

CR 2019/18

International Court  
of Justice

THE HAGUE

Cour internationale  
de Justice

LA HAYE

YEAR 2019

*Public sitting*

*held on Tuesday 10 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)*

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VERBATIM RECORD

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ANNÉE 2019

*Audience publique*

*tenue le mardi 10 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)*

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COMPTE RENDU

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*Present:*      President Yusuf  
                 Vice-President Xue  
                 Judges Tomka  
                         Abraham  
                         Bennouna  
                         Cañado Trindade  
                         Donoghue  
                         Gaja  
                         Sebutinde  
                         Bhandari  
                         Robinson  
                         Crawford  
                         Gevorgian  
                         Salam  
                         Iwasawa  
Judges *ad hoc* Pillay  
                         Kress  
  
                 Registrar Gautier

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

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

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

Mr. Payam Akhavan, LL.M., S.J.D. (Harvard), Professor of International Law, McGill University, member of the Bars of New York and the Law Society of Ontario, member of the Permanent Court of Arbitration,

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

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

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Mr. Hussein Thomasi, Ministry of Justice,

Ms Bafou Jeng, Ministry of Justice,

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

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

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

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

Ms Hasina Begum,

Ms Hamida Khatun,

Mr. Yousuf Ali,

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Mr. Scott Edmonds, Cartographer, International Mapping,

Ms Vickie Taylor, Cartographer, International Mapping,

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Mr. Mark van Melle,

Mr. Erik Alexander van Houwelingen,

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

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

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

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

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

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

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Mr. Matthew Christopher Terry, Assistant to the Secretariat,

*as Assistants;*

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

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

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

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

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

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M. Thihan Myo Nyun, consultant juridique,

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

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

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

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

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

*comme agents de sécurité.*

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today and will meet in the coming days to hear the oral observations of the Parties on the request for the indication of provisional measures submitted by the Republic of The Gambia in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*. This morning, the Court will hear The Gambia's first round of oral observations.

The Court does not include upon the Bench a judge of the nationality of either of the Parties. Both Parties have therefore availed themselves of the right, under Article 31, paragraph 3, of the Statute, to choose a judge *ad hoc*. The Gambia has chosen Ms Navanethem Pillay, and Myanmar, Mr. Claus Kress.

Article 20 of the Statute provides that “[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously”. Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*.

Before inviting Ms Pillay and Mr. Kress to make their solemn declaration, I shall first, in accordance with custom, say a few words about their career and qualifications.

Ms Navanethem Pillay, of South African nationality, is a former judge with a distinguished career at the national and international levels. After obtaining her law degree at Natal University in South Africa in 1965, she practised as an attorney for 28 years, *inter alia* providing legal defence for opponents of apartheid and handling seminal cases on the rights of political prisoners. In the 1980s, she was awarded a Master of Law and a Doctorate of Juridical Sciences from Harvard University. In 1995, she became acting judge at the High Court of South Africa. The same year, she was elected by the General Assembly of the United Nations to be a judge of the International Criminal Tribunal for Rwanda, where she served for eight years, including four as its President. In 2003, she was elected to the International Criminal Court, where she sat until 2008. From September 2008 to August 2014, Ms Pillay was the United Nations High Commissioner for Human Rights. Since then, she has continued to work in the field of human rights. She has written extensively on international criminal law, international humanitarian law and international human

rights law, and has received numerous honorary doctorates and awards for human rights achievements.

Mr. Claus Kress, of German nationality, is a professor of international law and criminal law. He now holds the Chair for German and International Criminal Law and is the Director of the Institute of International Peace and Security Law at the University of Cologne. Mr. Kress was awarded a doctorate in 1994 and completed his German Bar examinations in 1995. From April 1996 to March 2000, he worked for the German Federal Ministry of Justice on matters of criminal law and international law, as Counsellor or Deputy Head of Section. He was a member of his country's delegation to the Diplomatic Conference for the Establishment of an International Criminal Court, as well as to the subsequent Preparatory Commission for the ICC. From 2000 onwards, Mr. Kress conducted advisory work in relation to the activities of the International Criminal Court, in particular as Head of the Drafting Board for the Regulations of the International Criminal Court. He was appointed as a professor in Cologne in 2004 and has been a visiting professor at several universities thereafter. He is a Life Member of Clare Hall College at the University of Cambridge, a Member of the Academy of Sciences and Arts of North Rhine-Westfalia, and the recipient of the 2014 M.C. Bassiouni Justice Award.

I shall now invite Ms Pillay to make the solemn declaration prescribed by the Statute, and I request all those present to rise. You have the floor.

Judge *ad hoc* PILLAY:

“I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.”

The PRESIDENT: I thank you. I now invite Mr. Kress to make the solemn declaration prescribed in the Statute. You have the floor.

Judge *ad hoc* KRESS:

« Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience. ».

The PRESIDENT: Je vous remercie. Please be seated. I take note of the solemn declarations made by Judge *ad hoc* Pillay and Judge *ad hoc* Kress and declare them duly installed as judges

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

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I shall now recall the principal steps of the procedure in the case.

On 11 November 2019, The Gambia filed in the Registry of the Court an Application instituting proceedings against the Republic of the Union of Myanmar, alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide (to which I will refer as the “Genocide Convention”). To found the jurisdiction of the Court, The Gambia invokes Article 36, paragraph 1, of the Statute of the Court and Article IX of the Genocide Convention.

In its Application, The Gambia asserts that the Government of Myanmar has adopted, taken and condoned violent acts against members of the Rohingya group, a distinct ethnic, racial and religious group residing in Myanmar’s Rakhine State. The Gambia contends that these acts were perpetrated in manifest violation of the Genocide Convention and that they are all attributable to Myanmar.

The Application contained a request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court. In its Request, The Gambia maintains that Myanmar’s “genocidal acts” against the Rohingya group continues to this day, that all members of this group still in Myanmar are at grave risk of further acts of genocide, and that provisional measures are necessary in order to prevent further irreparable harm to the rights protected under the Genocide Convention.

The Registrar will now read out the passage from the Request specifying the provisional measures which the Government of The Gambia is asking the Court to indicate. You have the floor.

The REGISTRAR: Thank you, Mr. President. I quote:

“(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 member[s] of the Rohingya group: extrajudicial killings or physical abuse; rape or other forms of

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

- (b) Myanmar shall, in particular, ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any act of genocide, of conspiracy to commit genocide, or direct and public incitement to commit genocide, or of complicity in genocide, against the Rohingya group, including: extrajudicial killing or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part;
- (c) Myanmar shall not destroy or render inaccessible any evidence related to the events described in the Application, including without limitation by destroying or rendering inaccessible the remains of any member of the Rohingya group who is a victim of alleged genocidal acts, or altering the physical locations where such acts are alleged to have occurred in such a manner as to render the evidence of such acts, if any, inaccessible;
- (d) Myanmar and The Gambia shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of this Application, or render it more difficult of resolution; and
- (e) Myanmar and The Gambia shall each provide a report to the Court on all measures taken to give effect to this Order for provisional measures, no later than four months from its issuance.”

Thank you, Mr. President.

The PRESIDENT: I thank the Registrar. Immediately after the Application and the request for the indication of provisional measures were filed, the Registrar transmitted copies thereof to the Government of Myanmar. He also notified the Secretary-General of the United Nations.

Under Article 74 of the Rules of Court, a request for the indication of provisional measures shall have priority over all other cases. Paragraph 2 of the same provision states that the Court shall proceed to a decision on the request as a matter of urgency. This imperative must be, however, balanced with the need to fix the date of the hearings in such a way as to afford the parties an opportunity of being represented at the hearings. Consequently, the Parties were informed that the date for the opening of the oral proceedings, during which they could present their observations on the Request for the indication of provisional measures, had been fixed at Tuesday 10 December 2019, at 10 a.m.

I note the presence before the Court of the Agents and counsel of the two Parties. This morning the Court will hear The Gambia, which has submitted the Request for the indication of provisional measures. It will hear Myanmar tomorrow morning at 10 a.m. For the purposes of this first round of oral observations, each Party will have available to it a full three-hour sitting. After the first round of oral observations, the Parties will have the possibility to reply: The Gambia will have the floor on Thursday 12 December 2019, at 10 a.m., and Myanmar will take the floor in turn later that same day, at 4.30 p.m. Each of the Parties will have a maximum time of 90 minutes in which to present its reply.

Before giving the floor to the Agent of The Gambia, I wish to draw the Parties' attention to Practice Direction XI, which states as follows:

“In the oral pleadings on requests for the indication of provisional measures parties should limit themselves to what is relevant to the criteria for the indication of provisional measures as stipulated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose.”

In this first sitting, The Gambia may, if required, avail itself of a short extension beyond 1 p.m., in view of the time taken up by the opening part of these oral proceedings.

I now give the floor to the Agent of The Gambia, His Excellency Mr. Abubacarr Marie Tambadou. You have the floor, sir.

Mr. TAMBADOU:

#### **I. AGENT'S SPEECH**

1. Mr. President, honourable Judges, it is an honour to address you today as the Agent of the Republic of The Gambia in our dispute with the Republic of the Union of Myanmar. The Gambia is also pleased to be represented by a diverse team of dedicated international advocates, who will speak after me in the following sequence: Professor Payam Akhavan, Mr. Andrew Loewenstein and Ms Tafadzwa Pasipanodya will each speak about a different aspect of the evidence collected by the United Nations among others; Mr. Arsalan Suleman will discuss the Court's prima facie jurisdiction; Professor Pierre d'Argent will address the plausibility of the rights that are in dispute; Mr. Paul Reichler will address you on the urgency of provisional measures to prevent irreparable harm; and, finally, Professor Philippe Sands will discuss the specific measures sought by The

Gambia and explain why they are needed in these exigent circumstances. I am also pleased that The Gambia's delegation today includes members of the Rohingya community, including those who have travelled from the refugee camps in Bangladesh.

2. Mr. President, honourable Judges: as Attorney General of the Republic of The Gambia, I stand before you today as Agent in a dispute with the State of Myanmar, but not a conventional one that this Court is accustomed to. I stand before you to awaken the conscience of the world, and to arouse the voice of the international community. In the words of Edmund Burke: "The only thing necessary for the triumph of evil is that good men do nothing."

3. Honourable Judges, every genocide that has occurred in history has had its own causes, unique to its historical and political context. But one thing is certain, genocide does not occur in a vacuum. It does not suddenly spring up or appear overnight out of the blue; it is preceded by a history of suspicion, mistrust, and hateful propaganda that dehumanizes the other, and then crystallizes into a frenzy of mass violence, in which one group seeks the destruction, in whole or in part, of another.

4. But when we dehumanize others, we dehumanize ourselves as human beings. For any genocide to occur, two things must be present: a dehumanization of the other and the indifference of the international community.

5. It is indeed sad for our generation that 75 years after humankind committed itself to the words "never again", another genocide is unfolding right before our eyes, even as I make this statement to you today. Yet we do nothing to stop it. This is a stain on our collective conscience and it will be irresponsible for any of us to simply look the other way and pretend that it is not our business because it *is* our business. We signed up to make it our business when we, as civilized nations, committed ourselves to a pact under the 1948 Genocide Convention.

6. Mr. President, honourable Judges, in early 2018, I visited the refugee camps in Bangladesh as part of a delegation of the Organisation of Islamic Cooperation. As I listened to the stories of the refugees at the camp, I could smell the stench of genocide from across the border in Myanmar; stories of helplessness in the face of mass killings, of mass rape, and mass torture, and of children being burnt alive in the sanctuary of their homes and places of worship; stories all too

familiar to me from a decade and a half of interaction with surviving victims of the 1994 Rwandan genocide in my capacity as a prosecutor at the International Criminal Tribunal for Rwanda.

7. When I looked in the eyes of those refugees as they recounted their devastating stories, I could see the looks of fear, of despair, of desperation, and of destruction. The looks of victims of a modern-day genocide. And so we asked the question WHY? Why is the world standing by and allowing such horrors again in our lifetime?

8. Contrary to the views of many out there, it is not only the State of Myanmar which is on trial here! It is our collective humanity that is being put on trial. We are here because it is this Court, the International Court of Justice, the principal judicial organ of the United Nations, which epitomizes our collective conscience, and whose decisions give hope to millions of people in despair around the world.

9. Indeed, we come to you because we believe in the values that this Court has upheld for decades since its creation, because we know that you inspire confidence in the manner that you dispense justice, that you inspire trust in nations around the world, that you treat all sovereign nations, big or small, with equality, and that, because you restore hope when all seems lost. As the guardians of our moral and legal compass under the Genocide Convention, we come to you because to the millions of us around the world — the weak, the powerless, the insignificant others — you give us hope that someone out there will listen to us, to our pains and our sorrows; that someone will give consolation to victims and protect them.

10. Today, the Republic of The Gambia is asking you to inspire that same hope which you have given to generations, to the Rohingya in Myanmar, to hear their cries of genocide, and their cries for help. Every day of inaction means that more people are being killed, more women are being ravaged, and more children are being burnt alive. For what crime? Only because they were born different; born of a different race and to a different religion from those who kill and rape them. And for this, honourable Judges, they are being made to pay the ultimate price, genocide!

11. We must indeed learn lessons from history. It is clear that our best option must remain a strategy to prevent genocide and the conditions that breed it. Peace and justice must rest on the commitment of the international community to protect groups that are under threat, and to build societies based on justice and human rights. When strategies of prevention fail, as they

unfortunately sometimes do, the intervention of international justice mechanisms, which have the capacity to hold States accountable, must always follow.

12. Mr. President, honourable Judges, reports from various credible international organizations including the United Nations and the Organisation of Islamic Cooperation indicate that many thousands of people have already died as a direct result of Myanmar's genocidal actions, and the number of refugees on exodus is of biblical proportions.

13. These are not just numbers being floated around or mere statistical data, each number represents a real human being. I have met and spoken with them. They are the mothers and the fathers, the uncles and aunts, the nephews and nieces. People, like you and me, people we all like to have and love in our own families. Every death is being mourned by a family among the Rohingya in Myanmar, and these are the lucky ones. Some families have no one left alive to mourn for them, because no member of the family was left alive to tell their story.

14. And we in The Gambia know only too well how it feels like to be unable to tell your story to the world, to be unable to share your pain in the hope that someone somewhere will hear and help, to feel helpless. Twenty-two years of a brutal dictatorship in my own country has taught us that we must use our moral voice in condemnation of the oppression of others wherever it occurs around the world so that others will not suffer our pain and our fate.

15. Mr. President, honourable Judges, this is very much a dispute between The Gambia and Myanmar. We seek to protect not only the rights of the Rohingya, but our own rights as a State party to the Genocide Convention by holding Myanmar to its *erga omnes partes* obligations not to commit genocide, not to incite genocide, and to prevent and punish genocide. The Gambia has been accusing Myanmar of failure to fulfil these obligations, and of carrying out genocide against the Rohingya, since at least early 2018, and we have done so regularly in our public and official statements since then.

16. Myanmar has long been well aware of The Gambia's views, and has opposed them, by denying all responsibility for the acts of genocide, and by denying that it has violated the Genocide Convention. There being an unresolved dispute between the Parties, The Gambia has come here, to the International Court of Justice, to protect its rights under the Convention.

17. So all that The Gambia asks, is that you tell Myanmar to stop these senseless killings, to stop these acts of barbarity and brutality that have shocked and continue to shock our collective conscience, to stop this genocide of its own people!

18. All that we seek from you is that you tell Myanmar to give the Rohingya a chance to live a decent and dignified life in freedom and peace; to give Rohingya children the opportunity to laugh and play football or *Boli Kela* in their parks like our own children do; the opportunity to go to school and dream; dream of becoming lawyers or doctors or scientists; opportunities that we have all been given as children; opportunities that we all want for our own children; tell Myanmar to just give these Rohingya children a chance in life! It is what we ask of you because when you speak, the world listens. We ask for nothing more!

19. Mr. President, honourable Judges, it remains for me to thank you immensely for responding to our request for provisional measures by scheduling these hearings so promptly, and for allowing me to address you. With your permission, I would ask that you call Professor Akhavan to the podium. I thank you.

The PRESIDENT: I thank the Agent of The Gambia for his statement. I now invite Professor Akhavan to take the floor. You have the floor.

Mr. AKHAVAN:

## **II. THE SERIOUS RISK OF GENOCIDAL ACTIONS AGAINST THE ROHINGYA GROUP**

1. Mr. President, distinguished Members of the Court, it is a privilege to appear on behalf of The Gambia in this case of exceptional importance. It is my task to address the circumstances leading to this urgent request for provisional measures under Article 41 of the Statute of the Court, and to examine the evidence that is before you.

2. Yesterday marked 71 years since the United Nations adopted the Genocide Convention. On 9 December 1948, in the shadow of the Holocaust, the world said “never again”. Yet, in Srebrenica, Rwanda, Darfur, and many other sites of sorrow, we have witnessed, again and again, humankind’s failure to prevent genocide. We appear before you today, because there is still time to

save the Rohingya. We turn to this Court, as the guardian of the Genocide Convention, to prevent their further destruction at the hands of Myanmar.

3. In its Order of 8 April 1993 in *Bosnia v. Serbia*, the Court noted that whether or not past genocidal acts may be imputable to them, States parties to the Convention “are under a clear obligation to do all in their power to prevent the commission of any such acts in the future”<sup>1</sup>. In granting provisional measures in that case, it concluded that there was “a grave risk of acts of genocide being committed”<sup>2</sup>.

4. That, Mr. President is exactly the conclusion of the UN Independent International Fact-Finding Mission on Myanmar (“UN Mission”). In its Report of 16 September 2019, it found “a serious risk of genocidal actions recurring”, and that “Myanmar is failing in its obligation to prevent genocide”<sup>3</sup>. This appears at tab 2 of your folder.

The PRESIDENT: It is being told that we are having a technical problem, that the English language channel of interpretation is not working properly, so I will ask the technicians to deal with that issue as quickly as possible. Can you try and speak so that we know whether the English channel is working now.

Mr. AKHAVAN: Yes, Mr. President. Is this working now?

The PRESIDENT: No, I have not heard any complaint about the French channel. Thank you Mr. Akhavan, you may continue.

Mr. AKHAVAN: Thank you, Mr. President.

5. The UN Mission came to that conclusion following an exhaustive two-year investigation by three distinguished jurists. The Chair was Mr. Marzuki Darusman, Indonesia’s former Attorney General. Another member was Ms Radhika Coomaraswamy — the former Chair of the Sri Lanka Human Rights Commission, who was also the UN Special Rapporteur on Violence against Women

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<sup>1</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 22, para. 45.

<sup>2</sup> *Ibid.*

<sup>3</sup> UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 Sept. 2019), p. 195, para. 667; judges’ folder, tab 2, p. 21.

and UN Special Representative for Children and Armed Conflict. The other member, Mr. Christopher Sidoti, was Australia's former Human Rights Commissioner<sup>4</sup>.

6. The Mission's mandate was established by the UN Human Rights Council in March 2017. It was assisted by experts and advisers from the Office of the UN High Commissioner for Human Rights (OHCHR). Its investigation followed rigorous UN guidelines for best practices<sup>5</sup>. Over two years, more than 1,000 victims and witnesses were interviewed<sup>6</sup>, and "a vast amount of documents, photographs and videos"<sup>7</sup> were analysed. Myanmar "refused to co-operate with or give access to the Mission"<sup>8</sup> but that did not prevent a thorough and impartial investigation.

7. The UN Mission's conclusion on Myanmar's "continuing genocidal intent" and the "serious risk of genocidal actions recurring"<sup>9</sup> must be given significant weight. This is a finding of fact, by an independent inquiry, authorized by the United Nations. As the Court found in *Bosnia v. Serbia* in respect of the UN Report on Srebrenica: "The care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it"<sup>10</sup>.

8. Mr. President, a deeper appreciation of what led the UN Mission to this conclusion requires an examination of the wider context of the current situation, to which I now turn.

9. The Rohingya are a distinct ethnic and religious group in Myanmar's Rakhine State, where they have had historical presence for centuries. This region is depicted in the map at tab 3 of your folders. As set out in the Application, the genocidal acts against them have been a long time in the making. They incubated in toxic hate speech — on Facebook and Twitter — by which

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<sup>4</sup> UN Human Rights Council, "Biographies of the members of the Fact-Finding Mission on Myanmar", available at <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Members.aspx>.

<sup>5</sup> UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/CRP.2 (17 Sept. 2018), paras. 8-9.

<sup>6</sup> *Ibid.*, para. 754; UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 32.

<sup>7</sup> UN Human Rights Council, *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. 22; judges' folder, tab 1, p. 2.

<sup>8</sup> *Ibid.*, para. 1618; judges' folder, tab 1, p. 37.

<sup>9</sup> UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 667; judges' folder, tab 2, p. 21.

<sup>10</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Provisional Measures, Judgment*, I.C.J. Reports 2007 (I), p. 137, para. 230.

Myanmar demonized an entire group as “illegal Bengali immigrants”<sup>11</sup>, “terrorists”<sup>12</sup> and “jihadists”<sup>13</sup>; “maggots”<sup>14</sup> and “dogs”<sup>15</sup>; a “Muslim invasion” posing an existential threat to Burmese “racial purity”<sup>16</sup>. The UN Mission has pointed to the “systematic oppression and persecution of the Rohingya . . . from birth to death”; and their “extreme vulnerability [as] a consequence of State policies and practices implemented over decades”<sup>17</sup>.

10. Beginning in 2016, there was a dramatic escalation of this persecution, in successive waves of what Myanmar described as “clearance operations”<sup>18</sup>. This was ostensibly against the Arakan Rohingya Salvation Army (“ARSA”), but it targeted the Rohingya as such for collective destruction. The UN Mission observed that:

“There was not the least effort . . . 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 the ruthless campaign. The targeting of women and girls for rape, gang rape and other forms of sexual violence, as well as the targeting of and impact on children in general, has been shocking.”<sup>19</sup>

11. It was in this context that the Fact-Finding Mission first concluded in September 2018 that “the factors allowing the inference of genocidal intent are present”<sup>20</sup>. It did so based on the exacting requirements of Article II of the Convention; namely the intention “to destroy, [the protected group] in whole or in part . . . as such”<sup>21</sup>. It specifically noted that: “[d]estruction is understood to mean physical or biological destruction, rather than the disbandment or expulsion of

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<sup>11</sup> UN Human Rights Council, *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. 696; judges’ folder, tab 1, p. 8.

<sup>12</sup> *Ibid.*, para. 702; judges’ folder, tab 1, p. 9.

<sup>13</sup> *Ibid.*

<sup>14</sup> Steve Stecklow, “Why Facebook is losing the war on hate speech in Myanmar”, *Reuters* (15 Aug. 2018), available at <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/>.

<sup>15</sup> UN Human Rights Council, *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. 1312; judges’ folder, tab 1, p. 28.

<sup>16</sup> *Ibid.*, para. 1314; judges’ folder, tab 1, p. 29.

<sup>17</sup> *Ibid.*, para. 458; judges’ folder, tab 1, p. 4.

<sup>18</sup> *Ibid.*, para. 57; judges’ folder, tab 1, p. 3.

<sup>19</sup> *Ibid.*, para. 1433; judges’ folder, tab 1, p. 33.

<sup>20</sup> *Ibid.*, para. 1441; judges’ folder, tab 1, p. 34.

<sup>21</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 Dec. 1948, entered into force 12 Jan. 1951), 78 *UNTS* 277, Art. II.

the group”<sup>22</sup>. It found that: “[t]he actions of those who orchestrated the attacks on the Rohingya read as a veritable check-list” of what a State would have done had it “wished to destroy the target group in whole or in part”<sup>23</sup>.

12. The UN Mission was so convinced of its conclusion that it took an extraordinary step: it recommended that “named senior generals of the Myanmar military”, the so-called Tatmadaw, should be “investigated and prosecuted in an international criminal tribunal for genocide”<sup>24</sup>. Those named included Myanmar’s Commander-in-Chief, Senior-General Min Aung Hlaing<sup>25</sup>.

13. The UN Special Rapporteur on human rights in Myanmar, Yanghee Lee of Korea, similarly concluded that the commander-in-chief and other senior Tatmadaw generals “should be held accountable for genocide in Rakhine”<sup>26</sup>. The United Nations Special Adviser on the Prevention of Genocide, Mr. Adama Dieng of Senegal, also concluded that “Rohingya Muslims have been killed, tortured, raped, burnt alive and humiliated, solely because of who they are . . . the intent of the perpetrators was to cleanse northern Rakhine state of their existence, possibly even to destroy the Rohingya as such, which, if proven, would constitute the crime of genocide”<sup>27</sup>.

14. While time does not allow for a complete analysis of the United Nations Mission’s massive Report, it is instructive to focus on two specific genocidal acts under Article II of the Convention. The first is “killing members of the [Rohingya] group”, under paragraph (a). There are “detailed accounts” of “corroborated mass killings”<sup>28</sup>. In hundreds of villages, “men, women and children were killed” as “Tatmadaw soldiers . . . systematically moved from house to house, pulling people out of their homes and executing them, or shooting them inside their houses, or as

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<sup>22</sup> UN Human Rights Council, *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. 1412; judges’ folder, tab 1, p. 32.

<sup>23</sup> *Ibid.*, para. 1440; judges’ folder, tab 1, p. 34.

<sup>24</sup> *Ibid.*, p. 1 Summary; judges’ folder, tab 1, p. 1.

<sup>25</sup> *Ibid.*, para. 1555.

<sup>26</sup> “Prosecute Myanmar army chief for Rohingya ‘genocide’: UN Envoy” *Al Jazeera* (25 January 2019), available at <https://www.aljazeera.com/news/2019/01/prosecute-myanmar-army-chief-rohingya-genocide-envoy-190125112535665.html>; judges’ folder, tab 4.

<sup>27</sup> UN Press Release, *Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on his visit to Bangladesh to assess the situation of Rohingya refugees from Myanmar* (13 Mar. 2018), available at [https://www.un.org/en/genocideprevention/documents/2018-03-13%20Statement\\_visit%20Rohingya%20Bangladesh\\_FINAL.pdf](https://www.un.org/en/genocideprevention/documents/2018-03-13%20Statement_visit%20Rohingya%20Bangladesh_FINAL.pdf); judges’ folder, tab 5.

<sup>28</sup> UN Human Rights Council, *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. 892; judges’ folder, tab 1, p. 22.

they left their houses, often in front of family members”<sup>29</sup>. The Mission also “verified a pattern” of “people, including babies and children, being pushed or thrown into burning houses by [Tatmadaw] soldiers”<sup>30</sup>.

15. The Mission found that Rohingya children were specifically targeted. A woman described how, at Kyein Chaung village, to give but one example, soldiers beat her youngest child: “He was one and a half years old”, she testified, “he died as a result of the beating. My four year old son’s hand was being held by my daughter, who was also stabbed in the head. He started crying and then the military stabbed him and he died”<sup>31</sup>. Another survivor, from Kyet Yoe Pyin, recounted how: “A pregnant woman in labour . . . assisted by a midwife . . . [and] female relatives” were all killed by soldiers, including “the new-born baby”<sup>32</sup>.

16. Mr. President, the second category of Myanmar’s genocidal acts under Article II of the Convention is “causing serious bodily or mental harm to members of the group” under paragraph (b). I refer in particular to what the UN Mission described as “widespread sexual violence” intended “to contribute to the destruction of the Rohingya as a group and the breakdown of the Rohingya way of life”<sup>33</sup>. In the landmark 1998 *Akayesu* judgement, the International Criminal Tribunal for Rwanda (“ICTR”) made clear that when committed with the requisite intent, “rape and sexual violence . . . constitute genocide in the same way as any other act”<sup>34</sup>. It stressed that this was “one of the worst ways” of inflicting harm, because it “resulted in physical and psychological destruction of Tutsi women, their families and their communities”<sup>35</sup>; “destruction of the spirit, of the will to live, and of life itself”<sup>36</sup>.

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<sup>29</sup> UN Human Rights Council, *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. 893; judges’ folder, tab 1, p. 22.

<sup>30</sup> *Ibid.*, para. 908; judges’ folder, tab 1, p. 23.

<sup>31</sup> *Ibid.*, para. 894; judges’ folder, tab 1, p. 22.

<sup>32</sup> *Ibid.*, para. 895; judges’ folder, tab 1, p. 22.

<sup>33</sup> *Ibid.*, para. 941; judges’ folder, tab 1, p. 27.

<sup>34</sup> ICTR, *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, *Judgement* (2 September 1998), para. 731.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, para. 732.

17. The UN Mission found that in Myanmar there was a “notable pattern” of “mass gang rape, involving multiple perpetrators and multiple victims in the same incident”<sup>37</sup>. These crimes were committed “in open public spaces, in front of family and neighbours, within forested areas near the village; in large houses within the village; and during detention in military and police compounds”<sup>38</sup>.

18. A survivor, who had been gang raped with her sister, testified how a Tatmadaw soldier told them: “We are going to kill Rohingya. We will rape you. This is not your country.”<sup>39</sup>

19. In one case: “A large number of interviewees saw dead bodies of women and girls en route to Bangladesh who they thought had been raped, because the bodies were naked and large amounts of blood were visible between their legs”<sup>40</sup>.

20. A survivor who was eight months pregnant at the time, testified: “They stamped and kicked my stomach with their boots, and then stripped me naked . . . I was blindfolded and hung by my wrists from a tree. I was raped nine times . . . My mother found me in the evening. My unborn baby died.”<sup>41</sup>

21. Mr. President, in its 1951 Advisory Opinion, the Court recalled that genocide “shocks the conscience of [hu]mankind”<sup>42</sup>. It is devastating to recount these unspeakable crimes, but the voices of the survivors convey the immense gravity of the request that is now before you.

22. These are the circumstances leading the UN Mission to conclude that Myanmar’s genocidal intention is ongoing and unabated. In its September 2019 report, at tab 2 of your folder, it stated as follows:

“The Mission has identified seven indicators from which it inferred genocidal intent to destroy the Rohingya people as such, all based on the consideration of indicators of genocidal intent in international case law: first, the Tatmadaw’s extreme brutality during its attacks on the Rohingya; second, the organized nature of the Tatmadaw’s destruction; third, the enormity and nature of the sexual violence perpetrated against women and girls during the “clearance operations”; fourth, the

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<sup>37</sup> UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/CRP.2 (17 Sept. 2018), paras. 921, 1372; judges’ folder, tab 1, pp. 24, 30.

<sup>38</sup> *Ibid.*, para. 921; judges’ folder, tab 1, p. 24.

<sup>39</sup> *Ibid.*, para. 931; judges’ folder, tab 1, p. 26.

<sup>40</sup> *Ibid.*, para. 927; judges’ folder, tab 1, p. 25.

<sup>41</sup> *Ibid.*, para. 921; judges’ folder, tab 1, p. 24].

<sup>42</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

insulting, derogatory, racist and exclusionary utterances of Myanmar officials and others prior, during and after the “clearance operations”; fifth, the existence of discriminatory plans and policies, such as the Citizenship Law and the [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, the goal being to reduce the proportion of Rohingya; sixth, the Government’s tolerance for public rhetoric of hatred and contempt for the Rohingya; and seventh, the State’s failure to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law, both as they were occurring and after they occurred. These seven indicators also allow the Mission to infer that the State did not object and in fact endorsed the Tatmadaw’s “clearance operations” and the manner in which they were conducted.”<sup>43</sup>

23. As indicated at tab 2 of your folder, the UN Mission further concluded that:

“[e]very one of these indicators is linked to the acts or omissions of Myanmar State organs, including the military, other security forces, ministries, legislative bodies, the UEHRD and other civilian institutions. Collectively they demonstrate a pattern of conduct that infers genocidal intent on the part of the State to destroy the Rohingya, in whole or in part, as a group. For reasons explained in its 2018 report, there is no reasonable conclusion to draw, other than the inference of genocidal intent, from the State’s pattern of conduct.”<sup>44</sup>

24. The UEHRD, one of the State organs linked to the genocide, is the Union Enterprise for Humanitarian Assistance in Rakhine State. According to the United Nations Fact-Finding Mission, it has been responsible for “large-scale confiscation of [Rohingya] land”<sup>45</sup> and “the bulldozing of burned Rohingya villages, which is likely to have destroyed criminal evidence”<sup>46</sup>. Its Chairperson is Myanmar’s Agent in this case<sup>47</sup>.

25. Mr. President, the map on the screen, at tab 6 of your folder, is satellite imagery analysis by the United Nations Operational Satellite Application Programme (“UNOSAT”), published in October 2018. It shows that in northern Rakhine State, the Tatmadaw had destroyed, or partially destroyed, 392 villages comprising 37,700 homes and other structures<sup>48</sup>.

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<sup>43</sup> 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; judges’ folder, tab 2, p. 19.

<sup>44</sup> *Ibid.*, para. 225; judges’ folder, tab 2, p. 19.

<sup>45</sup> *Ibid.*, para. 121; judges’ folder, tab 2, p. 10.

<sup>46</sup> 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; judges’ folder, tab 1, p. 37.

<sup>47</sup> *Ibid.*, note 2784; UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 117; The Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine, “Who we are”, available at <https://www.uehrd.org/who-we-are-1>.

<sup>48</sup> UN Institute for Training and Research, “Myanmar Buthidaung, Maungdaw, and Rathedaung Townships / Rakhine State: Imagery Analysis: Multiples Dates” (18 Oct. 2018), available at [http://unosat-maps.web.cern.ch/unosat-maps/MM/CE20130326MMR/UNOSAT\\_A3\\_Rakhine\\_damage\\_villages\\_20180318\\_Portrait\\_Optimized.pdf](http://unosat-maps.web.cern.ch/unosat-maps/MM/CE20130326MMR/UNOSAT_A3_Rakhine_damage_villages_20180318_Portrait_Optimized.pdf).

26. But, Mr. President, *not all Rohingya villages* have been destroyed; at least not yet. Some 600,000 Rohingya remain in Myanmar; they are in urgent need of protection. As the Fact-Finding Mission concluded just a few weeks ago, they “remain under serious risk of genocide”<sup>49</sup>.

27. Mr. President, distinguished Members of the Court; this concludes my presentation. Mr. Loewenstein will now describe further evidence of Myanmar’s genocidal intention. I thank you for your kind attention, and ask that you call him to the podium.

The PRESIDENT: I thank Professor Akhavan for his statement. I now invite Mr. Lowenstein to take the floor. You have the floor.

Mr. LOEWENSTEIN:

### III. MYANMAR’S GENOCIDAL INTENT

1. Mr. President, Members of the Court, it is a special honour to appear before you in this most serious of cases. I will address further evidence of Myanmar’s genocidal actions and ongoing genocidal intent. As the UN Fact-Finding Mission emphasized in its most recent report, every risk factor used by the UN Office on Genocide Prevention to forecast genocide is present in Myanmar today<sup>50</sup>.

2. Myanmar’s genocidal intent is rooted in its long-standing policy — that the Rohingya, by dint of their ethnic and religious differences — constitute an existential threat to Myanmar’s racial and religious purity, and to the country’s well-being. As the UN Mission documented, Myanmar is saturated with anti-Rohingya writings that evoke the supposed threat to Myanmar’s demographic balance, bearing titles like *Fear of Extinction of the Race*<sup>51</sup>. They warn that unless pre-emptive action is taken “the whole country will be swallowed by the Muslim Kalars”, a racial slur used to describe those with dark skin and foreign ancestry<sup>52</sup>.

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<sup>49</sup> 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; judges’ folder, tab 2, p. 18.

<sup>50</sup> UN Human Rights Council (HRC), *Report of the Independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/42/50 (8 Aug. 2019), para. 241.

<sup>51</sup> 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. 697 & n. 1510; judges’ folder, tab 1, p. 8.

<sup>52</sup> *Ibid.*

3. Mr. President, dehumanizing language is prevalent. The Rohingya are described as a “Black tsunami”<sup>53</sup>. They are likened to “poisonous plants”<sup>54</sup>. They are compared to “African catfish” — an invasive species — that must not be “allowed into the country to breed”<sup>55</sup>. Myanmar’s law codifies this ideology. Anyone who does not belong to a “national race” — and that is the term used in these laws — is denied even basic rights<sup>56</sup>. To this day, Myanmar’s Ministry of Labour, Immigration and Population maintains this as its guiding motto: “The earth will not swallow a race to extinction but another race will.”<sup>57</sup>

4. The UN Special Rapporteur, in May of this year, reported that hate speech is “pervasive” and underscored that “senior government officials” traffic in it<sup>58</sup>. Both Facebook and Twitter have been compelled to suspend the account of the commander-in-chief of Myanmar’s armed forces. Why? For engaging in hate speech<sup>59</sup>. An academic study published earlier this year examined Myanmar’s State media; it concluded that the State-owned press “mirrors the extreme speech of nationalists” and signals the State’s approval<sup>60</sup>.

5. Mr. President, it is not only the Myanmar State that engages in hate speech; the Government’s actions have fostered an environment that is rife with extreme racist rhetoric. In August, the UN Special Rapporteur warned — again — that hate speech “remains prolific”<sup>61</sup>. As the Fact-Finding Mission concluded, the fact that Myanmar harbours genocidal intent is evidenced by its “tolerance for public rhetoric of hatred and contempt for the Rohingya”<sup>62</sup>.

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<sup>53</sup> 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. 702; judges’ folder, tab 1, p. 9.

<sup>54</sup> *Ibid.*, para. 697; judges’ folder, tab 1, p. 8.

<sup>55</sup> Dr. Kjell Anderson, “The Enemy Next Door: Hate Speech in Burma”, *The Sentinel Project* (17 Oct. 2014), available at <https://thesentinelproject.org/2014/10/17/the-enemy-next-door-hate-speech-in-burma/>.

<sup>56</sup> 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), paras. 477-479; judges’ folder, tab 1, pp. 4-A, 4-B.

<sup>57</sup> *Ibid.*, paras. 698-699.

<sup>58</sup> UN HRC, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/HRC/40/68 (5 March 2019), para. 52; judges’ folder, tab 7.

<sup>59</sup> “Twitter Suspends Account of Top Myanmar General Over Hate Speech”, *Radio Free Asia*, (16 May 2019), available at <https://www.rfa.org/english/news/myanmar/twitter-military-05162019162336.html>.

<sup>60</sup> Ronan Lee, “Extreme Speech in Myanmar: The Role of State Media in the Rohingya Forced Migration Crisis”, *International Journal of Communication* 13 (2019), p. 3214.

<sup>61</sup> UNGA, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/74/342 (30 Aug. 2019), para. 19; judges’ folder, tab 8.

<sup>62</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 238; judges’ folder, tab 2, p. 20.

6. Investigative reporting by Reuters last year identified more than 1,000 examples of extreme hate speech posted on Facebook alone. Many refer to the Rohingya as “kalars”. Others call them “dogs, maggots and rapists, suggest they be fed to pigs, and urge they be shot or exterminated”<sup>63</sup>. Here are some examples:

— “Kill all the kalars that you see in Myanmar; none of them should be left alive.”<sup>64</sup>

— “If it’s a kalar, get rid of the whole race.”<sup>65</sup>

— “kalar dogs, the Bengalis, are killing and destroying our land, our water and our ethnic people”;  
“We need to destroy their race.”<sup>66</sup>

— “We must fight them the way Hitler did the Jews . . .”<sup>67</sup>

— “Pour fuel and set fire so that they can meet Allah faster.”<sup>68</sup>

7. Mr. President, the Fact-Finding Mission also concluded that Myanmar’s genocidal intent is evident in its lack of remorse — or even acknowledgment — of any wrongdoing<sup>69</sup>. Instead, the Tatmadaw’s actions are glorified; the review of State media showed that Myanmar presents the situation as “the Tatmadaw gallantly defending the nation’s sovereignty from Muslim terrorists”<sup>70</sup>. Myanmar denies responsibility for its crimes against the Rohingya even when confronted with evidence of genocidal acts at specific locations. I will give three examples, one from each of the townships in Rakhine State with significant populations of Rohingya. In each instance, Myanmar has refused to acknowledge any wrongdoing.

8. I will begin at Min Gyi, in Maungdaw Township. You can see its location on the map on your screens<sup>71</sup>. This is a village where every witness interviewed by the Fact-Finding Mission

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<sup>63</sup> “Why Facebook is losing the war on hate speech in Myanmar”, Reuters (15 Aug. 2018), available at <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/>.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> 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. 1424; judges’ folder, tab 1, pp. 32-A, 32 – B.

<sup>70</sup> Ronan Lee, “Extreme Speech in Myanmar: The Role of State Media in the Rohingya Forced Migration Crisis”, *International Journal of Communication* 13 (2019).

<sup>71</sup> Map of Maungdaw Township with location of Min Gyi village; judges’ folder, tab 9.

“identified Tatmadaw soldiers as the main perpetrators”<sup>72</sup> and where a survivor reported the Tatmadaw saying: “We have the order to kill everyone”<sup>73</sup>, which is precisely what they tried to do. The Fact-Finding Mission estimates that at least 750 people were killed at Min Gyi alone<sup>74</sup>. Many were shot, including those who tried to escape by swimming across a river<sup>75</sup>. One survivor described how the military killed those who were hiding: “Whoever moved was shot. If they looked up or moved their heads, they were shot.”<sup>76</sup>

9. The Tatmadaw rounded up hundreds of Rohingya who could not escape<sup>77</sup>. They “separated women and children from the men” and “systematically killed the men”<sup>78</sup>. A witness recounted: “The first round of shooting was like a rain of bullets. The second round was slow as the soldiers killed the men individually. They aimed a gun at each man and shot.”<sup>79</sup> The soldiers “killed those who had survived gunshot wounds with long knives”<sup>80</sup>.

10. The Tatmadaw next “turned to the women and children”<sup>81</sup>. Some children were shot; other children were “thrown onto a fire”<sup>82</sup>. A witness described how “the soldiers took infants from their mothers’ laps and threw them into the river”<sup>83</sup>. Another recounted the slashing of “breastfeeding-age children”<sup>84</sup>. Another described “seeing soldiers stabbing a 10-year-old boy”

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<sup>72</sup> 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. 776; judges’ folder, tab 1, p. 14.

<sup>73</sup> International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar’s annihilation of the Rohingya*, available at <http://statecrime.org/state-crime-research/genocide-achieved-genocide-continues-myanmars-annihilation-of-the-rohingya-isci-report/>, pp. 54-55; judges’ folder, tab 10.

<sup>74</sup> 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. 774.

<sup>75</sup> *Ibid.*, para. 764.

<sup>76</sup> Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar* (July 2018), available at [https://www.fortifyrights.org/downloads/Fortify\\_Rights\\_Long\\_Swords\\_July\\_2018.pdf](https://www.fortifyrights.org/downloads/Fortify_Rights_Long_Swords_July_2018.pdf), p. 63; judges’ folder, tab 11.

<sup>77</sup> 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. 766.

<sup>78</sup> *Ibid.*; judges’ folder, tab 1, p. 11.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, para. 767.

<sup>81</sup> *Ibid.*, para. 770; judges’ folder, tab 1, pp. 11-12.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine state, Myanmar* (July 2018), available at [https://www.fortifyrights.org/downloads/Fortify\\_Rights\\_Long\\_Swords\\_July\\_2018.pdf](https://www.fortifyrights.org/downloads/Fortify_Rights_Long_Swords_July_2018.pdf), pp. 66-67; judges’ folder, tab 11.

while he was “trying to run away”<sup>85</sup>. One survivor told the Mission that seven of her children were killed<sup>86</sup>.

11. Rape was also widespread. At Min Gyi, the Tatmadaw “took women and girls in groups of between five and seven” into houses where they were “beaten, brutally raped and frequently stabbed”<sup>87</sup>. The young children and infants with them were “killed or severely injured, often by stabbing”<sup>88</sup>. The “houses were then locked and set on fire”<sup>89</sup>.

12. One survivor who escaped from such a burning house recounted:

“I entered the house with four of my neighbours, and three of us had babies. I knew the house. There were dead bodies on the floor, young boys and older men from our village. After we entered the house, the soldiers locked the door. One soldier raped me. They stabbed me in the back of my neck and in my abdomen.”<sup>90</sup>

13. She continues:

“I was trying to save my baby who was only 28 days old but they threw him on the ground and he died. The other women who were there were also raped.”<sup>91</sup>

14. Satellite imagery analysed by UNOSAT reveals that Min Gyi and its associated hamlets — numbering some 440 structures — were “completely burned and destroyed”<sup>92</sup>. By contrast, a village to the south inhabited by ethnic Rakhine, a predominantly Buddhist ethnic group, “remains intact”<sup>93</sup>.

15. What does Myanmar say about Min Gyi? The answer was given by the spokesperson for Myanmar’s Agent in this case. He blamed the Rohingya. He said it was the ethnic Rakhine and security forces who had been attacked by what he referred to as “hundreds of terrorists”<sup>94</sup>.

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<sup>85</sup> 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. 770; judges’ folder, tab 1, pp. 11-12.

<sup>86</sup> *Ibid.*, para. 767.

<sup>87</sup> *Ibid.*, para. 772; judges’ folder, tab 1, p. 12.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, para. 773; judges’ folder, tab 1, pp. 12-13.

<sup>93</sup> *Ibid.*

<sup>94</sup> Rebecca Wright, “Accounts of rape, burning children and murder: How a Rohingya massacre unfolded at Tula Toli”, *CNN* (4 Dec. 2017), available at <https://www.cnn.com/2017/11/12/asia/myanmar-rohingya-tula-toli-massacre-testimony/index.html>.

16. Myanmar likewise denies wrongdoing at any of its other thoroughly documented “clearance operations”, including the one at Maung Nu, in Buthidaung Township, the location of which you can see on your screens<sup>95</sup>. The operation was carried out by a “large group of Tatmadaw soldiers” who entered the village in military trucks<sup>96</sup>. A witness recounted that “many people were taken” to “the edge of the hillside and shot”<sup>97</sup>.

17. The soldiers approached a compound where a large number of Rohingya had sought shelter and “ordered” the “people to come out of the houses” or else the buildings “would be set on fire”<sup>98</sup>.

18. The “soldiers separated women and children from men”<sup>99</sup>. At gunpoint, the soldiers ordered the women to remove their headscarves, which they used to blindfold the men and boys and tie their hands behind their backs<sup>100</sup>. The soldiers then “opened fire on the men and boys” and “slit their throats with knives”<sup>101</sup>. A witness describes how “[s]ome of them were shot first and then their throats were slit with a knife. Others just had their throats slit”<sup>102</sup>.

19. The Tatmadaw killed children in the courtyard. One witness recounted: “The soldiers killed the male members of my family. They shot at them first and then slit their throats. The courtyard was full of blood. They killed my husband, my father-in-law and my two nephews of 15 and eight years old. They even killed the child in the same way.”<sup>103</sup>

20. The Fact-Finding Mission estimates that up to 100 people, mostly men and boys, were executed. Twenty-eight of the victims were under 18 years old<sup>104</sup>.

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<sup>95</sup> Map of Buthidaung Township with location of Maung Nu village; judges’ folder, tab 12.

<sup>96</sup> 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. 805; judges’ folder, tab 1, p. 18.

<sup>97</sup> Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine state, Myanmar* (July 2018), available at [https://www.fortifyrights.org/downloads/Fortify\\_Rights\\_Long\\_Swords\\_July\\_2018.pdf](https://www.fortifyrights.org/downloads/Fortify_Rights_Long_Swords_July_2018.pdf), p. 64; judges’ folder, tab 11.

<sup>98</sup> 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. 806; judges’ folder, tab 1, p. 18.

<sup>99</sup> *Ibid.*, para. 807.

<sup>100</sup> *Ibid.*, para. 808.

<sup>101</sup> *Ibid.*; judges’ folder, tab 1, p. 18.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*, para. 809; judges’ folder, tab 1, pp. 18-19.

<sup>104</sup> *Ibid.*, para. 815.

21. Women and girls were “gang raped, killed and mutilated”<sup>105</sup>. A victim described how “[t]hree members of the military took me. One man held me down and pushed me to the ground. They tore off my clothes. Two men raped me.”<sup>106</sup> One witness saw a woman “killed by being knifed in her vagina”<sup>107</sup>.

22. UNOSAT satellite imagery shows that Maung Nu and a neighbouring Rohingya village were systematically “burned over a period of several days”. More than 320 structures were destroyed<sup>108</sup>.

23. The spokesperson for Myanmar’s Agent in these proceedings dismissed the evidence against the Tatmadaw officer in command of the battalion that carried out this clearance operation as nothing more than what he called “unreliable accusations”<sup>109</sup>.

24. Myanmar has also refused to acknowledge responsibility for the “clearance operation” at Chut Pyin, in Rathedaung Township, which is now shown on your screens<sup>110</sup>. The Fact-Finding Mission determined that “hundreds of Tatmadaw soldiers” participated<sup>111</sup>. After surrounding the village, they “opened fire, shooting at villagers, including those who were fleeing”<sup>112</sup>. The perpetrators “dragged people from houses” and shot them at “point blank range”<sup>113</sup>. Others were “killed by having their throats slit with large knives”<sup>114</sup>. One survivor recounted: “If people were not killed by the gunshots, they were slaughtered to make sure they were really dead.”<sup>115</sup>

25. An elderly woman described being pulled from her house with her 70-year old brother:

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<sup>105</sup> 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. 810; judges’ folder, tab 1, p. 19.

<sup>106</sup> *Ibid.*, para. 811.

<sup>107</sup> *Ibid.*, para. 810.

<sup>108</sup> *Ibid.*, para. 816; judges’ folder, tab 1, p. 20.

<sup>109</sup> “Myanmar says U.S. sanctions against general based on ‘unreliable accusations’”, *Reuters* (27 Dec. 2017), available at <https://www.reuters.com/article/us-myanmar-rohingya-general/myanmar-says-u-s-sanctions-against-general-based-on-unreliable-accusations-idUSKBN1EL11X>.

<sup>110</sup> Map of Rathedaung Township with location of Chut Pyin village; judges’ folder, tab 13.

<sup>111</sup> 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. 782; see also *ibid.*, para. 797; judges’ folder, tab 1, p. 15.

<sup>112</sup> *Ibid.*, para. 783.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

“Soldiers used rifle butts to beat my brother on the head and I saw his brains come out. I saw people being killed with long knives. The soldiers were also spraying bullets and many people were injured and killed. Our village was full of dead bodies. I saw dozens of people killed. First, they shot the people and then if they were still alive and the body was moving they used a machete to slaughter across the throat.”<sup>116</sup>

26. The Tatmadaw “set houses on fire, including those still occupied”<sup>117</sup>. Other victims were “forced inside houses” before they were “intentionally set alight”<sup>118</sup>. In one house, between six and seven men were forced inside; those unable to escape were “burned alive”<sup>119</sup>.

27. The Fact-Finding Mission concluded that the Tatmadaw “specifically targeted” “children, including infants and babies”<sup>120</sup>. “[S]ome were wrenched from their mothers’ arms and thrown to the ground, others were thrown into fires and burned alive.”<sup>121</sup>

28. Women and girls were subjected to “rape, gang rape, sexual mutilation and sexual humiliation”<sup>122</sup>. The Tatmadaw took some to a makeshift military base “where mass gang rape” occurred<sup>123</sup>. These victims were “subjected to serious physical injuries either before being raped or after being killed, including the mutilation of their breasts”<sup>124</sup>.

29. UNOSAT’s analysis of satellite imagery confirms that the “entire” village was “destroyed”. By contrast, the “nearby non-Rohingya village . . . remains intact”<sup>125</sup>.

30. The Fact-Finding Mission estimates that the Tatmadaw killed 358 people at Chut Pyin. The victims included 127 children — all under the age of six<sup>126</sup>.

31. What does Myanmar say about Chut Pyin? Just a routine security operation: the Tatmadaw were searching for militants; no more than 10 people died; there were no rapes; the Rohingya burned their own homes<sup>127</sup>.

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<sup>116</sup> 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. 785; judges’ folder, tab 1, pp. 15-16.

<sup>117</sup> *Ibid.*, para. 784; judges’ folder, tab 1, p. 15.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, para. 789; judges’ folder, tab 1, p. 17.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*, para. 790.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*, para. 788; judges’ folder, tab 1, p. 16.

<sup>126</sup> *Ibid.*, para. 796.

32. Mr. President, the Fact-Finding Mission concluded, based on these and other atrocities, that Myanmar's genocidal intent is evidenced by, *inter alia*, "the Tatmadaw's extreme brutality during its attacks on the Rohingya . . . the organized nature of the Tatmadaw's destruction . . . [and] the enormity and nature of the sexual violence perpetrated against women and girls during the 'clearance operations'"<sup>128</sup>.

33. The Fact-Finding Mission concluded that further evidence of Myanmar's genocidal intent consists of its "lack of any accountability" or even "public condemnation" of crimes like those we just reviewed<sup>129</sup>.

34. This conclusion, Mr. President, is consistent with the UN Special Rapporteur's report, last month, that Myanmar's Government allows the military to operate with impunity, even though it is responsible for, in the Special Rapporteur's words, the "extreme violence" that was "inflicted" during "clearance operations" which were "executed on an unprecedented scale and with an unprecedented brutality"<sup>130</sup>, all indicators of genocidal intent.

35. Mr. President, Members of the Court, this concludes my presentation. I thank you for your kind attention and ask that you invite to the podium Ms Pasipanodya.

The PRESIDENT: I thank Mr. Loewenstein. I invite Ms Pasipanodya to take the floor. You have the floor, Madam.

Ms PASIPANODYA:

#### **IV. THE ROHINGYA'S VULNERABILITY TO CONTINUING ACTS OF GENOCIDE**

1. Mr. President, Members of the Court, good morning. It is an honour for me to appear before you on behalf of the Republic of The Gambia. You have already heard from my colleagues about the genocidal acts that have been committed against the Rohingya by Myanmar up to, and

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<sup>127</sup> Jon Emont & Niharika Mandhana, "'We'll Turn Your Village Into Soil': Survivors Recount One of Myanmar's Biggest Massacres", *Wall Street Journal* (11 May 2018), available at <https://www.wsj.com/articles/burn-the-houses-rohingya-survivors-recount-the-day-soldiers-killed-hundreds-1526048545>.

<sup>128</sup> 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; judges' folder, tab 2, p. 19.

<sup>129</sup> *Ibid.*, para. 238; judges' folder, tab 2, p. 20.

<sup>130</sup> 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>; judges' folder, tab 14.

through, the presentation of the United Nations Fact-Finding Mission's report of 16 September 2019. It is my role to address the situation of the approximately 600,000 Rohingya who remain in Myanmar today.

2. Their situation is one of extreme vulnerability, with ongoing acts of genocide against them, and the grave risk that even more heinous atrocities — a new “clearance operation” or worse — will be inflicted upon them at any time. As the independent fact finders have made clear, the evidence of Myanmar's genocidal intentions has actually “strengthened” over the past year<sup>131</sup>.

3. In the words of the distinguished Nobel laureate Toni Morrison, who passed away just a few months ago, “let us be reminded that before there is a final solution, there must be a first solution, a second one, even a third. The move toward a final solution is not a jump. It takes one step, then another, then another.”<sup>132</sup>

4. I will therefore draw your attention to the *steps* Myanmar is taking currently, that reflect its continuing intention to destroy the Rohingya as a group. Each of these *steps* has been reported by the highly credible, independent, and eminent investigators acting under the authority of the United Nations, intergovernmental organizations, and human rights organizations. Each of these *steps* heightens the Rohingya's vulnerability, points toward further acts of genocide, and foretells the risk of more violations of the Genocide Convention.

5. The first step is the forceful segregation and confinement of over 20 per cent of the Rohingya in internment camps and ghettos, where they are in situations of extreme precariousness.

6. As the UN Fact-Finding Mission reported, Myanmar forcibly transferred over 120,000 Rohingya men, women and children into displacement camps outside Sittwe town in central Rakhine State in June 2012<sup>133</sup>. For over seven years now, Myanmar has cordoned them off from the outside world with barbed wire, police checkpoints, and military posts; restricted their movements; subjected them to physical and mental abuse; and maintained them in a state of fear

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<sup>131</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 9; judges' folder, tab 2, p. 3.

<sup>132</sup> Toni Morrison, *The Source of Self-Regard: Selected Essays, Speeches, and Meditations* (2019), p. 14.

<sup>133</sup> 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), paras. 512, 525. UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 57.

for their survival<sup>134</sup>. They remain in that state, easy targets for the next wave of mass killings, especially as they are guarded by the same Tatmadaw that carried out the “clearance operations”.

7. Myanmar claims its confinement of the Rohingya in their displacement camps is for their own good. It claims this is necessary to ensure the “protection of the communities” from inter-communal violence between the ethnic Rakhine and the Rohingya<sup>135</sup>. But as the UN Fact-Finding Mission report points out, Myanmar has not shown how any actual risks justify this extreme and indefinite restriction of movement<sup>136</sup>.

8. At times, Myanmar has simply denied that there are any restrictions on the interned Rohingya population<sup>137</sup>. Yet, as the UN Fact-Finding Mission observed,

“the existence of the restrictions on the freedom of movement of the displaced population is *undeniable*. It is attested by the checkpoints and sign boards at the entry of the camps, the barbed wires, the experience of those trying [to] leave the camps, and the simple fact that [over 120,000] people have not been able to go back to their place of origin, despite their desire to do so.”<sup>138</sup>

9. Myanmar has confined a separate group of Rohingya in the Aung Mingalar quarter of Sittwe town<sup>139</sup>. The UN Fact-Finding Mission explained that this quarter is

“*effectively a closed ghetto, where Muslims are trapped and have lived separately from the rest of the population since 2012*. It is guarded by armed police, checkpoints and barbed wire . . . the Tatmadaw maintains a small presence in the school grounds . . . People can only leave the quarter with special permission and in organized convoys with police escorts.”<sup>140</sup>

10. The remaining 80 per cent of the Rohingya reside in villages under close watch by the Tatmadaw. The UN Fact-Finding Mission’s September 2018 report explained that these Rohingya are required to obtain travel permits to leave their villages, and are generally not permitted to travel to ethnic Rakhine areas, including the main towns and markets<sup>141</sup>. The September 2019 report

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<sup>134</sup> 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. 517.

<sup>135</sup> *Ibid.*, para. 513; judges’ folder, tab 1, p. 5. See also *ibid.*, para. 538.

<sup>136</sup> *Ibid.*, para. 513.

<sup>137</sup> *Ibid.*, para. 519.

<sup>138</sup> *Ibid.*; judges’ folder, tab 1, p. 7; emphasis added.

<sup>139</sup> *Ibid.*, para. 520.

<sup>140</sup> *Ibid.*; judges’ folder, tab 1, p. 7; emphasis added.

<sup>141</sup> *Ibid.*

indicated that the restrictions have increased in severity over the past year<sup>142</sup>. It noted that the Government “currently restricts the freedom of movement of Rohingya through a combination of local orders, verbal instructions, security checkpoints, soldiers and patrols, which have the cumulative effect of confining them to their villages and camps”<sup>143</sup>. The UN Fact-Finding Mission has concluded that this State-mandated segregation fosters a “conducive environment for dehumanization and hate campaigns”<sup>144</sup>.

11. Yet, Myanmar is building more internment camps for those Rohingya who have not yet been interned. Refugees arriving in Bangladesh informed the Office of the High Commissioner for Human Rights that the Tatmadaw is “forc[ing] men and children as young as 12 years of age to perform unpaid work on 12-hour shifts to build houses in camp-like facilities in different locations in northern Rakhine” State<sup>145</sup>.

12. According to the United Nations High Commissioner for Human Rights (HCHR), one interviewee stated “the inhabitants of his village, which was largely untouched by the violence in 2017, were informed by the village administrator that they would be removed from their homes to a newly constructed camp”<sup>146</sup>. Other interviewees described the camps as “closed areas, with only one entry gate, surrounded by barbed wire and watchtowers”<sup>147</sup>. Yet another interviewee “expressed fears that the camps had been built with the objective of forcing the Rohingya to live in miserable conditions” with “the eventual intention of exterminating them”<sup>148</sup>.

13. Mr. President, the extermination of the Rohingya, who have been rounded up into internment camps and closely-guarded ghettos and villages, can come swiftly, at any time, in the

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<sup>142</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 141.

<sup>143</sup> *Ibid.*, para. 144; judges’ folder, tab 2, p. 14.

<sup>144</sup> 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. 516; judges’ folder, tab 1, pp. 5-6.

<sup>145</sup> UN HCHR, *Situation of human rights of Rohingya in Rakhine State, Myanmar*, UN doc. A/HRC/40/37 (11 Mar. 2019), para. 53; judges’ folder, tab 15, p. 2.

<sup>146</sup> *Ibid.*; judges’ folder, tab 15, p. 2. See also UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 126.

<sup>147</sup> UN HCHR, *Situation of human rights of Rohingya in Rakhine State, Myanmar*, UN doc. A/HRC/40/37 (11 Mar. 2019), para. 53; judges’ folder, tab 15, p. 2.

<sup>148</sup> *Ibid.*

form of a new “clearance operation” perpetrated by security forces who are stationed there or it can occur in slow motion, through denying them food and other essentials of life.

14. The UN Fact-Finding Mission, in its most recent report, found that while the former method of destruction could be resumed at any time, the latter method is already in progress: “the Government has severely restricted access to food for Rohingya in Rakhine State” and the resulting “food insecurity is being caused by government laws and policies”<sup>149</sup>.

15. Article II (c) of the Genocide Convention identifies deliberately inflicting “conditions of life calculated to bring about [a group’s] physical destruction in whole or in part” as a genocidal act<sup>150</sup>. Myanmar is implementing its policy of denying food to the Rohingya by various means, including its widespread confiscation of agricultural lands on which the Rohingya grew crops essential to their survival. The UN Fact-Finding Mission determined that Myanmar is undertaking “a concerted effort” to “confiscate” these lands<sup>151</sup>. The ongoing land confiscations extend beyond the Rohingya villages that Myanmar destroyed during the “clearance operations”. “Rohingya-owned and cultivated land” has now been “confiscated in areas of northern Rakhine State where Rohingya remained”<sup>152</sup>. Members of the Rohingya group are “no longer allowed to consume products from their own lands following the confiscation”<sup>153</sup>.

16. The UN Fact-Finding Mission explained that the Tatmadaw is also depriving the Rohingya of food by deliberately killing or confiscating their livestock without permission or payment<sup>154</sup>. One interviewee who fled Buthidaung Township explained how this was conducted in his case:

“Military, police and members of ethnic Rakhine constantly came to the village and looted everything including food items. The military took away my seven cows that I was grassing in the hillside. I cultivated rice in my land, when it was ready for

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<sup>149</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 156; judges’ folder, tab 2, p. 15.

<sup>150</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 Dec. 1948, entered into force 12 Jan. 1951), United Nations, *Treaty Series (UNTS)*, Vol. 78, p. 277, Art. II (c).

<sup>151</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 139; judges’ folder, tab 2, p. 13.

<sup>152</sup> *Ibid.*, para. 123; judges’ folder, tab 2, p. 11.

<sup>153</sup> *Ibid.*, para. 126; judges’ folder, tab 2, p. 12.

<sup>154</sup> *Ibid.*, paras. 163-165.

harvesting; members of ethnic Rakhine snatched the harvest. I was left with nothing except two goats, which I had to offer to the military for my release”<sup>155</sup>.

17. As the UN Special Rapporteur reported, based on the evidence it found, “there appears to be a policy of forced starvation in place, designed to make life in northern Rakhine unsustainable for [the] Rohingya who remain [there]”<sup>156</sup>. The Committee on the Elimination of Discrimination against Women (CEDAW) made the very same determination earlier this year<sup>157</sup>.

18. Mr. President, a further step Myanmar is taking against the Rohingya as a group is the intensified effort to force them to accept “national verification cards” that explicitly recognize cardholders as non-citizens and brand them as “Bengali[s]”<sup>158</sup>. While the Rohingya are loathe to accept the national verification cards, which erode “their right to an identity”<sup>159</sup>, without them they are denied “access to essential life-saving and life-supporting [foods and] goods and services”<sup>160</sup>.

19. The UN Fact-Finding Mission has found that all of these steps — “the manner in which the Government deprives Rohingya of land”<sup>161</sup>; “the manner in which the Government imposes . . . movement restrictions [and] deprivation of food”<sup>162</sup>; and “the manner in which the Government . . . denies the Rohingya their identity and deprives them of the rights people need to survive and live with dignity”<sup>163</sup> — are ongoing and support a conclusion that “*the Government continues to harbour genocidal intent and that the Rohingya remain under serious risk of genocide*”<sup>164</sup>.

20. As the UN Fact-Finding Mission concluded just two months ago:

“[T]he Rohingya remain the target of a Government attack aimed at erasing the[ir] identity and removing them from Myanmar, and . . . this has caused them great suffering . . . The laws, policies and practices that formed the basis of the

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<sup>155</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 164; judges’ folder, tab 2, p. 16.

<sup>156</sup> UN OHCHR, *Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council* (12 March 2018), available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22806&LangID=E>; judges’ folder, tab 16, p. 2.

<sup>157</sup> CEDAW, *Concluding observations on the exceptional report of Myanmar*, UN doc. CEDAW/C/MMR/EP/CO/1 (8 Mar. 2019), para. 45.

<sup>158</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 66; judges’ folder, tab 2, p. 6.

<sup>159</sup> *Ibid.*, para. 84; judges’ folder, tab 2, p. 8.

<sup>160</sup> *Ibid.*, para. 68; judges’ folder, tab 2, p. 7.

<sup>161</sup> *Ibid.*, para. 140; judges’ folder, tab 2, p. 13.

<sup>162</sup> *Ibid.*, para. 175; judges’ folder, tab 2, p. 17.

<sup>163</sup> *Ibid.*, para. 106; judges’ folder, tab 2, p. 9.

<sup>164</sup> *Ibid.*; emphasis added.

Government's persecution against the Rohingya have been maintained . . . [T]heir plight can only be considered as having deteriorated."<sup>165</sup>

21. Similarly, the UN Special Rapporteur on the situation of human rights in Myanmar stated just two weeks ago: "The system of oppression [the Rohingya] are subjected to remains unchanged, and they are at real risk of recurring genocide."<sup>166</sup>

22. Mr. President, if the Rohingya are to be protected against further acts of genocide, it will be up to the Court to order their provisional measures that are necessary for their protection. There is no other alternative. Certainly, Myanmar cannot be counted on to protect them from itself. In the past few years, it has appointed numerous commissions to investigate the genocidal acts that have been reported by the UN Fact-Finding Mission and other international observers. None of Myanmar's commissions have found any violations of internationally protected rights. As the UN High Commissioner for Human Rights (HCHR) concluded earlier this year:

"The establishment of commissions of inquiry has become routine after cyclical episodes of violence in Myanmar, with eight such commissions having been established since 2012 . . . None of the previous commissions has led to the prosecution of any Tatmadaw official; all have indeed exonerated the army"<sup>167</sup>.

23. Likewise, the UN Fact-Finding Mission concluded in September of this year:

"Myanmar is not meeting its obligations under the Genocide Convention to conduct an independent criminal investigation into allegations of genocide. The Mission draws this conclusion based on the Government's pattern of ignoring compelling evidence that genocide took place on its territory and its failure to put in place investigative mechanisms that are independent, prompt, thorough, effective, credible and transparent."<sup>168</sup>

24. Typical of Myanmar's own investigative mechanisms is its Advisory Board for the Committee for Recommendations on Rakhine State. It is one of a very few that included international members. Among them was Ambassador Bill Richardson, a former United States Permanent Representative to the United Nations. He resigned after the first round of meetings,

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<sup>165</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 2; judges' folder, tab 2, p. 2. See also *ibid.*, para. 667.

<sup>166</sup> 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>; judges' folder, tab 14, p. 3.

<sup>167</sup> UN OHCHR, *Situation of human rights of Rohingya in Rakhine State, Myanmar*, UN doc. A/HRC/40/37 (11 Mar. 2019), para. 57; judges' folder, tab 15, p. 3.

<sup>168</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 226; judges' folder, tab 2, pp. 19-20.

denouncing the Board's so-called "investigation" as a "whitewash"<sup>169</sup>. Kobsak Chutikul, a Thai diplomat who served as the Board's Secretary, quit soon thereafter, expressing his concern that the Board's existence was "going to divert attention from the issues, give a false impression that things are being done"<sup>170</sup>. Instead, he said, Myanmar government officials did no more than "defend[] the line . . . that '[t]his is an internal matter, we are handling it, we haven't done anything wrong, this is a false narrative'"<sup>171</sup>.

25. Mr. President, it is Myanmar's narrative that is false. It is also reprehensible. This is what the chairperson of a State-level investigative committee said about the widespread and well-documented rape of Rohingya women. He said it was "inconceivable", because "[t]hey are very dirty. The Bengali/Rohingya women have a very low standard of living and poor hygiene. They are not attractive. So neither the local Buddhist men nor the soldiers are interested in them."<sup>172</sup>

26. The chairperson of Myanmar's investigative committee was not the only one to categorically deny that Tatmadaw soldiers have raped Rohingya women. What you see now before you, and at tab 18 of your judges' folders, is a current screenshot from the Facebook page of Myanmar's Agent in these proceedings. As you can see, the Facebook page insisting, "fake rape, fake rape" belongs to the "Myanmar State Counsellor Office"<sup>173</sup>.

27. Mr. President, Members of the Court, in The Gambia's view, Myanmar's false narratives, like these, and its sham investigations, further demonstrate the need for you to order provisional measures to compel it to live up to its obligations under the Genocide Convention, during the pendency of these proceedings, to protect the Rohingya from recurring acts of genocide.

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<sup>169</sup> Human Rights Watch, *Myanmar's Investigative Commissions: A History of Shielding Abusers* (September 2018), available at [https://www.hrw.org/sites/default/files/supporting\\_resources/201809myanmar\\_commissions.pdf](https://www.hrw.org/sites/default/files/supporting_resources/201809myanmar_commissions.pdf); judges' folder, tab 17, p. 6.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> 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. 1599; judges' folder, tab 17, p. 36.

<sup>173</sup> Facebook, Myanmar State Counsellor Office, "Fake Rape" (23 December 2016), available at <https://www.facebook.com/state.counsellor/photos/a.792613514206200.1073741827.792607210873497/943698079097742/?type=3&theater>; judges' folder, tab 18, p. 36.

28. Next, my colleagues will show how each of the requirements for provisional measures set out in Article 41 of the Court's Statute is fully satisfied, and they will describe the specific provisional measures that are called for in these exigent circumstances.

29. I thank you for your kind attention, and ask that you call next to the podium — after the break, if you are so disposed — Mr. Arsalan Suleman, who will address the Court on its prima facie jurisdiction over The Gambia's claims.

The PRESIDENT: I thank Ms Pasipanodya. Before I give the floor to the next speaker, the Court will observe a coffee break of 10 minutes. The sitting is adjourned.

*The sitting is adjourned from 11.35 to 11.50 a.m.*

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

Mr. SULEMAN:

#### **V. PRIMA FACIE JURISDICTION**

1. Mr. President, Members of the Court, it is an honour to appear before you and to represent The Gambia in these proceedings.

2. Before the break, you heard the terrible details of the genocidal acts perpetrated by Myanmar's military and security forces against the Rohingya group in Myanmar's Rakhine State. Now, and in the remainder of The Gambia's presentation today, you will hear how these circumstances not only require, but compel the indication of provisional measures under Article 41 (1) of the Court's Statute.

3. The standards that guide the Court in ruling on The Gambia's requested provisional measures are well established.

4. *First*, the Court must be satisfied that it has prima facie jurisdiction over the dispute. I will address the elements of that requirement.

5. *Second*, the rights asserted by The Gambia must be “at least plausible”<sup>174</sup>, and there must be a link between those rights and the measures requested. Professor Pierre d’Argent will speak to this.

6. *Third*, there must be a showing of urgency and a risk of irreparable harm, which my colleague, Paul Reichler, will amply demonstrate.

7. *Finally*, Professor Philippe Sands will identify the specific provisional measures that are requested, and explain why they are required.

8. Now, with the Court’s permission, I will turn to prima facie jurisdiction.

9. The Gambia has invoked the Court’s jurisdiction pursuant to Article 36 (1) of the Statute of the Court and Article IX of the Genocide Convention, which provides:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”<sup>175</sup>

10. Both The Gambia and Myanmar are parties to the Convention. Myanmar deposited its instrument of ratification on 14 March 1956<sup>176</sup>, and The Gambia deposited its instrument of accession on 29 December 1978<sup>177</sup>. Pursuant to its terms, the Convention became applicable between the Parties 90 days thereafter.

11. Neither Myanmar nor The Gambia entered any reservation to Article IX of the Convention. Both parties to this dispute have therefore consented to the Court’s jurisdiction over disputes between the Contracting Parties on the interpretation, application or fulfilment of the Genocide Convention.

12. Because The Gambia has invoked jurisdiction pursuant to Article IX of the Convention, the Court must determine whether “the acts complained of . . . are prima facie capable of falling

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<sup>174</sup> E.g., *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Provisional Measures, Order of 7 December 2016*, *I.C.J. Reports 2016 (II)*, p. 1165, para. 71.

<sup>175</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 Dec. 1948, entered into force 12 Jan. 1951), *UNTS*, Vol. 78, p. 277, Art. IX.

<sup>176</sup> United Nations, *Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide: Ratification with Reservations by Burma*, Reference C.N.25.1956.Treaties (29 March 1956), available at <https://treaties.un.org/doc/Publication/CN/1956/CN.25.1956-Eng.pdf>.

<sup>177</sup> United Nations, *Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide: Ratification by New Zealand, Accession by The Gambia*, Reference C.N.325.1978. *Treaties-1* (30 Jan. 1979), available at <https://treaties.un.org/doc/Publication/CN/1978/CN.325.1978-Eng.pdf>.

within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain”<sup>178</sup>.

13. As set forth in its Application, The Gambia has alleged that Myanmar is responsible for committing genocide, for attempting to commit genocide, for conspiring to commit genocide, for inciting genocide, for complicity in genocide, and for failing to prevent and punish genocide. Clearly, the acts complained of fall directly within the provisions of the Convention. The allegations are specific, and reflect, and in many cases repeat, the conclusions reached by the United Nations Fact-Finding Mission and other authoritative UN bodies, that acts of genocide have occurred and are likely to continue to occur. There can be little doubt that the Court has jurisdiction *ratione materiae*.

14. Further, there is an unambiguous dispute between the Parties. As the Court has frequently held, “a dispute between States exists where they hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations”<sup>179</sup>, and where “[t]he claim of one party [is] ‘positively opposed’ by the other”<sup>180</sup>.

15. The existence of a dispute is a matter for objective determination<sup>181</sup>. If the parties have made explicit reference to the specific treaty in dispute — as The Gambia has, in fact, done in this case — such an express specification “would remove any doubt about one State’s understanding of the subject-matter in issue and put the other on notice”<sup>182</sup>.

16. Mr. President, Myanmar was put on notice of this dispute under the Genocide Convention on several occasions, and it acknowledged receipt of that notice prior to The Gambia’s filing of this case.

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<sup>178</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1159, para. 47.

<sup>179</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 631, para. 28.

<sup>180</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 631, para. 28 (citing *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328).

<sup>181</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30.

<sup>182</sup> *Ibid.*, p. 85, para. 30.

17. From 5 to 6 May 2018, the Member States of the Organisation of Islamic Cooperation (“OIC”), including The Gambia, met at a ministerial level in Dhaka, Bangladesh, where, among other actions, they promulgated the Dhaka Declaration<sup>183</sup>. That Declaration expressed concern over the “systematic brutal acts perpetrated by security forces against the Rohingya . . . which constitute a serious and blatant violation of international law”<sup>184</sup>, and sought to address “the accountability issue for the violations . . . against the Rohingyas in Myanmar through [the] formation of an *ad hoc* ministerial committee, to be chaired by [The] Gambia”<sup>185</sup>.

18. In response, Myanmar’s Ministry of Foreign Affairs issued a press statement three days later to “categorically reject[]” the Declaration’s description of “events in Rakhine State” as “State backed violence”<sup>186</sup>. Myanmar was thus on notice as early as May of 2018 of the newly formed OIC *ad hoc* Committee on Accountability for Crimes against the Rohingya, chaired by The Gambia, and its allegations of State-sponsored violence against the Rohingya.

19. In September of 2018, the United Nations Fact-Finding Mission on Myanmar released its first series of reports in which it found evidence of genocidal acts and genocidal intent attributable to Myanmar in the context of its crimes against the Rohingya. Myanmar dismissed those findings as biased<sup>187</sup>. The Gambia, on the contrary, made clear in its remarks at the United Nations General Assembly later that month that “the Gambia has undertaken . . . to champion an accountability mechanism that would ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book”<sup>188</sup>.

20. On 2 March 2019, the member States of the OIC held another ministerial-level meeting, at which they, including The Gambia, adopted a resolution on Myanmar’s crimes against the

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<sup>183</sup> OIC, 45th Session of the Council of Foreign Ministers of the Organization of Islamic Cooperation, *Dhaka Declaration* (6 May 2018), available at [https://www.oic-oci.org/topic/?t\\_id=18652&t\\_ref=10334&lan=en](https://www.oic-oci.org/topic/?t_id=18652&t_ref=10334&lan=en).

<sup>184</sup> *Ibid.*, para. 14.

<sup>185</sup> *Ibid.*, para. 17.

<sup>186</sup> Republic of the Union of Myanmar, Ministry of Foreign Affairs, “Myanmar rebuts Dhaka Declaration’s reference on situation in Rakhine State and calls for Bangladesh’s sincere cooperation to start early repatriation” (9 May 2018), available at <https://twitter.com/MOFAMyanmar/status/994221493541220352>.

<sup>187</sup> Republic of the Union of Myanmar: State Counsellor Office, *Address by H.E. U Kyaw Tint Swe, Union Minister for the Office of the State Counsellor and Chairman of the Myanmar Delegation to the 74th Session of United Nations General Assembly at High-Level General Debate* (28 Sept. 2018), available at [https://gadebate.un.org/sites/default/files/gastatements/73/mm\\_en.pdf](https://gadebate.un.org/sites/default/files/gastatements/73/mm_en.pdf), p. 5.

<sup>188</sup> UNGA, 73rd Session, 7th Plenary Meeting, *Address by Mr. Adama Barrow, President of the Republic of the Gambia*, UN Doc. A/73/PV.7 (25 Sept. 2018), p. 29.

Rohingya, which emphasized that accountability was necessary for “preventing genocide” and endorsed the recommendation of the *ad hoc* Committee chaired by The Gambia to hold Myanmar accountable under the Genocide Convention<sup>189</sup>. In response, Myanmar again denied responsibility and criticized the resolution as an interference with its sovereignty<sup>190</sup>.

21. On 16 September 2019, the United Nations Fact-Finding Mission submitted its second report. Myanmar rejected wholesale the Fact-Finding Mission’s report<sup>191</sup>, which welcomed “the efforts of States, in particular The Gambia . . . to encourage and pursue a case against Myanmar before the International Court of Justice (ICJ) under the Genocide Convention”<sup>192</sup>. The Gambia, in remarks before the United Nations General Assembly on 26 September 2019, at which Myanmar was present, confirmed that:

“The Gambia is ready to lead the concerted efforts to take the Rohingya issue to the International Court of Justice on behalf of the Organization of Islamic Cooperation, and we will call on all stakeholders to support that process. As a global community with a conscience, we cannot continue to ignore the plight of the Rohingya.”<sup>193</sup>

22. On 11 October 2019, in furtherance of its support of the conclusions of the UN Fact-Finding Mission, The Gambia’s Permanent Mission to the United Nations sent<sup>194</sup> a Note Verbale to Myanmar’s Permanent Mission, expressing The Gambia’s concerns “regarding the ongoing genocide against the Rohingya people . . . in violation of Myanmar’s obligations under the . . . Genocide Convention”<sup>195</sup>. Noting Myanmar’s rejection of the Fact-Finding Mission’s

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<sup>189</sup> OIC, *Resolution No. 61/46-POL on The Work of the OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas* (2 March 2019), available at <https://www.oic-oci.org/docdown/?docID=4444&refID=1250>, pp. 176-177.

<sup>190</sup> Khin Khin Ei, “World Islamic Group Votes to Take Myanmar Rohingya Abuses to International Court of Justice”, Radio Free Asia (5 March 2019), available at <https://www.rfa.org/english/news/myanmar/world-islamic-group-votes-03052019165111.html>.

<sup>191</sup> The Republic of the Union of Myanmar, *State Counsellor Office, U Kyaw Tint Swe, Union Minister for the Office of the State Counsellor and Leader of Myanmar Delegation to the 74th Session of United Nations General Assembly Delivers Statement at High-Level General Debate (New York, 29th Sept. 2019)* (30 Sept. 2019), available at <https://www.statecounsellor.gov.mm/en/node/2551>, p. 11.

<sup>192</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 40; judges’ folder, tab 2, p. 4.

<sup>193</sup> UNGA, 74th Session, 8th Plenary Meeting, *Address by Mrs. Isatou Touray, Vice-President of the Republic of The Gambia*, UN Doc. A/74/PV.8 (26 Sept. 2019), p. 31.

<sup>194</sup> Email transmitting Note Verbale from Permanent Mission of the Republic of The Gambia to the United Nations to Permanent Mission of the Republic of the Union of Myanmar to the United Nations (11 Oct. 2019) (Observations of The Gambia, Ann. 2).

<sup>195</sup> Note Verbale from Permanent Mission of the Republic of The Gambia to the United Nations to Permanent Mission of the Republic of the Union of Myanmar to the United Nations, No. GPM/NV241/Vol.1(LY) (11 Oct. 2019) (Observations of The Gambia, Ann. 1).

report, The Gambia “emphatically reject[ed] Myanmar’s denial of its responsibility for the ongoing genocide against Myanmar’s Rohingya population, and its refusal to fulfill its obligations under the Genocide Convention and customary international law”<sup>196</sup>.

23. The Gambia concluded its Note Verbale by declaring:

“With somber reflection on the goals of the Genocide Convention and its obligations on all States, The Gambia understands Myanmar to be in ongoing breach of those obligations under the Convention and under customary international law. The Gambia insists that Myanmar take all necessary actions to comply with these obligations, including but not limited to its obligations to make reparations to the victims and to provide guarantees and assurances of non-repetition.”<sup>197</sup>

24. Myanmar received The Gambia’s Note Verbale on the date it was sent. Myanmar confirmed this by means of its own Note Verbale to The Gambia’s Mission to the United Nations, sent from the same email address to which The Gambia had sent its Note Verbale<sup>198</sup>.

25. Although the Court has previously held that a “formal diplomatic protest” is not required, here there was one<sup>199</sup>, in addition to direct statements and actions in multilateral settings and additional indicia of Myanmar’s awareness of this dispute under the Genocide Convention.

26. Mr. President, Members of the Court, The Gambia’s case against Myanmar *prima facie* falls squarely within the provisions of Article IX of the Genocide Convention. A dispute over Myanmar’s failure to fulfil its obligations under the Convention plainly exists. And Myanmar was well aware of this dispute prior to the filing of the Application.

27. Mr. President, Members of the Court, there can be no doubt that the Court has *prima facie* jurisdiction over The Gambia’s claims. I thank you and the Court for your kind attention, and ask that you call Professor Pierre d’Argent to the podium.

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<sup>196</sup> Note Verbale from Permanent Mission of the Republic of The Gambia to the United Nations to Permanent Mission of the Republic of the Union of Myanmar to the United Nations, No. GPM/NV241/Vol.1(LY) (11 Oct. 2019) (Observations of The Gambia, Ann. 1).

<sup>197</sup> *Ibid.*

<sup>198</sup> Email transmitting Note Verbale from Permanent Mission of the Republic of The Gambia to the United Nations to Permanent Mission of the Republic of the Union of Myanmar to the United Nations (11 Oct. 2019) (Observations of The Gambia, Ann. 2); Note Verbale from Permanent Mission of the Republic of the Union of Myanmar to the United Nations to Permanent Mission of the Republic of The Gambia to the United Nations, No. 394/03 10 29 (19) (12 Nov. 2019) (Observations of The Gambia, Ann. 3); Email transmitting Note Verbale from Permanent Mission of the Republic of the Union of Myanmar to the United Nations to Permanent Mission of the Republic of The Gambia to the United Nations (12 Nov. 2019) (Observations of The Gambia, Ann. 4).

<sup>199</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 849, para. 38.

The PRESIDENT: I thank Mr. Suleman for his statement. J'invite maintenant le professeur Pierre d'Argent à prendre la parole. Vous avez la parole.

M. d'ARGENT : Je vous remercie, Monsieur le président.

## VI. LES DROITS REQUÉRANT PROTECTION

1. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les juges, c'est un grand honneur pour moi de prendre la parole devant la Cour et de le faire aujourd'hui à l'appui de la noble cause soutenue par la Gambie dans le différend qui l'oppose au Myanmar.

2. Il me revient d'examiner la deuxième condition à laquelle est subordonné l'exercice du pouvoir de la Cour d'indiquer des mesures conservatoires. Cette deuxième condition est relative aux droits revendiqués qui, selon la Gambie, requièrent de manière urgente protection. La jurisprudence de la Cour sur ce point est bien établie et, ainsi que vous l'avez encore rappelé le 14 juin dernier, il y a lieu de déterminer si

«les droits revendiqués ... [dont la protection est sollicitée] sont des droits plausibles, compte tenu de la base de compétence *prima facie* de la Cour en [l']espèce. Partant, les droits allégués doivent présenter un lien suffisant avec l'objet de l'instance pendante devant la Cour sur le fond de l'affaire.»<sup>200</sup>

3. Tel est assurément le cas en l'espèce.

4. Après avoir rappelé quelques éléments essentiels relatifs au caractère normatif de la convention sur le génocide, tels qu'ils résultent de votre jurisprudence, j'identifierai plus précisément les différents «droits en litige dans [la présente] procédure judiciaire»<sup>201</sup> dont la Gambie sollicite la protection. Leur caractère plausible apparaîtra ainsi clairement. Je montrerai aussi que rien, dans l'article 41 du Statut, ne s'oppose à l'exercice de votre compétence en matière conservatoire lorsque les droits revendiqués sont de la nature de ceux de la convention.

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<sup>200</sup> *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Emirats arabes unis), ordonnance du 14 juin 2019, mesures conservatoires*, par. 18.

<sup>201</sup> *Violations alléguées du traité d'amitié, de commerce et de droits consulaires de 1955 (République islamique d'Iran c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 3 octobre 2018, C.I.J. Recueil 2018 (II), p. 645, par. 77, renvoyant à Jadhav (Inde c. Pakistan), mesures conservatoires, ordonnance du 18 mai 2017, C.I.J. Recueil 2017, p. 243, par. 49.*

5. Monsieur le président, dans l'avis consultatif de 1951, la Cour se pencha sur ce qu'elle appela «les traits particuliers que présente la Convention sur le génocide»<sup>202</sup>, et la Cour souligna «l'intention des Nations Unies de condamner et de réprimer le génocide comme «un crime de droit des gens» impliquant le refus du *droit à l'existence de groupes humains entiers*»<sup>203</sup>. Ce droit — le droit à l'existence du groupe humain des Rohingya — est un droit dont le Myanmar doit le respect, à tout le moins, à tous les Etats parties à la convention sur le génocide, y compris la Gambie. En saisissant la Cour, la Gambie cherche à protéger le droit à l'existence du groupe des Rohingya — ni plus, ni moins.

6. La nature des droits consacrés par la convention est intimement liée à ses «fins». Et, se penchant sur celles-ci, la Cour souligna dans un passage demeuré célèbre :

«Dans une telle convention, les États contractants n'ont pas d'intérêts propres ; ils ont seulement tous et chacun, un intérêt commun, celui de préserver les fins supérieures qui sont la raison d'être de la convention. Il en résulte que l'on ne saurait, pour une convention de ce type, parler d'avantages ou de désavantages individuels des États, non plus que d'un exact équilibre contractuel à maintenir entre les droits et les charges.»<sup>204</sup>

7. Depuis lors, la Cour a souligné que les traits particuliers de la convention indiquaient clairement «que les droits et obligations [qu'elle consacre] sont des droits et obligations *erga omnes*»<sup>205</sup> ; par ailleurs, la Cour a affirmé que «la norme interdisant le génocide constituait assurément une norme impérative du droit international (*jus cogens*)»<sup>206</sup>.

8. Il n'est dès lors pas douteux, Monsieur le président, Mesdames et Messieurs de la Cour, que la Gambie est en droit d'invoquer la responsabilité de l'Etat défendeur pour les manquements de ce dernier à la convention. En effet, au sujet de la convention contre la torture, vous n'avez pas manqué de souligner que puisque les obligations en cause étaient *erga omnes partes*, tout Etat

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<sup>202</sup> *Réserves à la convention pour la prévention et la répression du crime de génocide, avis consultatif, C.I.J. Recueil 1951, p. 23.*

<sup>203</sup> *Ibid.* (les italiques sont de nous).

<sup>204</sup> *Réserves à la convention pour la prévention et la répression du crime de génocide, avis consultatif, C.I.J. Recueil 1951, p. 23.*

<sup>205</sup> *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), exceptions préliminaires, arrêt, C.I.J. Recueil 1996 (II), p. 616, par. 31.*

<sup>206</sup> *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I), p. 111, par. 161, renvoyant à Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006, p. 32, par. 64.*

partie à cette convention pouvait «invoquer la responsabilité d'un autre Etat partie dans le but de faire constater le manquement allégué de celui-ci à [ces] obligations»<sup>207</sup>. Comme la Cour l'a également mis en lumière, c'est «[l]'intérêt commun des Etats parties à ce que soient respectées les obligations pertinentes énoncées dans la convention» qui justifie que tout Etat partie soit en droit d'invoquer la responsabilité de tout autre Etat partie pour manquement, sachant que «[s]i un intérêt particulier était requis à cet effet, aucun Etat ne serait, dans bien des cas, en mesure de présenter une telle demande»<sup>208</sup>.

9. En 2012, la Cour s'est prononcée en ce sens au sujet des obligations *erga omnes partes* de la convention contre la torture ; *a fortiori* doit-il en être de même, et nous le savons depuis l'arrêt *Barcelona Traction*<sup>209</sup>, au sujet des obligations de la convention sur le génocide que la Cour a caractérisées comme étant des obligations *erga omnes*<sup>210</sup>. Tout Etat peut donc invoquer la responsabilité d'un autre Etat pour violation des obligations de la convention sur le génocide, sans avoir à justifier d'un intérêt particulier<sup>211</sup>. En réalité, l'Etat qui invoque la responsabilité d'un autre Etat pour violation d'une obligation *erga omnes* possède bien un intérêt pour ce faire, d'autant qu'il a lui-même droit à voir la convention respectée ; toutefois, son intérêt n'a rien de particulier. Cet intérêt, partagé par tous les Etats, est de voir l'intérêt commun — intérêt commun au sujet duquel tous ont des droits — pleinement protégé<sup>212</sup>.

10. Ces rappels étant faits, les droits en litige dont la protection est sollicitée apparaissent clairement.

11. Monsieur le président, Mesdames et Messieurs les juges, par l'action qu'elle a introduite contre le Myanmar, la Gambie met en œuvre le droit qu'elle détient en droit des traités de voir la

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<sup>207</sup> *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, arrêt, C.I.J. Recueil 2012 (II), p. 450, par. 69.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Barcelona Traction, Light and Power Company, Limited (Belgique c. Espagne)*, deuxième phase, arrêt, C.I.J. Recueil 1970, p. 32, par. 33.

<sup>210</sup> Voir aussi Institut de droit international, «Les obligations et les droits *erga omnes* en droit international», session de Cracovie (2005), rapporteur : G. Gaja ; et Commission du droit international (CDI), «Responsabilité de l'État pour fait internationalement illicite», 2001, art. 48.

<sup>211</sup> Parmi la doctrine sur ce point, voir notamment J. Verhoeven, «Le crime de génocide. Originalité et ambiguïté», *Revue belge de droit international (RBDI)*, 1991, p. 14.

<sup>212</sup> En ce sens voir G. Gaja, «Obligations and Rights *Erga Omnes* in International Law», First Report, *Annuaire de l'Institut de droit international*, session de Cracovie (2005), vol. 71, n° 1, p. 142.

convention dûment exécutée. Il s'agit du droit de la Gambie elle-même, en tant qu'Etat partie à la convention. En effet, comme la Cour l'a souligné, la convention consacre des obligations, mais aussi des droits *erga omnes*<sup>213</sup>. Et ces droits sont l'exact reflet de ces obligations : les obligations collectives de la convention se doublent du droit pour chaque partie contractante d'en demander et d'en obtenir l'exécution. Tandis que le caractère *erga omnes* des obligations de la convention fonde l'intérêt juridique de tout Etat d'invoquer la responsabilité de l'Etat coupable, le droit de tout Etat partie à la convention consiste à pouvoir exiger le respect du droit primaire, c'est-à-dire le «devoir de l'État responsable d'exécuter l'obligation violée»<sup>214</sup>.

12. Il est donc certain que la Gambie détient des droits qui lui reviennent et dont elle entend obtenir le respect par le biais de cette procédure juridictionnelle. La demande de mesures conservatoires est à cet égard entièrement compatible avec l'article 41 du Statut puisque le droit de la Gambie d'obtenir du Myanmar qu'il exécute pleinement la convention est gravement menacé par le comportement de l'Etat défendeur.

13. Par ailleurs, en cherchant à protéger son droit d'Etat partie à la convention, la Gambie cherche par la même occasion à assurer la protection — pour reprendre la formule utilisée par la Cour en 1951 — du «droit à l'existence [d'un] groupe[] humain[] entier[]»<sup>215</sup>, à savoir le groupe des Rohingya. A cet égard, il n'est pas nécessaire de déterminer si la convention personnifie des groupes ou confère directement des droits à des individus, en tant que membres de groupes protégés, dont ils pourraient se prévaloir en justice. Il suffit en effet de constater que la convention a pour objet premier et pour but la sauvegarde de tout groupe national, ethnique, racial ou religieux, comme tel. Et puisque la convention interdit le génocide en tant que destruction physique totale ou partielle d'un tel groupe, elle entend essentiellement protéger le droit de ses membres à la vie et à l'intégrité physique ou mentale. C'est en ce sens que la convention sur le génocide est souvent

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<sup>213</sup> Voir par. 7 ci-dessus et références.

<sup>214</sup> CDI, «Responsabilité de l'État pour fait internationalement illicite», 2001, art. 29.

<sup>215</sup> *Réserves à la convention pour la prévention et la répression du crime de génocide, avis consultatif, C.I.J. Recueil 1951*, p. 23.

considérée comme le premier traité moderne protecteur des droits de l'homme<sup>216</sup>. En effet, chacun des actes criminels définis par l'article II de la convention porte atteinte au groupe protégé à travers les membres qui le composent, plutôt qu'à travers son patrimoine, son territoire, sa culture ou sa langue. Ce sont des êtres humains, des femmes, des hommes, des enfants, qui, du fait de leur appartenance à un groupe, sont protégés par la convention, de même que le groupe lui-même.

14. Par son action, la Gambie entend faire respecter son droit à ce que tous les membres du groupe des Rohingya ne subissent plus d'actes de génocide prohibés par la convention. A ce stade, il n'est pas nécessaire d'établir définitivement l'existence de ce droit ; il suffit à la Cour de constater qu'un tel droit est plausible, c'est-à-dire «fondé[] sur une interprétation possible de la convention»<sup>217</sup>.

15. Tel est assurément le cas car en imposant aux parties contractantes les obligations de prévenir et de punir le génocide, la convention protège les groupes qu'elle vise et leurs membres. En ce sens, les bénéficiaires des droits prévus par la convention ne sont pas seulement les Etats parties, mais aussi les groupes et leurs membres. Ce sont leurs droits fondamentaux qui sont violés chaque fois que la convention est violée ; leurs droits sont protégés par la convention chaque fois que «[les] actes couverts par les termes de [la] convention»<sup>218</sup> constituent en même temps des actes susceptibles de porter atteinte à ces droits humains essentiels. «Thus — et je me permets de citer le rapport du juge Gaja à l'Institut de droit international — a group threatened with genocide has a right towards all the States that genocide should not be committed and be prevented and punished.»<sup>219</sup>

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<sup>216</sup> Voir United Nations Office on Genocide Prevention and the Responsibility to Protect, "Legal Framework: The Genocide Convention" disponible à l'adresse : <https://www.un.org/en/genocideprevention/genocide-convention.shtml> ; Bureau de la prévention du génocide de la responsabilité de protéger «La Convention pour la prévention et répression du crime de génocide (1948) : A propos de la Convention sur le génocide» disponible à l'adresse : <https://www.un.org/en/genocideprevention/documents/Genocide%20Convention-FactSheet-FR.pdf> ; le Haut-Commissariat des Nations Unies aux Droits de l'Homme, «Les instruments universels des droits de l'homme» disponible à l'adresse : <https://www.ohchr.org/FR/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>.

<sup>217</sup> *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009, p. 152, par. 60.*

<sup>218</sup> *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnance du 13 septembre 1993, C.I.J. Recueil 1993, opinion individuelle de M. le juge Lauterpacht, p. 412, par. 14.*

<sup>219</sup> G. Gaja, «Obligations and Rights Erga Omnes in International Law», First Report, *Annuaire de l'Institut de droit international*, session de Cracovie (2005), vol. 71-I, p. 135, voir onglet n° 19 du dossier des juges.

16. Monsieur le président, Mesdames et Messieurs les juges, l'article 41 du Statut vous permet de protéger les droits que la Gambie possède au titre de la convention, lesquels incluent celui des Rohingya de ne pas être exposés à des actes de génocide.

17. En effet, ainsi que votre jurisprudence l'indique clairement, les droits pouvant être protégés par des mesures conservatoires sont «les droits revendiqués»<sup>220</sup> par l'Etat qui en sollicite la protection, c'est-à-dire tous les «droits en litige devant le juge»<sup>221</sup>. Comme la Cour permanente l'avait déjà souligné, il s'agit de «sauvegarder les droits objet du différend dont la Cour est saisie»<sup>222</sup> en attendant le jugement sur le fond. C'est en ce sens qu'à propos des mesures conservatoires sollicitées par la Bosnie-Herzégovine, la Cour a rappelé que les droits protégés «pourraient en définitive constituer la base d'un arrêt»<sup>223</sup> sur le fond. L'article 41 permet donc à la Gambie de solliciter la protection de tous les droits en litige au titre de la convention.

18. Toute autre conception reviendrait d'ailleurs à limiter de manière absurde la compétence incidente de la Cour en matière conservatoire, là où elle est pourtant le plus nécessaire.

19. Enfin, les mesures sollicitées par la Gambie tendent manifestement à protéger ces droits. Elles présentent donc un lien avec les droits dont la protection est sollicitée, ainsi que le professeur Sands le rappellera en fin d'audience.

20. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie de votre bienveillante attention. Puis-je vous demander, Monsieur le président, de bien vouloir inviter

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<sup>220</sup> Cf. note 1 ci-dessus ; voir aussi *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie)*, mesures conservatoires, ordonnance du 19 avril 2017, C.I.J. Recueil 2017, p. 126, par. 63.

<sup>221</sup> Voir notamment *Plateau continental de la mer Egée (Grèce c. Turquie)*, mesures conservatoires, ordonnance du 11 septembre 1976, C.I.J. Recueil 1976, p. 9, par. 25 ; *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran)*, mesures conservatoires, ordonnance du 15 décembre 1979, C.I.J. Recueil 1979, p. 19, par. 36 ; *Sentence arbitrale du 31 juillet 1989 (Guinée-Bissau c. Sénégal)*, mesures conservatoires, ordonnance du 2 mars 1990, C.I.J. Recueil 1990, p. 69, par. 24 ; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro))*, mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993, p. 19, par. 34 ; plus récemment : *Violations alléguées du traité d'amitié, de commerce et de droits consulaires de 1955 (République islamique d'Iran c. Etats-Unis d'Amérique)*, mesures conservatoires, ordonnance du 3 octobre 2018, C.I.J. Recueil 2018 (II), p. 645, par. 77 renvoyant à *Jadhav (Inde c. Pakistan)*, mesures conservatoires, ordonnance du 18 mai 2017, C.I.J. Recueil 2017, p. 243, par. 49.

Voir aussi H. Thirlway, «The Law and Procedure of the International Court of Justice», OUP, vol. 1, 2013, p. 936 ; R. Kolb, «The International Court of Justice», Hart, 2013, p. 625.

<sup>222</sup> *Réforme agraire polonaise et minorité allemande*, ordonnance du 29 juillet 1933, C.P.J.I. série A/B n° 58, p. 177.

<sup>223</sup> *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro))*, mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993, p. 19, par. 35.

M<sup>e</sup> Paul Reichler au lutrin afin qu'il aborde les deux dernières conditions pour l'indication de mesures conservatoires : le risque de préjudice irréparable aux droits revendiqués et l'urgence ?

Le PRESIDENT : Je remercie le professeur Pierre d'Argent. Je donne à présent la parole à M. Paul Reichler. Vous avez la parole.

Mr. REICHLER:

## VII. URGENCY AND IRREPARABLE HARM

1. Mr. President, Members of the Court, good afternoon.

2. It is, as always, an honour for me to appear before you. This time, it is both a special privilege, and a grave responsibility, to represent The Gambia, in its effort to prevent further acts of genocide against the Rohingya people in Myanmar. These horrific acts, committed by the State of Myanmar, have been comprehensively documented by the United Nations Fact-Finding Mission, the UN High Commissioner for Human Rights, the UN Special Rapporteur on the Situation of Human Rights in Myanmar, the UN Special Adviser on the Prevention of Genocide and numerous independent human rights organizations and experts.

3. Based on these highly credible reports, it is blindingly obvious that there is an urgent need for provisional measures to prevent irreparable harm to the rights at issue in this dispute. The requirements of urgency and irreparable harm are more than fully satisfied here. This case for provisional measures is among the most compelling that have ever been heard in this Great Hall of Justice.

4. As the Court has emphasized in its prior rulings on provisional measures: "The condition of urgency is met when the acts susceptible of causing irreparable prejudice can 'occur at any moment' before the Court makes a final decision on the case."<sup>224</sup>

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<sup>224</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II), pp. 645-646, para. 78; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II), p. 428, para. 61; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II), p. 1169, para. 90.

5. That is precisely the situation here. It is exactly what the UN Fact-Finding Mission concluded, in its report of 16 September 2019, which you will find at tab 2, page 3 of your judges' folders:

“The Mission concludes, based on its findings, that grave violations against the Rohingya continue and that there is a *real and significant danger of the situation deteriorating further*. The Mission also has reasonable grounds to conclude that the evidence that infers genocidal intent on the part of the State against the Rohingya, identified in its last report, has *strengthened*, that *there is a serious risk that genocidal actions may occur or recur*, and that Myanmar is failing in its obligation to *prevent genocide, to investigate genocide and to enact effective legislation criminalizing and punishing genocide*.”<sup>225</sup>

6. These conclusions, as you have heard, are based on thorough and meticulous investigations, carried out over a two-year period, and resulting in voluminous reports totalling over 700 pages.

7. Even more recently, on 26 November 2019, the United Nations Special Rapporteur on the Human Rights Situation in Myanmar, wrote, as you can see at tab 14:

“The Rohingya still living in Rakhine state continue to be denied their most basic rights and are confined to either closely guarded internment camps or remote villages. The system of oppression remains unchanged, and *they are at real risk of recurring genocide*.”<sup>226</sup>

8. Mr. President, the evidence that is now before you is several orders of magnitude greater, and even more compelling, than the evidence submitted by Bosnia in 1993, which the Court found sufficient to determine that “there is a grave risk of acts of genocide being committed”<sup>227</sup>. On that basis, the Court indicated provisional measures to ensure that the parties “do all in their power to prevent the commission of any such acts in the future”<sup>228</sup>.

9. Since 1993 the Court has repeatedly found the requirements of urgency and irreparable harm to be met in situations where the threats to human life, or to other fundamental human rights short of life itself, were considered serious. In *Democratic Republic of Congo v. Uganda*, the Court

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<sup>225</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 58; judges' folder, tab 2, p. 3.

<sup>226</sup> Yanghee Lee and 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>; emphasis added; judges' folder, tab 14.

<sup>227</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Provisional Measures, Order of 8 April 1993*, I.C.J. Reports 1993, p. 22, para. 45.

<sup>228</sup> *Ibid.*

ordered provisional measures based on its finding “that persons, assets and resources present on the territory of the Congo, particularly in the area of conflict, *remain extremely vulnerable*, and that there is a *serious risk* that the rights at issue in this case . . . may suffer irreparable prejudice”<sup>229</sup>.

10. In the *Certain Activities* case, the Court ordered provisional measures, prohibiting Nicaragua from sending its personnel into disputed territory, in part because “this situation . . . gives rise to a *real and present risk* of incidents liable to cause irremediable harm in the form of *bodily injury or death*”<sup>230</sup>.

11. In *Ukraine v. Russia*, the Court ordered provisional measures on the ground that “Crimean Tatars and ethnic Ukrainians in Crimea *appear to remain vulnerable*”<sup>231</sup>, because “certain rights in question in these proceedings, in particular, the political, civil, economic, social and cultural rights . . . are of such a nature that prejudice to them is capable of causing irreparable harm”<sup>232</sup>. Here, the Rohingya are not only deprived of their political, social and cultural rights, they are threatened with *massive loss of life itself*, and, striking at the heart of these proceedings, with *loss of their very existence as a group*.

12. In *Qatar v. United Arab Emirates*, the Court ordered provisional measures to protect the rights of Qataris living in the UAE. The Court found that “individuals *forced to leave their own place of residence without the possibility of return* could, depending on the circumstances, be subject to a *serious risk* of irreparable prejudice”<sup>233</sup>. At the time the Court made this finding, according to the UN Fact-Finding Mission, the Rohingya in Myanmar were suffering an even worse fate. They, too, were “forced to leave their own place of residence without the possibility of return”<sup>234</sup>. But in Myanmar, the UN Fact-Finding Mission found that this was because the army,

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<sup>229</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000, p. 128, para. 43; emphasis added.

<sup>230</sup> *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. 24, para. 75; emphasis added.

<sup>231</sup> *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, p. 138, para. 96; emphasis added.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II), p. 431, para. 69; emphasis added.

<sup>234</sup> *Ibid.*

the Tatmadaw, deliberately burned thousands of their homes to the ground, often with family members forced to remain inside, and went on to slaughter masses of men, women and especially children, with the intention of destroying the Rohingya as a group. Since then, the threat of genocide has not abated, but grown even worse. As the UN Fact-Finding Mission concluded in its report of 16 September 2019, evidence of Myanmar’s genocidal intent toward the Rohingya has actually “strengthened” in the past year<sup>235</sup>.

13. In the case of Qataris living in the UAE, the Court was of the view that

“a prejudice can be considered as irreparable when individuals are subject to temporary or potentially ongoing separation from their families and suffer from psychological distress; when students are prevented from taking their exams due to enforced absence . . . or when the persons concerned are impeded from being able to physically appear in any proceedings or to challenge any measure they find discriminatory”<sup>236</sup>.

14. Mr. President, The Gambia agrees that these are very important human and civil rights, whose interim protection by the Court is justified where the facts show that their enjoyment is threatened irreparably. If that is so, then how much greater is the justification for provisional measures here? This case is about the commission of genocide, the most heinous of all crimes. The evidence before you makes clear that provisional measures are urgently needed to protect a group that is at serious risk of suffering further genocidal acts, which independent observers have warned are capable of recurring at any time: including another “clearance operation”, which is Myanmar’s own Orwellian term for the targeted killing of Rohingya, burning of their homes and villages, and especially brutal and depraved acts of sexual violence against women and girls — the very kinds of atrocities the Genocide Convention was intended to prevent.

15. Mr. President, if provisional measures were justified in all of *these* cases, they must be justified in *this* one.

16. More recently, in the *Alleged Violations of the Treaty of Amity* case, the Court, using language that is especially pertinent here, found that “a prejudice can be considered as irreparable

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<sup>235</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sep. 2019), para. 58; judges’ folder, tab 2, p. 19.

<sup>236</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 431, para. 69; emphasis added.

when the persons concerned are *exposed to danger to health and life*<sup>237</sup>. The Court ordered provisional measures, notwithstanding the assurances given by the United States that it would “use its best endeavours” to ensure that “humanitarian or safety of flight-related concerns” receive “full and expedited consideration”<sup>238</sup>. The Court explained:

“While appreciating these assurances, the Court considers nonetheless that, in so far as they are limited to an expression of best endeavours and to co-operation between departments and other decision-making agencies, the said assurances are not adequate to address fully the *humanitarian and safety concerns* raised by the Applicant. Therefore, the Court is of the view that there remains a risk that the measures adopted by the United States . . . may entail irreparable consequences.”<sup>239</sup>

17. Without question, if humanitarian and safety concerns merited provisional measures to protect the people of Iran against an economic and commercial embargo, they are absolutely indispensable here, where the Rohingya face, every single day, the risk that they and their children will be killed, or raped *en masse*, pursuant to what independent expert investigators have found to be Myanmar’s ongoing and strengthened genocidal intent.

18. In the case between Iran and the United States, the Court found that the assurances of the respondent State could not serve as a substitute for provisional measures. Even less can they substitute for provisional measures in this case. Myanmar, from its highest official levels, has been giving empty assurances to the United Nations, repeatedly, since even before the first clearance operation in 2016, and it continues to do so. It backs them up with phony investigations, finding no wrongdoing whatsoever, a complete “whitewash” in the words of a former United States ambassador<sup>240</sup>, a total lack of accountability according to the UN Fact Finding Mission<sup>241</sup>.

19. The UN Special Rapporteur on the human rights situation in Myanmar recently explained why Myanmar’s assurances cannot be relied upon, in a document you will find at tab 14:

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<sup>237</sup> *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 650, para. 91; emphasis added.

<sup>238</sup> *Ibid.*, para. 92.

<sup>239</sup> *Ibid.*; emphasis added.

<sup>240</sup> Bill Tarrant, “Exclusive: Richardson quits Myanmar’s ‘whitewash’ Rohingya crisis panel”, *Reuters* (24 Jan. 2018), available at <https://www.reuters.com/article/us-myanmar-rohingya-richardson-exclusive/exclusive-richardson-quits-myanmars-whitewash-rohingya-crisis-panel-idUSKBN1FD2OJ>.

<sup>241</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar* (16 Sept. 2019), para. 230.

“Those responsible for these violations enjoy impunity which perpetuates the devastating cycle of abuse.”<sup>242</sup>

20. This is because “[t]he emboldened military leadership retains a firm grip on politics and the economy, while the government has so far proved unwilling or unable to make any significant move against it”<sup>243</sup>.

21. Under the present conditions, the Special Rapporteur concluded, Myanmar is simply “incapable of delivering accountability”<sup>244</sup> — incapable of delivering accountability.

22. The Special Rapporteur ended with a warning that “[t]he military, backed by Aung San Suu Kyi, has responded with defiance, and with the immediate threat of further atrocities present, more must urgently be done to prevent further tragedy”<sup>245</sup>.

23. Mr. President, as if to prove the Special Rapporteur’s point, soon after The Gambia’s Application was filed with the Court, billboards were posted across Myanmar like this one, which you will find at tab 20. The three smiling Tatmadaw generals behind the Agent are Myanmar’s Minister of Border Affairs, Minister of Defence, and Minister of Home Affairs. This shows — in fact, it can only have been intended to show — that they are all in it together, and that Myanmar has absolutely no intention of holding its “emboldened military leadership” accountable.

24. Mr. President, in these circumstances, for the Court *not* to order provisional measures would be to completely ignore the imminent risk of death and destruction that the Rohingya face today, and every day during the pendency of these proceedings; and it would be a complete break with the long and distinguished line of jurisprudence that the Court itself has firmly established, and very recently confirmed.

25. There is law, and there is also morality. They are not opposed. In its Advisory Opinion on *Reservations to the Genocide Convention*, the Court explained:

“The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this

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<sup>242</sup> 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-191120120-104014.html>; judges’ folder, tab 14.

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

dual character to a greater degree, 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.”<sup>246</sup>

26. What happens when international institutions lack the will to uphold these elementary moral and legal principles? Lieutenant-General Roméo Dallaire, commander of the UN peacekeepers in Rwanda in 1994, offered sobering testimony which you will find in your judges’ folders at tab 21:

“Almost fifty years to the day that my father and father-in-law helped to liberate Europe — when the extermination camps were uncovered and when, in one voice, humanity said, ‘Never again’ — we once again sat back and permitted this unspeakable horror to occur. We could not find the political will nor the resources to stop it.”<sup>247</sup>

27. There is no uncertainty about who “we” are. According to the Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda:

“The United Nations failed the people of Rwanda during the genocide in 1994. It is a failure for which the United Nations as an organization, but also its Member States, should have apologized more clearly, more frankly, and much earlier.”<sup>248</sup>

28. Mr. President, Members of the Court, apologies are not enough. They always come too late, when there is already something to apologize for: the failure to act, and the resulting catastrophe that might have been prevented. And, as history has shown, when the international community fails to act, it only invites further catastrophes. In Lieutenant-General Dallaire’s distressingly prophetic words: “The genocide in Rwanda was a failure of humanity that could easily happen again.”<sup>249</sup>

29. Mr. President, tragically, it *has* happened again. In Myanmar. And still, the world has not yet found the will or the means to stop it. So say the independent fact-finding reports of highly credible investigators, acting under the mandate of the United Nations. So say the most respected

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<sup>246</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

<sup>247</sup> Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (2003), pp. xvii-xviii; judges’ folder, tab 21.

<sup>248</sup> *Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda* (15 December 1999), enclosed in UN doc. S/1999/1257 (16 Dec. 1999), p. 51.

<sup>249</sup> Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (2003), p. xviii; judges’ folder, tab 21.

international experts on genocide, including those of the United States Holocaust Memorial Museum, who have written:

“Shocking in scale, the mass atrocities against the Rohingya were predictable and preventable, following decades of escalating persecution, including the revocation of citizenship and restrictions on basic freedoms. The Burmese government as well as the international community *failed to respond to the early warning signs and prevent the genocide.*”<sup>250</sup>

30. Mr. President, genocide in Myanmar is happening *still*. Of course, Myanmar denies this. As have all the perpetrators of genocide, throughout history. But the UN Fact-Finding Mission, the UN Special Rapporteur, and other independent experts and observers have heard all of Myanmar’s excuses and explanations, and found them unconvincing, and even cynical, and refuted them one by one in their detailed reports.

31. The Gambia has come to the International Court of Justice in the face of an insufficient response by the international community, because, as its Agent so eloquently said, it has faith in this Court to uphold the Genocide Convention, and the humanitarian and civilizing purposes it reflects. The time to prevent further genocide is now, because nothing less will save the Rohingya from their ultimate destruction as a group.

32. In these proceedings, The Gambia asks you to order Myanmar to do what it is already obligated to do under the Genocide Convention, but has refused to do, and cannot be counted upon to do without the Court’s intervention. The Court spelled out these obligations in its Judgment in the *Bosnian genocide* case, where it made clear that the obligation to prevent genocide does *not* only come into being

“when *perpetration* of genocide commences; that — the Court said — would be absurd, since the *whole point* of the obligation is to *prevent*, or *attempt* to prevent, the occurrence of the act. In fact, a State’s obligation to prevent, and the corresponding duty to act, arise *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. From *that moment* onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent . . . it is *under a duty* to *make use* of these means.”<sup>251</sup>

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<sup>250</sup> US Holocaust Memorial Museum, *Museum Statement on 2nd Anniversary of Atrocities Against Rohingya* (22 Aug. 2019), available at <https://www.ushmm.org/information/press/press-releases/museum-statement-on-2nd-anniversary-of-atrocities-against-rohingya>; emphasis added; judges’ folder, tab 22.

<sup>251</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007 (I), p. 222, para. 431; emphasis added.

33. Mr. President, The Gambia asks you to order provisional measures that require Myanmar to fulfil this obligation, by refraining from any further acts of genocide, and by using every means at its disposal to prevent further acts of genocide against the Rohingya people.

34. In two words, Mr. President, The Gambia asks you to say to Myanmar: “Never again!” And to say it in the clearest of terms, and with all the legal and moral force that this highest of all international judicial authorities commands.

35. The UN Fact-Finding Mission, at the conclusion of its report of 16 September 2019, made a series of recommendations to the United Nations and the international community, on actions that must be taken to prevent further genocidal acts against the Rohingya people. Among them is this one at tab 2, p. 22: “Encourage and support States parties to the Genocide Convention to bring a case to the International Court of Justice against Myanmar for breaches of its obligations under the Genocide Convention.”<sup>252</sup>

36 The Gambia has heeded that call. On its own behalf, as a State party to the Genocide Convention. On behalf of the 57 Member States of the Organisation for Islamic Cooperation which have fully endorsed and encouraged this case. And most especially, on behalf of the Rohingya people, whose hopes for survival as a group in Myanmar now rest with you. On behalf of all, Mr. President, The Gambia calls on this honourable Court, humbly and respectfully, to indicate the particular provisional measures that are urgently required in these exigent circumstances, and that my distinguished colleague, Professor Sands, will describe for you.

37. Mr. President, Members of the Court, this concludes my presentation. I thank you, as always, for your kind courtesy and patient attention, and I ask that you call Professor Sands to the podium.

The PRESIDENT: I thank Mr. Reichler for his statement. I now invite Professor Sands to take the floor. You have the floor.

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<sup>252</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar* (16 Sept. 2019), para. 702; judges’ folder, tab 2, p. 22.

Mr. SANDS:

### VIII. THE REQUESTED PROVISIONAL MEASURES

1. Mr. President, Madam Vice-President, Members of the Court, it is a privilege — albeit a regrettable one — to appear before you on behalf of The Gambia, on this application concerning the crime of genocide. My colleagues have addressed the evidentiary and legal prerequisites for the Order on provisional measures that we seek. My submissions now turn to the specific provisional measures we request, and why they are needed.

2. This Court is the ultimate guardian of the Genocide Convention. It is on you that the eyes of the world are turned today, at this preliminary stage of the proceedings. The Court's well-established conditions for the grant of provisional measures are amply met as you have heard.

3. This application is brought to protect hundreds of thousands of people from a multitude of acts that are genocidal. Back in 1948, the drafters of the Convention well knew the consequences of a failure to prevent acts of genocide. They created a system to allow steps to be taken to respond to a future genocide. That is why a Convention was proposed. That is why it was negotiated and adopted. That is why Article IX bestows a jurisdiction on this Court to ensure that the obligations set forth in the Convention — and the rights of The Gambia — are respected, including by provisional measures.

4. Mr. President, as you well know, this is not the first time the Court has been asked to protect rights under the Convention. In April 1993, in the *Bosnian Genocide* case, the Court ordered the Government of the FRY (Federal Republic of Yugoslavia) to “take all measures within its power to prevent commission of the crime of genocide”<sup>253</sup>. It did so by a unanimous decision. It also voted, by 13 votes to 1, to adopt a further order, addressing, in particular, the acts of military, paramilitary and irregular armed units<sup>254</sup>.

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<sup>253</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 24, para. 52 A (1).*

<sup>254</sup> *Ibid.*, para. 52 A (2).

5. Five months later, it reaffirmed those measures and called for its earlier order to be “immediately and effectively implemented”<sup>255</sup>. Mr. President, we do not wish to be back here in five months’ time. Our hope is that the Court will order provisional measures that are clear and specific. Our expectation is that Myanmar will comply fully with a binding order of this Court.

6. The provisional measures we seek are concerned — all of them — with “genocide-related activity”, as *ad hoc* Judge Lauterpacht put it back in 1993<sup>256</sup>. As Mr. Reichler made clear, it is difficult to imagine many situations the Court has faced in which the need for provisional measures has been more acute. The evidence before you, frankly speaking, is overwhelming. The risk of destruction of the Rohingya group, in part or in whole, is very real<sup>257</sup>.

7. In light of that evidence, it cannot reasonably be argued that there is no further risk of genocidal acts. The further harm that is anticipated to occur cannot be undone or recompensed<sup>258</sup>. As the Court put it in the *Bosnia* case, “no reparation could efface the results of conduct which the Court may rule to have been contrary to international law”<sup>259</sup>.

8. In the face of Myanmar’s failure to give effect to a multitude of calls, repeated, to desist from acts that give rise to genocide, we submit that this Court must act. The question before you is not whether to order provisional measures, but what provisional measures to order.

### **The provisional measures sought**

9. The Gambia seeks six provisional measures:

— The first and the second require Myanmar to act with immediate effect to prevent the further genocide of the Rohingya group.

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<sup>255</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 349, para. 61 (1).

<sup>256</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*; separate opinion of Judge *ad hoc* Lauterpacht, p. 433, para. 73.

<sup>257</sup> UN HRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sep. 2019), paras. 238-240.

<sup>258</sup> *Denunciation of the Treaty of 2 November 1865 between China and Belgium, Measures of Protection, 8 January 1927, P.C.I.J., Series A, No. 8*, p. 7.

<sup>259</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 349, para. 58.

- The third measure requires Myanmar not to destroy or render inaccessible any evidence relating to the events already described in the Application — this is to ensure the integrity of the proceedings before this Court and the proper fulfilment by the Court of its dispute-settlement function.
- The fourth and fifth measures require both Parties not to take any action, and positively to act to prevent any action, which might aggravate the dispute, or render it more difficult of resolution, and to provide a report to the Court on implementing measures.
- The sixth measure, which we made available yesterday, requires Myanmar to co-operate with United Nations bodies that seek to investigate the acts that are the subject of this case.

Each of these requests is based on the Court's jurisprudence<sup>260</sup>.

### **The first two provisional measures**

10. I turn to the first two provisional measures. They are directed, Mr. President, to Myanmar's obligation to prevent genocide — *first*, by taking all measures within its power to prevent genocidal acts against the Rohingya group, and *second*, by ensuring, in particular, that any military, paramilitary or other organizations under its direction or support, or subject to its control or influence, do not commit acts of genocide against the Rohingya group.

11. The written Application sets out the specific acts which are sought to be prevented: all of them fall within the list of genocidal acts defined in Article II. As you have heard, there is compelling evidence that each of these acts has already been perpetrated, and *is* being perpetrated, right now, against the Rohingya group by Myanmar or by entities acting under Myanmar's control or at its behest.

12. Accordingly, the request for these two provisional measures goes to the very heart of The Gambia's Application: to uphold and to enforce the Genocide Convention and its rights under it, to protect the Rohingya group against total or partial destruction.

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<sup>260</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993; Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986; Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003.*

13. Mr. President, the measures requested are grounded in the recognition of the “value in humankind”, the idea that every human being is expected to have a “value and dignity of her kind or his kind”<sup>261</sup>. Those words will be familiar to some in the room. According to the United Nations Fact-Finding Mission, regrettably, that is not the situation in Myanmar today, as far as the Rohingya are concerned. Indeed, in 2016, the State Counsellor and Foreign Minister of Myanmar is reported to have insisted to the United Nations that it must refrain from even using the word “Rohingya”. “We won’t use the term Rohingya because Rohingya are not recognized as among the 135 official ethnic groups”. The Agent’s Ministry affirmed that statement<sup>262</sup>.

14. The Foreign Ministry of Myanmar has simply refused to recognize the Rohingya as a group, and it has overtly sought to dehumanize the group and its members. In September 2018, the UN Fact-Finding Mission reported on a communication from the Foreign Ministry that included links to four videos about the August 2017 events in Rakhine State. The four videos were each imbued with explicitly anti-Muslim and anti-Rohingya messages<sup>263</sup>. The UN Fact-Finding Report does not mince its words. It states — and you will find it at tab 1 — as follows:

“The State Counsellor, Daw Aung San Suu Kyi, has not used her de facto position as Head of Government, nor her moral authority, to stem or prevent the unfolding events, or seek alternative avenues to meet the Government’s responsibility to protect the civilian population or even to reveal and condemn what was happening. On the contrary, the civilian authorities have spread false and hateful narratives; denied the Tatmadaw’s wrongdoing; blocked independent investigations, including of the Fact-Finding Mission; and overseen the bulldozing of burned Rohingya villages and the destruction of crime sites and evidence.”<sup>264</sup>

15. The Fact-Finding Mission is not alone in expressing these concerns. Very recently, the UN Special Rapporteur on the human rights situation in Myanmar has gone even further in her expression<sup>265</sup>.

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<sup>261</sup> Speech of Aung San Suu Kyi to the University of Oxford (20 June 2012) available at <http://www.ox.ac.uk/news/2012-06-20-transcript-aung-san-suu-kyi-speech#>.

<sup>262</sup> Antoni Slodkowski, “Myanmar’s Suu Kyi reiterates stance on not using term ‘Rohingya’ — Official”, Reuters (20 June 2016), available at <https://www.reuters.com/article/us-myanmar-rights/myanmars-suu-kyi-reiterates-stance-on-not-using-term-rohingya-official-idUSKCN0Z61AC>.

<sup>263</sup> 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), note 3000.

<sup>264</sup> *Ibid.*, para. 1548; judges’ folder, tab 1, p. 35; UN HRC, *Report of the independent international fact-finding mission on Myanmar*, UN doc. A/HRC/39/64 (12 Sep. 2018), para. 93.

<sup>265</sup> Yanghee Lee and 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>.

16. The Gambia's Application is premised on the view that the Rohingya group and its members are a part of "humankind", that they have a "value and a dignity", and that they are entitled to the fullest protections of the Convention from any act which is plausibly capable of being characterized as genocidal, before it is too late. Given the evidence before the Court as to what has already occurred, and given the length of time these proceedings are likely to take, the need for protective measures to ensure the survival of the Rohingya as a group in Myanmar, and The Gambia's rights as a State party to the Convention, is pressing and urgent.

17. The *primary obligation* arising under Article I of the Convention — the rights it creates — is the duty on State parties to prevent genocide. That duty seeks to give effect to the words of Rafael Lemkin, whose book *Axis Rule in Europe*, published in the autumn of 1944, first coined the word — you will have it at tab 23 and this is from that first edition — "[G]enocide does not necessarily mean the immediate destruction of a nation", he wrote. "It is intended rather to signify a coordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups." It is not a single act, genocide, and it does not occur at a single moment. It comprises "different actions", the objectives of which include the "disintegration of social and political institutions" followed by, as Lemkin put it, "the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups"<sup>266</sup>.

18. The intervention of a court, therefore, does not have to await the final moment, although in the case of the many thousands of "lives of individuals" belonging to the Rohingya group that moment has already come and gone. Genocide is a continuum, and you are called upon to act now, as acts of genocide have occurred and are continuing to occur. The ILC Articles on State Responsibility make clear that obligation to prevent a given act "extends over the entire period during which the event continues"<sup>267</sup>, an approach the Court confirmed in its *Bosnian Genocide Judgment* in 2007<sup>268</sup>.

19. The order for provisional measures we seek would require Myanmar to respect and comply with its Article I obligation. It is the only means to ensure that the rights of The Gambia,

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<sup>266</sup> Rafael Lemkin, *Axis Rule in Occupied Europe*, 1944, p. 79; judges' folder, tab 23.

<sup>267</sup> ILC, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001), Art. 14 (3).

<sup>268</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 222, para. 431.

and of the Rohingya group, are further safeguarded under international law. It is the only means to ensure that the ability of this Court to resolve the dispute is not compromised by further acts of Myanmar rendering the partial or total destruction of the Rohingya group in Myanmar a *fait accompli*.

20. The first two provisional measures sought in this Application are equivalent to those ordered by this Court in the *Bosnian Genocide* case and they serve the same “conservatory” purpose. Here, as then, an order on provisional measures does not “anticipate or prejudice the final judgment” and it is “in conformity with the nature of interim measures because they [are] the only means ‘to preserve the substance of the rights . . . *pendente lite*’”<sup>269</sup>. Furthermore, just as in that and other cases in which the Court has considered provisional measures, irreparable damage is at risk here<sup>270</sup>.

21. You will recall, to achieve its protective function and having regard to the experience in the *Bosnia* case, and in particular — and I emphasize this —, the fact that the killing of 8,000 men in Srebrenica occurred two years *after* the Court ordered provisional measures, The Gambia submits that something more is needed here. The Court’s Order should and must identify, on a non-exhaustive basis, particular acts of genocide — which the evidence shows have already been committed — and which must not recur. As set out in the reports of the UN Fact-Finding Mission and other bodies, these acts include: extrajudicial killings; physical and mental abuse; rape and other forms of sexual abuse; the destruction of homes and villages; forced starvation; denial of access to medical treatment and humanitarian assistance; and restrictions on movement. In our respectful submission, your order must explicitly set out acts of a genocidal nature which are to be avoided and prohibited. Specificity of an order can only help to contribute to their non-recurrence.

22. In the present appalling circumstances, the Court’s order should, we submit, indicate provisional measures of as great a specificity as possible. Only in this way can we hope that the rights of The Gambia, and the safety of the Rohingya group, be fully protected.

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<sup>269</sup> Andreas Zimmerman & Christian J. Tams (Eds.), *The Statute of the International Court of Justice: A Commentary* (3rd Ed., 2019), Part Three, Ch. III, p. 1149.

<sup>270</sup> *Ibid.*, p. 1162.

### **The third, fourth, fifth and sixth provisional measures**

23. Mr. President, I turn briefly to the third, fourth, fifth and sixth provisional measures. The Gambia also seeks what might be called “procedural” provisional measures, with the aim overall of protecting the integrity of the proceedings before this Court. The measures requested have several objectives. In particular, they will, first, contribute to the preservation and accessibility of evidence on the merits of the dispute; second, prevent any aggravation or extension of the dispute between The Gambia and Myanmar; and third, assure the implementation of the foregoing provisional measures by providing for reporting on them within four months of their issue.

24. To these measures, The Gambia has added a *sixth provisional measure*. This is necessitated by Myanmar’s persistent refusal — persistent refusal — to co-operate at all with the United Nations Fact-Finding Mission, or any other independent fact-finding mission including the UN Special Rapporteur<sup>271</sup>. In particular, Myanmar has refused all such missions access to Rakhine State, to the scenes of the Tatmadaw’s “clearance operations”, or to the places where genocidal acts against the Rohingya are reported to have been committed. This deliberate effort to prevent access to evidence of genocide, which is documented in the UN Fact-Finding Mission’s reports, must not be allowed to continue during the pendency of these proceedings, because, we say, it constitutes an obstruction of the fair administration of justice, which it is the Court’s responsibility to ensure.

25. And so, accordingly, as a sixth provisional measure, we request that Myanmar be ordered to grant access to, and co-operate 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.

26. These provisional measures, the third through the sixth, are necessary to ensure that the Court is properly equipped in due course to adjudge the merits of the underlying claim, including the facts, and to ensure that the dispute can be considered fairly and comprehensively, by reference to all relevant material. The order is necessary where there is an evidential imbalance between the Parties, since the acts complained of occurred on the territory of Myanmar, which has the primary

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<sup>271</sup> UN General Assembly Resolution, *Situation of human rights in Myanmar* (22 Dec. 2018), UN doc. A/RES/73/264; OHCHR, *Statement by Ms Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 74th session of the General Assembly* (22 Oct. 2019), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25192&LangID=E>.

control of all the first-hand evidence. In such a case, where access to various areas has been prevented, the Court, we submit, has a responsibility to ensure the fair disposal of the claim.

27. Moreover, the indications sought will also assist in protecting against non-compliance, or inadequate compliance, as so regrettably happened in the *Bosnian Genocide* case<sup>272</sup>. The Court has — in other cases that involve the rights both of States and individuals — required parties to inform it of the progress made in implementing its orders<sup>273</sup>. We are not looking for an excessively active continuing role in these matters, but given the gravity of the situation, given the likely length of future proceedings, and given, in particular, what occurred in Bosnia and Srebrenica, after the Court's provisional measures in that case, we submit that the facts of this case call for a clear reporting requirement.

### Conclusion

28. Mr. President, to sum up, the indication of provisional measures is, we recognize, without prejudice to the merits of the underlying claim. Yet the evidence at this stage indicates grave violence and genocidal acts against the Rohingya group, in flagrant contravention of the Genocide Convention and in breach of The Gambia's rights. The consequences of not indicating clear and particularized, specific provisional measures, and not taking steps to intervene in Myanmar's disregard of its international obligations, would, we fear, be very grave indeed: for the Rohingya group, who remain at real risk of further genocidal acts; for the future effectiveness of the Convention; for the rights of The Gambia; and for the reputation of this Court, which is equipped with and must exercise its powers to afford an effective realization of the rights under the Convention.

29. That means, we respectfully submit, indicating the provisional measures sought by The Gambia, as well as any others in addition the Court might deem appropriate. The balance of equities points overwhelmingly in favour of far-reaching provisional measures.

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<sup>272</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 348, para. 57.*

<sup>273</sup> *Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, p. 92, para. 59 (I) (b).*

30. Mr. President, Madam Vice-President, Members of the Court, many in the Great Hall today — which happens to be International Human Rights Day — will have read a fine book with the title: *If This Is a Man*, by the Italian writer Primo Levi. It was published in 1947; you will find the relevant extract at tab 24. In the preface, Primo Levi recorded a concern which might be said to be of universal application. He wrote: “Many people — many nations — can find themselves holding, more or less wittingly, that ‘every stranger is an enemy’”. When this happens, Primo Levi continued, “when the unspoken dogma becomes the major premise in a syllogism, then, at the end of the chain, there is the Lager”<sup>274</sup>.

31. In the case of Myanmar and the Rohingya, when it comes to the merits, this Court will have the authority to break that chain. In the meantime, what you have is the power of interim relief, and we place our hope in your willingness to fully discharge your judicial responsibility and powers.

32. Mr. President, Members of the Court, I thank you for your kind attention. This brings The Gambia’s first round to a close.

The PRESIDENT: I thank Professor Sands. Your statement indeed brings to an end today’s sitting. The Court will meet again tomorrow, 11 December 2019, at 10 a.m., to hear the first round of oral observations of Myanmar. The sitting is adjourned.

*The Court rose at 1.15 p.m.*

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<sup>274</sup> Primo Levi, *If This Is A Man/The Truce* (2014), Preface, p. 9; judges’ folder, tab 24.