Measures of Protection just ordered by the ICJ in the *cas d'espèce* aim to safeguard the fundamental rights of the surviving victims. The suffering of victims has marked presence in the writings of thinkers along the centuries" (paras. 53-54).

5. In sequence, in part V of the separate opinion, Judge Cançado Trindade focuses on provisional measures of protection and the imperative of overcoming the extreme vulnerability of victims, encompassing the legacy of the Second World Conference on Human Rights (1993) in its attention to human vulnerability (paras. 55-65), and international case law and the need of properly addressing human vulnerability (paras. 66-74).

6. He stresses that "[i]nvocation of extreme human vulnerability is a key element to be taken into account in a decision concerning provisional measures of protection, in a case like the present one, on the *Application of the Convention against Genocide*. In effect, from time to time, the ICJ has been seized of cases disclosing human cruelty, always present in the history of humankind" (para. 72). In revising the recent case law of the ICJ, he points out "the great need of a people-centred approach, keeping in mind the fundamental right to life, with the *raison d'humanité* prevailing over the *raison d'Etat*" (para. 74).

7. Judge Cançado Trindade then outlines the utmost relevance of the safeguard of fundamental rights by provisional measures of protection, in the domain of *jus cogens*, under the Convention against Genocide and the corresponding customary international law (part VI). He points out that the rights protected by the present Order of provisional measures of protection are truly fundamental rights, starting with the right to life, right to personal integrity, right to health, among others (para. 75).

8. He adds that these rights are not simply "plausible", as the Court says; there is great need of serious reflection on this superficial use of "plausible" — a recent and unfortunate invention of the Court's majority — devoid of a meaning (para. 76). The major goal is to extend protection to human beings suffering a *continuing situation* of extreme vulnerability affecting their fundamental rights (para. 77). Given that we are here before fundamental human rights, there is need to keep in mind that the basic principle of equality and non-discrimination lies in the foundations of the rights safeguarded under the Convention against Genocide, and human rights conventions, also by means of provisional measures of protection (para. 80).

9. In Judge Cançado Trindade's understanding, law and justice are indissociably together, in the Court's mission of contributing to a *humanized* law of nations, in the dehumanized world of our days (para. 80). To him, care is to be turned attentively to the victims, rather than to inter-State susceptibilities. In sum, "*jus cogens* is to be properly considered under the Convention against Genocide and the corresponding customary international law" (para. 87).

10. The way is then paved for the presentation of an epilogue recapitulating the main points sustained in the separate opinion (part VII), so as to secure the advances in the domain of the autonomous legal régime of provisional measures of protection (para. 88). In a case like the present one, Judge Cançado Trindade sustains that the provisions of the Convention against Genocide conform a *law of protection* (a *droit de protection*), oriented towards the safeguard of the fundamental rights of those victimized in a continuing situation of extreme human vulnerability, so as also to secure the prevalence of the rule of law *(la prééminence du droit)* (para. 89).

11. Provisional measures of protection, like the ones indicated in the present Order, are intended to put an end to a continuing situation of extreme vulnerability of the victimized persons (para. 91). He adds that as such provisional measures have recently been protecting growing numbers of persons in situations of extreme vulnerability, they appear transformed into a true jurisdictional *guarantee* of preventive character (para. 92).

12. Judge Cançado Trindade observes that the legacy of the Second World Conference on Human Rights (Vienna, 1993) has been much contributing precisely to the protection of human beings in situations of great vulnerability. Furthermore, international case law, as the *cas d'espèce* shows, can serve the need of properly addressing extreme human vulnerability (para. 93). The present case shows — he concludes — that

> "the determination and ordering of provisional measures of protection under the Convention against Genocide, and under human rights Conventions, can only be properly undertaken from a humanist perspective, necessarily avoiding the pitfalls of an outdated and impertinent State voluntarist outlook" (para. 94).

Declaration of Judge *ad hoc* Kress

In his declaration, Judge *ad hoc* Kress observes that the Order must be read keeping in mind the distinctive protective function of the indication of provisional measures. He notes, in particular, that, at this initial stage of the proceedings, the Court has not proceeded to anything close to a detailed examination of the question of genocidal intent. Against this background and in view of the exceptional gravity of the violations alleged, Judge *ad hoc* Kress believes it is worth emphasizing that the Court's Order in no way whatsoever prejudges the merits.

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