

23 JANUARY 2020

ORDER

**APPLICATION OF THE CONVENTION ON THE PREVENTION
AND PUNISHMENT OF THE CRIME OF GENOCIDE**

(THE GAMBIA *v.* MYANMAR)

**APPLICATION DE LA CONVENTION POUR LA PRÉVENTION
ET LA RÉPRESSION DU CRIME DE GÉNOCIDE**

(GAMBIE *c.* MYANMAR)

23 JANVIER 2020

ORDONNANCE

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INTERNATIONAL COURT OF JUSTICE

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23 January 2020

**APPLICATION OF THE CONVENTION ON THE PREVENTION
AND PUNISHMENT OF THE CRIME OF GENOCIDE**

(THE GAMBIA *v.* MYANMAR)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: President YUSUF; Vice-President XUE; Judges TOMKA, ABRAHAM, BENNOUNA, CANÇADO TRINDADE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN, SALAM, IWASAWA; Judges ad hoc PILLAY, KRESS; Registrar GAUTIER.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

1. On 11 November 2019, the Republic of The Gambia (hereinafter “The Gambia”) filed in the Registry of the Court an Application instituting proceedings against the Republic of the Union of Myanmar (hereinafter “Myanmar”) concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the “Genocide Convention” or the “Convention”).

2. At the end of its Application, The Gambia

“respectfully requests the Court to adjudge and declare that Myanmar:

- has breached and continues to breach its obligations under the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI;
- must cease forthwith any such ongoing internationally wrongful act and fully respect its obligations under the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI;
- must ensure that persons committing genocide are punished by a competent tribunal, including before an international penal tribunal, as required by Articles I and VI;
- must perform the obligations of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group, including but not limited to allowing the safe and dignified return of forcibly displaced Rohingya and respect for their full citizenship and human rights and protection against discrimination, persecution, and other related acts, consistent with the obligation to prevent genocide under Article I; and
- must offer assurances and guarantees of non-repetition of violations of the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI.”

3. In its Application, The Gambia seeks to found the Court’s jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention.

4. The Application contained a Request for the indication of provisional measures submitted with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

5. At the end of its Request, The Gambia asked the Court to indicate the following provisional measures:

- “(a) Myanmar shall immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent all acts that amount to or contribute to the crime of genocide, including taking all measures within its power to prevent the following acts from being committed against [any] member of the Rohingya group: extrajudicial killings or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part;
- (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.”

6. The Registrar immediately communicated to the Government of Myanmar the Application containing the Request for the indication of provisional measures, in accordance with Article 40, paragraph 2, of the Statute of the Court, and Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing by The Gambia of the Application and the Request for the indication of provisional measures.

7. Pending the notification provided for by Article 40, paragraph 3, of the Statute, the Registrar informed all States entitled to appear before the Court of the filing of the Application and the Request for the indication of provisional measures by a letter dated 11 November 2019.

8. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. The Gambia chose Ms Navanethem Pillay and Myanmar Mr. Claus Kress.

9. By letters dated 12 November 2019, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had fixed 10, 11 and 12 December 2019 as the dates for the oral proceedings on the Request for the indication of provisional measures.

10. By a letter dated 9 December 2019, a copy of which was immediately communicated to Myanmar, The Gambia submitted to the Court the text of the following additional provisional measure requested from the Court:

“The Gambia requests that Myanmar be ordered to grant access to, and cooperate with, all United Nations fact-finding bodies that are engaged in investigating alleged genocidal acts against the Rohingya, including the conditions to which the Rohingya are subjected.”

11. At the public hearings, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of The Gambia: H.E. Mr. Abubacarr Marie Tambadou,
Mr. Payam Akhavan,
Mr. Andrew Loewenstein,
Ms Tafadzwa Pasipanodya,
Mr. Arsalan Suleman,
Mr. Pierre d’Argent,
Mr. Paul Reichler,
Mr. Philippe Sands.

On behalf of Myanmar: H.E. Ms Aung San Suu Kyi,
Mr. William Schabas,
Mr. Christopher Staker,
Ms Phoebe Okowa.

12. At the end of its second round of oral observations, The Gambia asked the Court to indicate the following provisional measures:

“(a) Myanmar shall immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent all acts that amount to or contribute to the crime of genocide, including taking all measures within its power to prevent the following acts from being committed against any member of the Rohingya group: extrajudicial killings or physical abuse; rape or other forms of sexual

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

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

13. At the end of its second round of oral observations, Myanmar requested the Court:

- “(1) to remove the case from its List;
- (2) in the alternative, to reject the request for the indication of provisional measures submitted by The Gambia.”

*

* *

14. In its Application, The Gambia seeks protection for “all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Genocide Convention”. According to a 2016 Report of the United Nations High Commissioner for Human Rights, Rohingya Muslims “self-identify as a distinct ethnic group with their own language and culture, and claim a longstanding connection to Rakhine State”; however, “[s]uccessive Governments [of Myanmar] have rejected these claims, and the Rohingya were not included in the list of recognized ethnic groups. Most Rohingya are stateless” (United Nations, Situation of human rights of Rohingya Muslims and other minorities in Myanmar, doc. A/HRC/32/18, 29 June 2016, para. 3).

15. The Court’s references in this Order to the “Rohingya” should be understood as references to the group that self-identifies as the Rohingya group and that claims a longstanding connection to Rakhine State, which forms part of the Union of Myanmar.

I. PRIMA FACIE JURISDICTION

1. General introduction

16. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, *inter alia*, *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. 630, para. 24).

17. In the present case, The Gambia seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention (see paragraph 3 above). The Court must therefore first determine whether those provisions prima facie confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

18. Article IX of Genocide Convention 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.”

19. The Gambia and Myanmar are parties to the Genocide Convention. Myanmar deposited its instrument of ratification on 14 March 1956, without entering a reservation to Article IX, but making reservations to Articles VI and VIII. The Gambia acceded to the Convention on 29 December 1978, without entering any reservation.

2. Existence of a dispute relating to the interpretation, application or fulfilment of the Genocide Convention

20. Article IX of the Genocide Convention makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation, application or fulfilment of the Convention. A dispute between States exists where they hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations (see *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. 115, para. 22, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, *I.C.J. Reports 1950*, p. 74). The claim of one party must be "positively opposed" by the other (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1962*, p. 328). The Court cannot limit itself to noting that one of the parties maintains that a dispute exists, and the other denies it (cf. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment*, *I.C.J. Reports 1996 (II)*, p. 810, para. 16). Since The Gambia has invoked as a basis of the Court's jurisdiction the compromissory clause in an international convention, the Court must ascertain whether the acts complained of by the Applicant are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain (*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). The Court also recalls that, "[i]n principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court" (see, for example, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 2016 (I)*, p. 271, para. 39).

* * *

21. The Gambia contends that a dispute exists with Myanmar relating to the interpretation and application of the Genocide Convention and the fulfilment by Myanmar of its obligations "to prevent genocide and to desist from its own acts of genocide". Specifically, The Gambia asserts that in October 2016 the Myanmar military and other Myanmar security forces began widespread and systematic "clearance operations" against the Rohingya group, during the course of which they committed mass murder, rape and other forms of sexual violence, and engaged in the systematic destruction by fire of Rohingya villages, often with inhabitants locked inside burning houses, with the intent to destroy the Rohingya as a group, in whole or in part. The Gambia alleges that, from August 2017 onwards, such genocidal acts continued with Myanmar's resumption of "clearance operations" on a more massive and wider geographical scale.

22. The Gambia maintains that, prior to filing its Application, it made clear to Myanmar that the latter's actions constituted a violation of its obligations under the Genocide Convention, but that Myanmar "has rejected and opposed any suggestion that it has violated the Genocide Convention". In this connection, The Gambia argues that it has made several statements

in multilateral settings whereby it clearly addressed the situation of the Rohingya in Rakhine State, including allegations of breaches by Myanmar of the Genocide Convention, and expressed its readiness to take this issue to the Court. The Gambia adds that Myanmar was aware that the Independent International Fact-Finding Mission on Myanmar established by the Human Rights Council of the United Nations (hereinafter the “Fact-Finding Mission”) welcomed the efforts of States, in particular Bangladesh and The Gambia, and the Organisation of Islamic Cooperation (hereinafter the “OIC”) “to encourage and pursue a case against Myanmar before the International Court of Justice under the Convention on the Prevention and Punishment of the Crime of Genocide” (United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/42/50, 8 August 2019, para. 107). According to The Gambia, Myanmar completely rejected the Fact-Finding Mission reports and the conclusions contained therein. Finally, The Gambia emphasizes that its claims against Myanmar regarding breaches by the latter of its obligations under the Genocide Convention were specifically communicated to Myanmar by a Note Verbale sent on 11 October 2019, to which Myanmar did not respond.

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23. Myanmar contends that the Court does not have jurisdiction under Article IX of the Genocide Convention. It first argues that there is no dispute between the Parties in view of the fact that the proceedings before the Court were instituted by The Gambia, not on its own behalf, but rather as a “proxy” and “on behalf of” the OIC. It further argues that no such dispute existed at the time of the filing of the Application. In this regard, Myanmar asserts that the allegations contained in the OIC documents and statements regarding the situation of the Rohingya mentioned by The Gambia could not give rise to a dispute between the Parties as they did not amount to allegations of violations of the Genocide Convention made by The Gambia against Myanmar. It also contends that the Court cannot infer the existence of a dispute between the Parties from The Gambia’s Note Verbale of 11 October 2019 and the absence of any response by Myanmar before the filing of the Application on 11 November 2019. In Myanmar’s opinion, the Note Verbale in question did not call for a response as it did not formulate specific allegations of violations of the Convention, and, in any event, such a response could not be expected within a month.

24. Myanmar concludes that, in the absence of a dispute, the Court’s lack of jurisdiction is manifest and the case should be removed from the General List.

* *

25. With regard to Myanmar’s contention that, in bringing before the Court its claims based on alleged violations of the Genocide Convention, The Gambia acted as a “proxy” for the OIC in circumvention of Article 34 of the Statute, the Court notes that the Applicant instituted proceedings

in its own name, and that it maintains that it has a dispute with Myanmar regarding its own rights under the Convention. In the view of the Court, the fact that The Gambia may have sought and obtained the support of other States or international organizations in its endeavour to seise the Court does not preclude the existence between the Parties of a dispute relating to the Genocide Convention.

26. Turning to the question whether there was a dispute between the Parties at the time of the filing of the Application, the Court recalls that, for the purposes of deciding this issue, it takes into account in particular any statements or documents exchanged between the Parties (see *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (II), pp. 443-445, paras. 50-55), as well as any exchanges made in multilateral settings (see *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. 94, para. 51 and p. 95, para. 53). In so doing, it pays special attention to “the author of the statement or document, their intended or actual addressee, and their content” (*ibid.*, p. 100, para. 63). The existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I), p. 270, paras. 35-36).

27. The Court notes that, on 8 August 2019, the Fact-Finding Mission published a report which affirmed its previous conclusion “that Myanmar incurs State responsibility under the prohibition against genocide” and welcomed the efforts of The Gambia, Bangladesh and the OIC to pursue a case against Myanmar before the Court under the Genocide Convention (United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/42/50, 8 August 2019, paras. 18 and 107). On 26 September 2019, The Gambia stated during the general debate of the seventy-fourth session of the General Assembly of the United Nations that it was ready to lead concerted efforts to take the Rohingya issue to the International Court of Justice (United Nations, *Official Records of the General Assembly*, doc. A/74/PV.8, 26 September 2019, p. 31). Myanmar addressed the General Assembly two days later, characterizing the Fact-Finding Mission reports as “biased and flawed, based not on facts but on narratives” (United Nations, *Official Records of the General Assembly*, doc. A/74/PV.12, 28 September 2019, p. 24). In the Court’s view, these statements made by the Parties before the United Nations General Assembly suggest the existence of a divergence of views concerning the events which allegedly took place in Rakhine State in relation to the Rohingya. In this regard, the Court recalls that

“a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis* . . . the position or the attitude of a party can be established by inference, whatever the professed view of that party” (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 315, para. 89).

28. In addition, the Court takes into account The Gambia's Note Verbale of 11 October 2019, in which The Gambia, referring to the reports of the Fact-Finding Mission, wrote that it "underst[ood] Myanmar to be in ongoing breach of [its] obligations under the [Genocide] Convention and under customary international law" and "insist[ed] that Myanmar take all necessary actions to comply with these obligations". The Court observes that this Note Verbale specifically referred to the reports of the Fact-Finding Mission and indicated The Gambia's opposition to the views of Myanmar, in particular as regards the latter's denial of its responsibility under the Convention. In light of the gravity of the allegations made therein, the Court considers that the lack of response may be another indication of the existence of a dispute between the Parties. As the Court has previously held, "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 271, para. 37).

29. As to whether the acts complained of by the Applicant are capable of falling within the provisions of the Genocide Convention, the Court recalls that The Gambia contends that Myanmar's military and security forces and persons or entities acting on its instructions or under its direction and control have been responsible, *inter alia*, for killings, rape and other forms of sexual violence, torture, beatings, cruel treatment, and for the destruction or denial of access to food, shelter and other essentials of life, all with the intent to destroy the Rohingya group, in whole or in part. In The Gambia's view, these acts are all attributable to Myanmar, which it considers to be responsible for committing genocide. The Gambia contends that Myanmar has also violated other obligations under the Genocide Convention, "including by attempting to commit genocide; conspiring to commit genocide; inciting genocide; complicity in genocide; and failing to prevent and punish genocide". The Court notes that Myanmar, for its part, denied that it has committed any of the violations of the Genocide Convention alleged by The Gambia, arguing in particular the absence of any genocidal intent.

30. For the purposes of the present proceedings, the Court is not required to ascertain whether any violations of Myanmar's obligations under the Genocide Convention have occurred. Such a finding, which notably depends on the assessment of the existence of an intent to destroy, in whole or in part, the group of the Rohingya as such, could be made by the Court only at the stage of the examination of the merits of the present case. What the Court is required to do at the stage of making an order on provisional measures is to establish whether the acts complained of by The Gambia are capable of falling within the provisions of the Genocide Convention. In the Court's view, at least some of the acts alleged by The Gambia are capable of falling within the provisions of the Convention.

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

3. The reservation of Myanmar to Article VIII of the Convention

32. Myanmar further submits that The Gambia cannot validly seise the Court as a result of Myanmar's reservation to Article VIII of the Genocide Convention, which specifically deals with the right of any of the Contracting Parties to the Convention to seise any competent organ of the United Nations. According to the Respondent, this provision applies to the Court, being a competent organ of the United Nations. In its view, only this provision enables States parties not specially affected to bring a claim before the Court for alleged breaches of the Convention by another State party. Myanmar therefore submits that the valid seisin of the Court by The Gambia, on the basis of Article VIII, is a necessary precondition to the exercise of the Court's jurisdiction under Article IX of the Genocide Convention. In light of its reservation to Article VIII, Myanmar concludes that the Court should not assume jurisdiction in the present case.

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33. The Gambia submits that Myanmar's argument based on its reservation to Article VIII of the Genocide Convention should be rejected as it would amount to depriving Article IX of any substance. In particular, the Applicant contends that the Respondent has not explained how its argument could be reconciled with Myanmar's consent to Article IX and to the Court's jurisdiction.

* *

34. The Court recalls that Myanmar has made a reservation to Article VIII of the Genocide Convention, which reads as follows: "With reference to article VIII, the Union of Burma makes the reservation that the said article shall not apply to the Union."

Article VIII of the Genocide Convention provides:

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

35. The Court considers that, although the terms "competent organs of the United Nations" under Article VIII are broad and may be interpreted as encompassing the Court within their scope of application, other terms used in Article VIII suggest a different interpretation. In particular, the Court notes that this provision only addresses in general terms the possibility for any Contracting Party to "call upon" the competent organs of the United Nations to take "action" which is "appropriate" for the prevention and suppression of acts of genocide. It does not refer to the submission of disputes between Contracting Parties to the Genocide Convention to the Court for

adjudication. This is a matter specifically addressed in Article IX of the Convention, to which Myanmar has not entered any reservation. Article VIII and Article IX of the Convention can therefore be said to have distinct areas of application. It is only Article IX of the Convention which is relevant to the seisin of the Court in the present case (cf. *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. 23, para. 47).

36. In view of the above, Myanmar's reservation to Article VIII of the Genocide Convention does not appear to deprive The Gambia of the possibility to seise the Court of a dispute with Myanmar under Article IX of the Convention.

4. Conclusion as to prima facie jurisdiction

37. In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article IX of the Genocide Convention to deal with the case.

38. Given the above conclusion, the Court considers that it cannot accede to Myanmar's request that the case be removed from the General List for manifest lack of jurisdiction.

II. QUESTION OF THE STANDING OF THE GAMBIA

39. Myanmar accepts that, because of the *erga omnes partes* character of some obligations under the Convention, The Gambia has an interest in Myanmar's compliance with such obligations. It disputes, however, that The Gambia has the capacity to bring a case before the Court in relation to Myanmar's alleged breaches of the Genocide Convention without being specially affected by such alleged violations. Myanmar argues that "it is the right of an injured State to decide if, and eventually how, to invoke the responsibility of another State, and that the right of non-injured States to invoke such responsibility is subsidiary". The Respondent submits that Bangladesh, as the State being specially affected by the events forming the subject-matter of the Application, would be the State entitled to invoke the responsibility of Myanmar, but that Bangladesh is prevented from doing so in light of its declaration made with regard to Article IX of the Genocide Convention.

*

40. The Gambia contends that, since the obligations under the Genocide Convention are obligations *erga omnes partes*, any State party to the Genocide Convention is entitled to invoke the responsibility of another State party for the breach of its obligations, without having to prove a special interest. The Gambia argues that the fact of being party to a treaty imposing obligations *erga omnes partes* suffices to establish its legal interest and legal standing before the Court. In this regard, it refers to the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, in which the Court recognized the capacity of Belgium to bring a

claim before the Court in relation to alleged breaches of *erga omnes partes* obligations by Senegal under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the “Convention against Torture”), without determining whether Belgium had been specially affected by those breaches. The Gambia also submits that if a special interest were required with respect to alleged breaches of obligations *erga omnes partes*, in many cases no State would be in a position to make a claim against the perpetrator of the wrongful act.

* * *

41. The Court recalls that in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it observed that

“[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.” (*I.C.J. Reports 1951*, p. 23.)

In view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. In its Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the Court observed that the relevant provisions in the Convention against Torture were “similar” to those in the Genocide Convention. The Court held that these provisions generated “obligations [which] may be defined as ‘obligations *erga omnes partes*’ in the sense that each State party has an interest in compliance with them in any given case” (*Judgment, I.C.J. Reports 2012 (II)*, p. 449, para. 68). It follows that any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end.

42. The Court concludes that The Gambia has *prima facie* standing to submit to it the dispute with Myanmar on the basis of alleged violations of obligations under the Genocide Convention.

III. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED

43. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such

measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *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)*, pp. 421-422, para. 43).

44. At this stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights which The Gambia wishes to see protected exist; it need only decide whether the rights claimed by The Gambia on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*ibid.*, para. 44).

* *

45. In its Application, The Gambia states that it seeks to assert the rights of “all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Genocide Convention”, including the “rights of the Rohingya group to exist as a group”, to be protected from acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide, in accordance with Article III of the Convention. The Gambia adds that it “also seeks to protect the *erga omnes partes* rights it has under the Convention, which mirror the *erga omnes* obligations of the Convention with which it is entitled to seek compliance”.

46. The Gambia contends that, for the purposes of the indication of provisional measures, the rights it asserts in the present case are plausible, and that their protection coincides with the very object and purpose of the Convention. The Gambia affirms that, based on the evidence and material placed before the Court, the acts of which it complains are capable of being characterized at least plausibly as genocidal. The Applicant maintains that the evidence of the specific genocidal intent (*dolus specialis*) can be deduced from the pattern of conduct against the Rohingya in Myanmar and refers, in this regard, to the inference of such intent drawn by the Fact-Finding Mission in its reports. In The Gambia’s view, the Court should not be required, before granting provisional measures, to ascertain whether the existence of a genocidal intent is the only plausible inference to be drawn in the given circumstances from the material put before it, a requirement which would amount to making a determination on the merits. In this regard, the fact that some of the alleged acts may also be characterized as crimes other than genocide would not be inconsistent with and should not exclude the plausible inference of the existence of the said genocidal intent.

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47. Myanmar does not specifically address the question whether, for the purposes of the indication of provisional measures, the rights asserted by The Gambia are at least plausible. The Respondent rather contends that the Court should indicate provisional measures only if the claims put forward by The Gambia, based on the facts alleged in its Application, are plausible. Myanmar argues that, for that purpose, a “plausible claim” under the Genocide Convention must include evidence of the required specific genocidal intent. For Myanmar, “it is this subjective intent that is the critical element distinguishing genocide from other violations of international law such as crimes against humanity and war crimes”. Myanmar maintains that the Court should take into account the exceptional gravity of the alleged violations in assessing whether the required level of plausibility is met. It submits that the Court should therefore determine whether it is plausible that the existence of a genocidal intent is the only inference that can be drawn from the acts alleged and the evidence submitted by the Applicant. In this respect, the Respondent explains that if the information and the materials invoked in support of the Application may provide evidence indicating alternative inferences that can be drawn from the alleged conduct, other than an inference of a genocidal intent, the Court should conclude that the claims are not plausible.

48. On that basis, Myanmar states that, in the present case, the Applicant has not provided sufficient and reliable evidence to establish that the acts complained of were plausibly committed with the required specific genocidal intent. The Respondent argues that alternative inferences, other than a genocidal intent to destroy, in whole or in part, the Rohingya group as such, may be drawn from the alleged conduct of Myanmar vis-à-vis the Rohingya.

* *

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

“genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

50. Pursuant to Article III of the Genocide Convention, the commission of the following acts, other than genocide itself, are also prohibited by the Convention: conspiracy to commit genocide (Article III, para. (b)), direct and public incitement to commit genocide (Article III, para. (c)), attempt to commit genocide (Article III, para. (d)) and complicity in genocide (Article III, para. (e)).

51. The obligation to prevent and punish genocide set out in Article I of the Convention is supplemented by the distinct obligations which appear in the subsequent articles, especially those in Articles V and VI requiring the enactment of the necessary legislation to give effect to the provisions of the Convention, as well as the prosecution of persons charged with such acts. In so far as these provisions concerning the duty to punish also have a deterrent and therefore a preventive effect or purpose, they too meet the obligation to prevent genocide (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 109, para. 159 and p. 219, para. 426).

52. The Court further observes that the provisions of the Convention are intended to protect the members of a national, ethnical, racial or religious group from acts of genocide or any other punishable acts enumerated in Article III. The Court also considers that there is a correlation between the rights of members of groups protected under the Genocide Convention, the obligations incumbent on States parties thereto, and the right of any State party to seek compliance therewith by another State party (cf. *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. 426, para. 51). In the Court's view, the Rohingya in Myanmar appear to constitute a protected group within the meaning of Article II of the Genocide Convention.

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

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

and that

"[t]here may also have been failures to prevent civilians from looting or destroying property after fighting or in abandoned villages".

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

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

to the situation in Rakhine State, that crimes against humanity and war crimes have been committed in Kachin, Rakhine and Shan States, including murder, imprisonment, enforced disappearance, torture, rape, sexual slavery and other forms of sexual violence, persecution and enslavement, that children were subjected to and witnessed serious human rights violations, including killing, maiming and sexual violence, that there are reasonable grounds to conclude that serious crimes under international law have been committed that warrant criminal investigation and prosecution and that the military has consistently failed to respect international human rights law and international humanitarian law”.

By the same resolution, the General Assembly condemned

“all violations and abuses of human rights in Myanmar, as set out in the report of the fact-finding mission, including the widespread, systematic and gross human rights violations and abuses committed in Rakhine State, including the presence of elements of extermination and deportation and the systematic oppression and discrimination that the fact-finding mission concluded may amount to persecution and to the crime of apartheid”.

It also

“strongly condemn[ed] the grossly disproportionate response of the military and the security forces, deplore[d] the serious deterioration of the security, human rights and humanitarian situation and the exodus of more than 723,000 Rohingya Muslims and other minorities to Bangladesh and the subsequent depopulation of northern Rakhine State, and call[ed] upon the Myanmar authorities to ensure that those responsible for violations of international law, including human rights violations and abuses, are held accountable and removed from positions of power” (United Nations, doc. A/RES/73/264, 22 December 2018, paras. 1-2).

55. In this connection, the Court recalls that the Fact-Finding Mission, to which the General Assembly refers in its above-mentioned resolution, stated, in its report of 12 September 2018, that it had “reasonable grounds to conclude that serious crimes under international law ha[d] been committed that warrant[ed] criminal investigation and prosecution”, including the crime of genocide, against the Rohingya in Myanmar (United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/39/64, 12 September 2018, paras. 83 and 84-87). The Court notes that, regarding the acts perpetrated against the Rohingya in Rakhine State, the Fact-Finding Mission, in its 2018 detailed findings, observed that

“[t]he actions of those who orchestrated the attacks on the Rohingya read as a veritable check-list: the systematic stripping of human rights, the dehumanizing narratives and rhetoric, the methodical planning, mass killing, mass displacement, mass fear, overwhelming levels of brutality, combined with the physical destruction of the home of the targeted population, in every sense and on every level” (United Nations, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/39/CRP.2, 17 September 2018, para. 1440).

The Fact-Finding Mission concluded that “on reasonable grounds . . . the factors allowing the inference of genocidal intent [were] present” (United Nations, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/39/CRP.2, 17 September 2018, para. 1441). The Fact-Finding Mission reiterated its conclusions, based on further investigations, in its report of 8 August 2019 (United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/42/50, 8 August 2019, para. 18). The Court further notes that the Fact-Finding Mission, in its 2018 detailed findings, also asserted, based on its overall assessment of the situation in Myanmar since 2011, and particularly in Rakhine State, that the extreme levels of violence perpetrated against the Rohingya in 2016 and 2017 resulted from the “systemic oppression and persecution of the Rohingya”, including the denial of their legal status, identity and citizenship, and followed the instigation of hatred against the Rohingya on ethnic, racial or religious grounds (United Nations, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/39/CRP.2, 17 September 2018, paras. 458-748). The Court also recalls that following the events which occurred in Rakhine State in 2016 and 2017, hundreds of thousands of Rohingya have fled to Bangladesh.

56. In view of the function of provisional measures, which is to protect the respective rights of either party pending its final decision, the Court does not consider that the exceptional gravity of the allegations is a decisive factor warranting, as argued by Myanmar, the determination, at the present stage of the proceedings, of the existence of a genocidal intent. In the Court’s view, all the facts and circumstances mentioned above (see paragraphs 53-55) are sufficient to conclude that the rights claimed by The Gambia and for which it is seeking protection — namely the right of the Rohingya group in Myanmar and of its members to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of The Gambia to seek compliance by Myanmar with its obligations not to commit, and to prevent and punish genocide in accordance with the Convention — are plausible.

* *

57. The Court now turns to the issue of the link between the rights claimed and the provisional measures requested.

* *

58. The Gambia submits that the provisional measures it requests (see paragraph 12 above) are directly linked to the rights which form the subject-matter of the dispute. In particular, the Applicant asserts that the first two provisional measures have been requested to ensure Myanmar’s compliance with its obligation to prevent genocide and to uphold the rights of The Gambia to protect the Rohingya group against total or partial destruction, and that the four other provisional measures requested are aimed at protecting the integrity of the proceedings before the Court and The Gambia’s right to have its claim fairly adjudicated.

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59. Myanmar does not dispute the link of the provisional measures requested with the rights under the Genocide Convention for which protection is sought by the Applicant, except with regard to the fifth and sixth provisional measures requested. The Respondent claims that these last two measures would go beyond the specific purpose of preserving the respective rights of the Parties pending a final decision by the Court. Furthermore, with regard to the sixth provisional measure, Myanmar argues that the indication of such a measure would circumvent Myanmar's reservation to Article VIII of the Genocide Convention.

* *

60. The Court has already found (see paragraph 56 above) that the rights asserted by The Gambia under the Genocide Convention are plausible.

61. The Court considers that, by their very nature, the first three provisional measures sought by The Gambia (see paragraph 12 above) are aimed at preserving the rights it asserts on the basis of the Genocide Convention in the present case, namely the right of the Rohingya group in Myanmar and of its members to be protected from acts of genocide and other acts mentioned in Article III, and the right of The Gambia to have Myanmar comply with its obligations under the Convention to prevent and punish acts identified and prohibited under Articles II and III of the Convention, including by ensuring the preservation of evidence. As to the fourth and fifth provisional measures requested by The Gambia, the question of their link with the rights for which The Gambia seeks protection does not arise, in so far as such measures would be directed at preventing any action which may aggravate or extend the existing dispute or render it more difficult to resolve, and at providing information on the compliance by the Parties with any specific provisional measure indicated by the Court.

62. As to the sixth provisional measure requested by The Gambia, the Court does not consider that its indication is necessary in the circumstances of the case.

63. The Court concludes, therefore, that a link exists between the rights claimed and some of the provisional measures being requested by The Gambia.

IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY

64. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences (*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. 645, para. 77*).

65. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision. The 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. The Court must therefore consider whether such a risk exists at this stage of the proceedings (*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).

66. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of the Genocide Convention, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court’s decision on the Request for the indication of provisional measures.

* *

67. The Gambia contends that there is a risk of irreparable prejudice to the rights of the Rohingya and to its own rights under the Genocide Convention, as well as urgency. According to The Gambia, not only have the Rohingya been subjected to genocidal acts in the recent past, but there is a grave danger of further such acts because the Government of Myanmar continues to harbour genocidal intent and to commit crimes against members of the Rohingya group. The Gambia thus argues that the Rohingya remaining in Myanmar face grave threats to their existence, placing them in urgent need of protection.

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68. Myanmar denies that there exists a real and imminent risk of irreparable prejudice in the present case. Myanmar first asserts that it is currently engaged in repatriation initiatives for the return of displaced Rohingya presently in Bangladesh, with the support of international actors, whose support would not be forthcoming if there was an imminent or ongoing risk of genocide. Myanmar also argues that it is engaged in a range of initiatives aimed at bringing stability to Rakhine State, protecting those who are there or who will return there, and holding accountable those responsible for past violence — actions which are inconsistent with it allegedly harbouring genocidal intent. Finally, Myanmar stresses the challenges it is facing, *inter alia*, in ending an ongoing “internal armed conflict” with the Arakan Army in Rakhine State. It submits that the indication of provisional measures by the Court might reignite the 2016-2017 “internal armed conflict” with the Arakan Rohingya Salvation Army, and undermine its current efforts towards reconciliation.

* *

69. The Court recalls that, as underlined in General Assembly resolution 96 (I) of 11 December 1946,

“[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations”.

The Court has observed, in particular, that the Genocide Convention “was manifestly adopted for a purely humanitarian and civilizing purpose”, since “its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23*).

70. In view of the fundamental values sought to be protected by the Genocide Convention, the Court considers that the rights in question in these proceedings, in particular the right of the Rohingya group in Myanmar and of its members to be protected from killings and other acts threatening their existence as a group, are of such a nature that prejudice to them is capable of causing irreparable harm.

71. The Court notes that the reports of the Fact-Finding Mission (see paragraph 55 above) have indicated that, since October 2016, the Rohingya in Myanmar have been subjected to acts which are capable of affecting their right of existence as a protected group under the Genocide Convention, such as mass killings, widespread rape and other forms of sexual violence, as well as beatings, the destruction of villages and homes, denial of access to food, shelter and other essentials of life. As indicated in resolution 74/246 adopted by the General Assembly on 27 December 2019, this has caused almost 744,000 Rohingya to flee their homes and take refuge in neighbouring Bangladesh (United Nations, doc. A/RES/74/246, 27 December 2019, preambular para. 25). According to the 2019 detailed findings of the Fact-Finding Mission, approximately 600,000 Rohingya remained in Rakhine State as of September 2019 (United Nations, Detailed findings of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/42/CRP.5, 16 September 2019, paras. 4, 57, 107, 120, 158 and 212).

72. The Court is of the opinion that the Rohingya in Myanmar remain extremely vulnerable. In this respect, the Court notes that in its resolution 74/246 of 27 December 2019, the General Assembly reiterated

“its grave concern that, in spite of the fact that Rohingya Muslims lived in Myanmar for generations prior to the independence of Myanmar, they were made stateless by the enactment of the 1982 Citizenship Law and were eventually disenfranchised, in 2015, from the electoral process” (United Nations, doc. A/RES/74/246, 27 December 2019, preambular para. 14).

The Court further takes note of the detailed findings of the Fact-Finding Mission on Myanmar submitted to the Human Rights Council in September 2019, which refer to the risk of violations of the Genocide Convention, and in which it is “conclude[d] on reasonable grounds that the Rohingya people remain at serious risk of genocide under the terms of the Genocide Convention” (United Nations, Detailed findings of the Independent International Fact-Finding Mission on Myanmar, doc. A/HRC/42/CRP.5, 16 September 2019, para. 242; see also paras. 58, 240 and 667).

73. The Court takes note of the statement of Myanmar during the oral proceedings that it is currently engaged in repatriation initiatives to facilitate the return of Rohingya refugees present in Bangladesh and that it intends to promote ethnic reconciliation, peace and stability in Rakhine State, and to make its military accountable for violations of international humanitarian and human rights law. In the view of the Court, however, these steps do not appear sufficient in themselves to remove the possibility that acts causing irreparable prejudice to the rights invoked by The Gambia for the protection of the Rohingya in Myanmar could occur. In particular, the Court notes that Myanmar has not presented to the Court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention. Moreover, the Court cannot ignore that the General Assembly has, as recently as on 27 December 2019, expressed its regret that “the situation has not improved in Rakhine State to create the conditions necessary for refugees and other forcibly displaced persons to return to their places of origin voluntarily, safely and with dignity” (United Nations, doc. A/RES/74/246, 27 December 2019, preambular para. 20). At the same time the General Assembly reiterated

“its deep distress at reports that unarmed individuals in Rakhine State have been and continue to be subjected to the excessive use of force and violations of human rights and international humanitarian law by the military and security and armed forces, including extrajudicial, summary or arbitrary killings, systematic rape and other forms of sexual and gender-based violence, arbitrary detention, enforced disappearance and government seizure of Rohingya lands from which Rohingya Muslims were evicted and their homes destroyed” (*ibid.*, preambular para. 16).

74. Finally, the Court observes that, irrespective of the situation that the Myanmar Government is facing in Rakhine State, including the fact that there may be an ongoing internal conflict between armed groups and the Myanmar military and that security measures are in place, Myanmar remains under the obligations incumbent upon it as a State party to the Genocide Convention. The Court recalls that, in accordance with the terms of Article I of the Convention, States parties expressly confirmed their willingness to consider genocide as a crime under international law which they must prevent and punish independently of the context “of peace” or “of war” in which it takes place (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 615, para. 31). The context invoked by Myanmar does not stand in the way of the Court’s assessment of the existence of a real and imminent risk of irreparable prejudice to the rights protected under the Convention.

75. In light of the considerations set out above, the Court finds that there is a real and imminent risk of irreparable prejudice to the rights invoked by The Gambia, as specified by the Court (see paragraph 56 above).

V. CONCLUSION AND MEASURES TO BE ADOPTED

76. From all of the above considerations, the Court concludes that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by The Gambia, as identified above (see paragraph 56).

77. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power in the past (see, for example, *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. 651, para. 96).

78. In the present case, having considered the terms of the provisional measures requested by The Gambia and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

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

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

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

82. Regarding the provisional measure requested by The Gambia that each Party shall provide a report to the Court on all measures taken to give effect to its Order, the Court recalls that it has the power, reflected in Article 78 of the Rules of Court, to request the parties to provide information on any matter connected with the implementation of any provisional measures it has indicated. In view of the specific provisional measures it has decided to indicate, the Court considers that Myanmar must submit a report to the Court on all measures taken to give effect to

this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court. Every report so provided shall then be communicated to The Gambia which shall be given the opportunity to submit to the Court its comments thereon.

83. The Gambia has further requested the Court to indicate measures aimed at ensuring the non-aggravation of the dispute with Myanmar. In this respect, the Court recalls that when it is indicating provisional measures for the purpose of preserving specific rights, it also possesses the power to indicate additional provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require (see *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, pp. 551-552, para. 59). However, in the circumstances of the present case, and in view of the specific provisional measures it has decided to take, the Court does not deem it necessary to indicate an additional measure relating to the non-aggravation of the dispute between the Parties.

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84. The Court reaffirms that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

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85. The Court further reaffirms that the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of The Gambia and Myanmar to submit arguments and evidence in respect of those questions.

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86. For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) Unanimously,

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

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to the members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
- (d) imposing measures intended to prevent births within the group;

(2) Unanimously,

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

(3) Unanimously,

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

(4) Unanimously,

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

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-third day of January, two thousand and twenty, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of The Gambia and the Government of the Republic of the Union of Myanmar, respectively.

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Philippe GAUTIER,
Registrar.

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

(Initialed) A.A.Y.

(Initialed) Ph.G.
