

INTERNATIONAL COURT OF JUSTICE

**APPLICATION INSTITUTING PROCEEDINGS  
AND  
REQUEST FOR PROVISIONAL MEASURES**

REPUBLIC OF THE GAMBIA

v.

REPUBLIC OF THE UNION OF MYANMAR

11 November 2019

## **APPLICATION INSTITUTING PROCEEDINGS AND REQUEST FOR PROVISIONAL MEASURES**

To the Registrar of the International Court of Justice,

The undersigned, being duly authorized by the Government of the Republic of The Gambia, states as follows:

1. In accordance with Articles 36(1) and 40 of the Statute of the Court and Article 38 of the Rules of Court, I have the honour to submit this Application instituting proceedings in the name of the Republic of The Gambia (“The Gambia”) against the Republic of the Union of Myanmar (“Myanmar”). Pursuant to Article 41 of the Statute, the Application includes a request that the Court indicate provisional measures to protect the rights invoked herein from imminent and irreparable loss.

### **I. Introduction**

2. This Application concerns acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group, a distinct ethnic, racial and religious group that resides primarily in Myanmar’s Rakhine State. These acts, which include killing, causing serious bodily and mental harm, inflicting conditions that are calculated to bring about physical destruction, imposing measures to prevent births, and forcible transfers, are genocidal in character because they are intended to destroy the Rohingya group in whole or in part. They have been perpetrated in manifest violation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”).<sup>1</sup> These acts are all attributable to Myanmar, which is thus responsible for committing genocide. Myanmar has also violated other fundamental 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.

3. In preparing this Application, The Gambia has taken care to pay close attention to the provisions of the Genocide Convention, including the circumstances of its adoption and its interpretation and application in the years following its entry into force on 12 January 1951. In

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<sup>1</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277 [hereinafter Genocide Convention].

this regard, particular attention has been paid to the jurisprudence of the International Court of Justice, as well as of other international courts and tribunals, including the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.

4. The Gambia is acutely aware that acts of genocide are distinct from other prohibited acts – such as discrimination, ethnic cleansing, persecution, disappearance and torture – but that there is often a close connection between all such acts. It is equally aware that acts of genocide are invariably part of a continuum, as Raphaël Lemkin recognised in his pioneering work,<sup>2</sup> and for this reason it is important to place the acts of genocide in their broader context. Thus, when referring in this Application to Myanmar’s acts of persecution and other violations of international law that have been committed against the Rohingya, The Gambia’s case is based on those aspects constituting genocidal acts under the Genocide Convention.

5. The Gambia is cognisant of the Court’s important role as guardian of the Genocide Convention, especially in the absence of any international criminal tribunal with jurisdiction over individuals associated with the acts of genocide described in this Application. For this reason, and to assist the Court in the exercise of its grave responsibility, the Application provides a more detailed account of the relevant facts and their context than might otherwise have been necessary.<sup>3</sup>

6. Those facts are extensively documented by independent investigative efforts conducted under the auspices of the United Nations and corroborated by international human rights organizations and other credible sources. They establish that, against the backdrop of longstanding persecution and discrimination, from around October 2016 the Myanmar military (the “Tatmadaw”) and other Myanmar security forces began widespread and systematic

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<sup>2</sup> Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944), chapter IX.

<sup>3</sup> Myanmar is not a State Party to the Statute of the International Criminal Court. With the narrow exception of deportation and other crimes against humanity consummated on the territory of Bangladesh (a State Party to the ICC Statute), there is no basis for jurisdiction over crimes committed within the territory of Myanmar, including the crime of genocide. See ICC, Pre-Trial Chamber I, *Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”*, No. ICC-RoC46(3)-01/18 (6 September 2018); ICC, Office of the Prosecutor, *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar*, Request for authorisation of an investigation pursuant to article 15, No. ICC-01/19 (4 July 2019). In any event, the Court remains the sole basis for the attribution of State responsibility, which is distinct from other forms of accountability.

“clearance operations” – the term that Myanmar itself uses – against the Rohingya group. The genocidal acts committed during these operations were intended to destroy the Rohingya as a group, in whole or in part, by the use of mass murder, rape and other forms of sexual violence, as well as the systematic destruction by fire of their villages, often with inhabitants locked inside burning houses. From August 2017 onwards, such genocidal acts continued with Myanmar’s resumption of “clearance operations” on a more massive and wider geographical scale.

7. Multiple UN investigations have underscored the genocidal intent of these crimes. The UN Special Rapporteur on the situation of human rights in Myanmar, Ms. Yanghee Lee (of the Republic of Korea), carried out extensive fact-finding in regard to Myanmar’s campaign against the Rohingya. She reported first-hand accounts of “attacks in which homes were set ablaze by security forces, in many cases with people trapped inside, and entire villages razed to the ground.”<sup>4</sup> She documented parents “witnessing their young children being thrown into fires.”<sup>5</sup> She described Myanmar’s “security forces calling families out of their homes, separating men and boys to be executed in front of their families or taken away.”<sup>6</sup> She further recounted the “testimony of women and girls being raped and then killed, some burned alive in their homes while unconscious or tied up.”<sup>7</sup>

8. The UN Special Rapporteur concluded: “I am becoming more convinced that the crimes committed [in Myanmar] bear the hallmarks of genocide.”<sup>8</sup> She has since stated, without equivocation, that the commander-in-chief of Myanmar’s military and other responsible individuals “should be held accountable for genocide in Rakhine.”<sup>9</sup> These individuals were indisputably acting on behalf of the State.

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<sup>4</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>.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> “Myanmar army chief must be prosecuted for Rohingya ‘genocide’: U.N. rights envoy,” *Reuters* (25 January 2019), available at <https://www.reuters.com/article/us-myanmar-rohingya-un/myanmar-army-chief-must-be-prosecuted-for-rohingya-genocide-u-n-rights-envoy-idUSKCN1PJ1AK>.

9. Similarly, the UN Special Advisor on the Prevention of Genocide, Mr. Adama Dieng (of Senegal), based on his own fact-finding activities, including interviews with survivors who had fled to Bangladesh, stated: “Rohingya Muslims have been killed, tortured, raped, burnt alive and humiliated, solely because of who they are. All the information I have received indicates that 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>10</sup>

10. The findings of the UN Human Rights Council’s Independent International Fact-Finding Mission on Myanmar (“UN Fact-Finding Mission”) are especially significant. The Mission was established on 24 March 2017 amidst escalating violence against the Rohingya, with the mandate “to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State.”<sup>11</sup> It was composed of three distinguished jurists: Marzuki Darusman (Chairman, from Indonesia), Radhika Coomaraswamy (Sri Lanka), and Christopher Sidoti (Australia). In carrying out its mandate, the Mission followed best practices established by the UN High Commissioner for Human Rights in its *International Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and International Humanitarian Law – Guidance and Practice*.<sup>12</sup>

11. The Mission conducted over 600 interviews with victims and eyewitnesses as well as over 250 consultations with stakeholders, including intergovernmental and non-governmental organizations, researchers and diplomats.<sup>13</sup> It “took care to diversify its sources of information”<sup>14</sup> and, in selecting interviewees, “strove to only speak with persons who had not previously spoken with any other organization or media outlet, and confirmed this ahead

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<sup>10</sup> UN Secretary-General, *Note to Correspondents: 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* (12 March 2018), available at <https://www.un.org/sg/en/content/sg/note-correspondents/2018-03-12/note-correspondents-statement-adama-dieng-united-nations>.

<sup>11</sup> UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar* (12 September 2018), UN Doc. A/HRC/39/64 [hereinafter UN Fact-Finding Mission, *Report* (2018)], para. 4; UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar* (17 September 2018), UN Doc. A/HRC/39/CRP.2 [hereinafter UN Fact-Finding Mission, *Report of the Detailed Findings* (2018)], para. 4.

<sup>12</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 9.

<sup>13</sup> *Ibid.*, paras. 19, 23, 754.

<sup>14</sup> *Ibid.*, para. 19.

of the interview.”<sup>15</sup> The Mission also “obtained a large body of satellite imagery and analysis with the support of UNOSAT [the United Nations Operational Satellite Applications Programme], and received a vast amount of documents, photographs and videos – some clandestinely recorded or obtained by the source.”<sup>16</sup> It “only used those materials that it was able to authenticate,” and “[a]ll information was checked against secondary information assessed as credible and reliable, including organizations’ raw data or notes, expert interviews, submissions and open source material.”<sup>17</sup>

12. Based on its meticulous collection and review of the evidence, the UN Fact-Finding Mission concluded in its September 2018 *Report of the Detailed Findings* to the UN Human Rights Council that “the factors allowing the inference of genocidal intent are present.”<sup>18</sup> It thus urged that “named senior generals of the Myanmar military” be “investigated and prosecuted in an international criminal tribunal for genocide.”<sup>19</sup> On 24 October 2018, the Chairman of the Mission, Mr. Darusman, stated that the situation in Myanmar is an “ongoing genocide.”<sup>20</sup> Those who carried out the genocidal acts were officials and agents of the State of Myanmar, and were acting on its behalf.

13. The UN Fact-Finding Mission issued an additional report on its detailed findings in September 2019, based on further investigation, with a particular attention to events that transpired since September 2018.<sup>21</sup> It conducted additional interviews with victims and witnesses, both targeted and randomly selected, taking “special care to avoid re-interviewing victims and witnesses.”<sup>22</sup> It also “obtained and analysed satellite imagery, photographs and

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<sup>15</sup> *Ibid.*, para. 20.

<sup>16</sup> *Ibid.*, para. 22.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, para. 1441.

<sup>19</sup> *Ibid.*, p. 1.

<sup>20</sup> “Rohingya genocide is still going on, says top UN investigator,” *The Guardian* (24 October 2018), available at <https://www.theguardian.com/world/2018/oct/24/rohingya-genocide-is-still-going-on-says-top-un-investigator>.

<sup>21</sup> UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar* (16 September 2019), UN Doc. A/HRC/39/CRP.2 [hereinafter UN Fact-Finding Mission, *Report of the Detailed Findings* (2019)], para. 1.

<sup>22</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), paras. 32-33. In total, the Mission conducted 419 interviews, some of which concerned situations elsewhere in Myanmar. *Ibid.*, para. 32.

videos and a range of documents,” and “cross-checked the information against secondary information assessed as credible and reliable.”<sup>23</sup>

14. The Mission’s September 2019 report confirmed its earlier conclusion that Myanmar is responsible for the “commission of genocide.”<sup>24</sup> It found: “the evidence that infers genocidal intent on the part of the State against the Rohingya, identified in its last report, has strengthened.”<sup>25</sup> Alarmingly, the Mission warned: “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>26</sup>

15. The Gambia, mindful of the *jus cogens* character of the prohibition of genocide and the *erga omnes* and *erga omnes partes* character of the obligations that are owed under the Genocide Convention, institutes the present proceedings to establish Myanmar’s responsibility for violations of the Genocide Convention, to hold it fully accountable under international law for its genocidal acts against the Rohingya group, and to have recourse to this Court to ensure the fullest possible protection for those who remain at grave risk from future acts of genocide.

## **II. The Jurisdiction of the Court**

16. The Gambia and Myanmar are both Members of the United Nations and therefore bound by the Statute of the Court, including Article 36(1), which provides that the Court’s jurisdiction “comprises ... all matters specially provided for ... in treaties and conventions in force.”

17. The Gambia and Myanmar are also parties to the Genocide Convention. Myanmar signed the Genocide Convention on 30 December 1949 and deposited its instrument of ratification on 14 March 1956. The Gambia deposited its instrument of accession on 29 December 1978. While the Genocide Convention entered into force on 12 January 1951, it became applicable between the Parties ninety days after 29 December 1978, pursuant to Article XIII of the Convention.

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<sup>23</sup> *Ibid.*, para. 32.

<sup>24</sup> *Ibid.*, para. 9.

<sup>25</sup> *Ibid.*, para. 58.

<sup>26</sup> *Ibid.*

18. Article IX of the 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.<sup>27</sup>

19. Neither The Gambia nor Myanmar has purported to enter any reservation to Article IX.

20. The Gambia has repeatedly expressed its concerns in respect of the conduct described in this Application. Because the prohibition of genocide has the character of a peremptory norm and the obligations under the Convention are owed *erga omnes* and *erga omnes partes*,<sup>28</sup> The Gambia has, in particular, made clear to Myanmar that its actions constitute a clear violation of its obligations under the Convention. In response to such statements, Myanmar has rejected and opposed any suggestion that it has violated the Genocide Convention.

21. Myanmar has been made fully aware of the grave concerns expressed by The Gambia and others as to its responsibility for acts of genocide. The latest relevant events include, *inter alia*, the following:

- **12 September 2018:** After a year documenting atrocities committed by Myanmar's military and security forces against the Rohingya group, the UN Fact-Finding Mission presented its first report affirming that "[t]he crimes in Rakhine State, and the manner in which they were perpetrated, are similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts."<sup>29</sup>

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<sup>27</sup> Genocide Convention, art. IX.

<sup>28</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, pp. 45-47, paras. 85-88 (citing *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), pp. 110-111, para. 161).

<sup>29</sup> UN Fact-Finding Mission, *Report* (2018), para. 85.



- **1-2 March 2019:** The Gambia, through its membership in the Organization of Islamic Cooperation (“OIC”), called upon Myanmar “[t]o honor its obligations under International Law and Human Rights covenants, and to take all measures to immediately halt all vestiges and manifestations of the practice of ... genocide ... against Rohingya Muslims.”<sup>30</sup>
- **31 May 2019:** At the 14th OIC Summit Conference, The Gambia affirmed its support for the Ad hoc Ministerial Committee on Human Rights Violations against the Rohingyas in Myanmar and declared the urgency of “using all international legal instruments to hold accountable the perpetrators of crimes against the Rohingya.”<sup>31</sup>
- **8 August 2019:** The UN Fact-Finding Mission submitted to the UN General Assembly its consolidated findings in an additional report confirming “[the] perpetration by Myanmar of genocide and the State’s failure to prevent and punish genocide.”<sup>32</sup>
- **16 September 2019:** The UN Fact-Finding Mission emphasized before the UN Human Rights Council the need to hold Myanmar accountable for the crime of genocide.<sup>33</sup> The UN Fact-Finding Mission also demonstrated that Myanmar “continues to harbour genocidal intent” and therefore that “the Rohingya remain under serious risk of genocide.”<sup>34</sup> In doing so, the UN Fact-Finding Mission welcomed the efforts of “The Gambia ... and the Organisation of Islamic Cooperation to encourage and pursue a case against

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<sup>30</sup> OIC, *Resolution No. 4/46-MM on the Situation of the Muslim Community in Myanmar*, OIC Doc. OIC/CFM-46/2019/MM/RES/FINAL (1-2 March 2019), available at <https://www.oic-oci.org/docdown/?docID=4447&refID=1250>, para. 11(a).

<sup>31</sup> OIC, *Final Communiqué of the 14th Islamic Summit Conference*, OIC Doc. OIC/SUM-14/2019/FC/FINAL (31 May 2019), available at <https://www.oic-oci.org/docdown/?docID=4496&refID=1251>, para. 47.

<sup>32</sup> UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar* (8 August 2019), UN Doc. A/HRC/42/50 [hereinafter UN Fact-Finding Mission, *Report* (2019)], para. 108; see also *ibid.*, paras. 18, 90.

<sup>33</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), paras. 41, 220.

<sup>34</sup> *Ibid.*, para. 140; see also *ibid.*, para. 213.

Myanmar before the International Court of Justice (ICJ) under the Genocide Convention.”<sup>35</sup>

- **26 September 2019:** In response to the latest reports of the UN Fact-Finding Mission, Her Excellency Mrs. Isatou Touray, Vice-President of the Republic of The Gambia, stated during the general debate of the 74th Session of the UN General Assembly that “The Gambia is ready to lead the concerted efforts for taking the Rohingya issue to the International Court of Justice.”<sup>36</sup>
- **29 September 2019:** Kyaw Tint Swe, Union Minister for the Office of the State Counsellor of Myanmar, reacted at the general debate of the 74th Session of the UN General Assembly to the latest reports of the UN Fact-Finding Mission, by denying the conclusions: “[The Mission’s] Reports, without exception, are biased and flawed, based not on facts but on narratives.”<sup>37</sup>
- **11 October 2019:** The Gambia’s Permanent Mission to the United Nations in New York transmitted to Myanmar’s Permanent Mission a *Note Verbale* concerning Myanmar’s ongoing breach of its obligations under the Genocide Convention. The Gambia expressed its concerns over the findings of the UN Fact-Finding Mission and Myanmar’s rejection of those findings. The Gambia also called Myanmar’s attention to OIC Resolution No. 4/46-MM of 2 March 2019. Finally, The Gambia urged Myanmar to take actions to return to compliance with the Convention, to make reparations to the victims and to issue assurances and guarantees of non-repetition.<sup>38</sup>

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<sup>35</sup> *Ibid.*, para. 40.

<sup>36</sup> UN General Assembly, 74th Session, 8th Plenary Meeting, *Official Records*, UN Doc. A/74/PV.8 (26 September 2019), p. 31.

<sup>37</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 September 2019)* (30 September 2019), available at <https://www.statecounsellor.gov.mm/en/node/2551>, p. 11.

<sup>38</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* (11 October 2019).

22. Despite all the evidence, and the calls on it to desist from further acts of genocide, Myanmar continues to deny any wrongdoing. It has not responded to The Gambia's *Note Verbale* of 11 October 2019.

23. A dispute therefore exists between The Gambia and 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, as well as Myanmar's obligation to make reparations to the victims and offer assurances and guarantees of non-repetition.

24. Accordingly, pursuant to Article 36(1) of the Court's Statute and Article IX of the Genocide Convention, the Court has jurisdiction to hear the claims submitted in the present Application by The Gambia against Myanmar.

### **III. The Facts**

#### **A. Background**

25. Myanmar (formerly known as Burma) is located in Southeast Asia. It is bordered by Thailand and Laos to the east, by China to the north, and by India and Bangladesh to the west. The Bay of Bengal lies to the south.



Map of Myanmar<sup>39</sup>

<sup>39</sup> UN Geospatial Information Section, *Myanmar*, Map No. 4168 Rev. 3 (June 2012), available at <https://www.un.org/Depts/Cartographic/map/profile/myanmar.pdf>.

26. Myanmar is “inhabited by a large number of groups with various ethnic, cultural, linguistic and religious backgrounds.”<sup>40</sup> The Bamar, who are predominantly Buddhist, are Myanmar’s largest ethnic group, estimated to comprise 60-70 percent of the population.<sup>41</sup> The Rohingya, who are Muslim, are one of Myanmar’s ethnic and religious minorities.

27. Nearly all members of the Rohingya group reside in Myanmar’s Rakhine State, which is located in the westernmost extremity of the country, along the border with Bangladesh. The Rohingya are a minority within Rakhine State as well; the majority of the State’s population are ethnic Rakhine (also known as Arakanese), a group that is predominantly Buddhist. The Rohingya speak their own language, known as Rohingya. The ethnic Rakhine speak Arakanese, a regional dialect of Burmese.

28. Prior to the genocidal acts that began in 2016, most members of the Rohingya group lived in the townships of Maungdaw, Buthidaung and Rathedaung, located in the northern part of Rakhine State. Until that time, the Rohingya lived predominantly in villages where all or nearly all the inhabitants were ethnic Rohingya. Some members of the Rohingya group also lived in ethnically mixed villages and towns. After the Myanmar military attacked and displaced ethnic Rohingya in 2012, many were confined by Myanmar’s security forces to enclosed camps which the Rohingya are still forbidden to leave without authorization.

## **B. Myanmar’s Persecution of the Rohingya Group**

29. Myanmar has subjected the Rohingya group to persecution for decades. As far back as October 1992, the UN Special Rapporteur on Freedom of Religion or Belief reported:

since late 1989, the Rohingya citizens of Myanmar ... have been subjected to persecution based on their religious beliefs involving extrajudicial executions, torture, arbitrary detention, forced disappearances, intimidation, gang-rape, forced labour, robbery, setting of fire to homes, evictions, land confiscation and population resettlement as well as the systematic destruction of towns and mosques.<sup>42</sup>

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<sup>40</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 84.

<sup>41</sup> *Ibid.*, para. 84.

<sup>42</sup> *Ibid.*, para. 100.

30. More recently, the UN Fact-Finding Mission’s September 2018 report found that: “The Rohingya are in a situation of severe, systemic and institutionalised oppression from birth to death. Their extreme vulnerability is a consequence of State policies and practices implemented over decades.”<sup>43</sup> The Mission found that the “level of oppression faced by the Rohingya is hard to fathom” and that “[c]umulatively” the “rules, regulations, orders and practices” that Myanmar has imposed have “made life for the Rohingya in Rakhine State slowly but steadily unbearable.”<sup>44</sup> Myanmar has adopted these measures, the Mission concluded, “to implement a racist and exclusionary vision.”<sup>45</sup>

31. The Gambia describes below elements of Myanmar’s persecution of the Rohingya group that the UN Fact-Finding Mission determined are particularly indicative of genocidal intent, including its systematic denial of legal rights to members of the group and its support for, and participation in, pervasive hate campaigns designed to achieve the collective demonisation and dehumanisation of the Rohingya as a group.<sup>46</sup>

### **1. Denial of Legal Rights to Members of the Rohingya Group**

32. The UN Fact-Finding Mission found evidence of genocidal intent in the “existence of discriminatory plans and policies,”<sup>47</sup> including Myanmar’s 1982 Citizenship Law, a statute that remains in force, which makes citizenship and the legal rights associated therewith contingent upon belonging to one of the country’s predetermined racial categories – known as “national races.”<sup>48</sup> Pursuant to this legal regime, the Rohingya are not a “national race,” and therefore have no rights. The Myanmar authorities even consider that “the Rohingya do not

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<sup>43</sup> *Ibid.*, para. 458; *see also ibid.*, para. 748 (referring to “[d]ecades of gradual marginalisation and eroding of rights, resulting in a State-sanctioned and institutionalised system of oppression affecting the lives of Rohingya from birth to death”).

<sup>44</sup> *Ibid.*, para. 622.

<sup>45</sup> *Ibid.*, para. 497.

<sup>46</sup> ICTY, Trial Chamber, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgement (14 January 2000), para. 636 (“[W]hen persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.”).

<sup>47</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1425.

<sup>48</sup> *See ibid.*, paras. 477-479. On 8 October 1982, Myanmar’s then Head of State, General Ne Win, declared that there should be “three classes of citizens,” with full citizenship reserved for “pure-blooded nationals,” and the remaining classes for those who “cannot [be] trust[ed] fully” and who therefore must be denied “full rights.” UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 476 (citing Online Burma/Myanmar Library, *Translation of the speech by General Ne Win provided in The Working People’s Daily, 9 October 1982, available at* [http://www.burmalibrary.org/docs6/Ne\\_Win%27s\\_speech\\_Oct-1982-Citizenship\\_Law.pdf](http://www.burmalibrary.org/docs6/Ne_Win%27s_speech_Oct-1982-Citizenship_Law.pdf)). The 1982 Citizenship Law also permits citizenship through means not relevant here, including through naturalisation.

belong in Myanmar” because they “are not considered a ‘national race.’”<sup>49</sup> According to the UN Fact-Finding Mission, the Myanmar authorities “object” to the very “use of the name ‘Rohingya,’” insisting instead that they be referred to as “Bengali” so as to suggest they belong not in Myanmar but in neighbouring Bangladesh.<sup>50</sup>

33. Myanmar’s persecutory laws and regulations include measures that restrict the ability of the Rohingya to marry and bear children. Regional Order 1/2005 of the Maungdaw Township Peace and Development Council, adopted in 2005, includes a section – applicable only to those who marry “as per the Islamic religion,” *i.e.*, the Rohingya – that mandates obtaining special marriage permission from the relevant government authorities. Those who manage to receive permission to marry “must limit the number of children.”<sup>51</sup>

34. Members of the Rohingya group are also subjected to “severe restrictions” on their “freedom of movement,” including their “ability to move between villages in the same township, between townships and outside Rakhine State”<sup>52</sup> Rohingya must obtain “travel permits to leave their township.”<sup>53</sup> In northern Rakhine State, “movement between villages is also restricted and curfews are imposed.”<sup>54</sup> The restrictions are enforced through at least 160 security checkpoints.<sup>55</sup>

35. Since 2012, 128,000 members of the Rohingya group and the Kaman group (another Muslim minority) in central Rakhine State have been confined in displacement camps that are “effectively places of deprivation of liberty.”<sup>56</sup> The members of the Rohingya group who reside in these camps are “cordoned off from the outside world ... unable to move outside freely.”<sup>57</sup> The Mission found: “In most cases, access is strictly controlled by checkpoints set up by the Myanmar Police Force. Moreover, many camps are surrounded by barbed wire fencing. There are also police checkpoints and military posts in the camp area, further limiting

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<sup>49</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 460.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, para. 590.

<sup>52</sup> *Ibid.*, para. 500.

<sup>53</sup> *Ibid.*, para. 525.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, paras. 512, 517.

<sup>57</sup> *Ibid.*, para. 517.

freedom of movement.”<sup>58</sup> In the town of Sittwe, approximately 4,000 members of the Rohingya and Kaman groups are confined to a quarter that the Mission describes as “effectively a closed ghetto,” guarded by “armed police, checkpoints and barbed wire.”<sup>59</sup> There, “Muslims are trapped and have lived separately from the rest of the population since 2012.”<sup>60</sup> Members of the Rohingya group “can only leave the quarter with special permission and in organized convoys with police escorts.”<sup>61</sup>

36. The UN Fact-Finding Mission determined that the restrictions which Myanmar has imposed since 2012 amount to a “policy of segregation” under which Rohingya are generally barred from moving to “ethnic Rakhine areas, including the main towns and markets.”<sup>62</sup> The Mission concluded that this State-mandated segregation fosters a “conducive environment for dehumanization and hate campaigns.”<sup>63</sup>

## **2. Hate Propaganda Against the Rohingya Group**

37. The UN Fact-Finding Mission found further evidence of genocidal intent in the Myanmar authorities’ “tolerance for public rhetoric of hatred and contempt for the Rohingya,” as well as in the “insulting, derogatory, racist and exclusionary utterances of Myanmar officials and others.”<sup>64</sup> Such propaganda includes the Government of Myanmar’s incitement of anti-Rohingya hatred that portrays the group as a “threat, not only to the local Buddhist communities, but also to the nation and its Buddhist character as a whole.”<sup>65</sup> The Mission determined that these hate campaigns employ “dehumanising language” and are undertaken with the “involvement of and condoning by State authorities and influential figures of authority.”<sup>66</sup> This propaganda alleges that the Rohingya identity cannot be reconciled with

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<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, para. 520.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, para. 525.

<sup>63</sup> *Ibid.*, para. 516.

<sup>64</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224.

<sup>65</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 606.

<sup>66</sup> *Ibid.*, para. 748.



belonging to Myanmar. According to the Myanmar military: “Despite living among peacocks, crows cannot become peacocks.”<sup>67</sup>

38. The UN Fact-Finding Mission described the vast extent of Myanmar’s hate campaign against the Rohingya group:

The Mission has examined documents, publications, statements, Facebook posts and audio-visual materials that have contributed to shaping public opinion on the Rohingya and Muslims more generally. The analysis demonstrates that a carefully crafted hate campaign has developed a negative perception of Muslims among the broad population in Myanmar. This campaign has been the work of a few key players: nationalistic political parties and politicians, leading monks, academics, prominent individuals and members of the Government. This hate campaign, which continues to the present day, portrays the Rohingya and other Muslims as an existential threat to Myanmar and to Buddhism. In the case of the Rohingya, it has gone a step further. It is accompanied by dehumanising language and the branding of the entire community as “illegal Bengali immigrants.”<sup>68</sup>

39. The systematic and sustained hate campaign against the Rohingya group has included, *inter alia*:

- the fomenting of anti-Rohingya sentiment by the Association for the Protection of Race and Religion, an organization founded in June 2013 by the monk Ashin Wirathu, who, among other things, has likened Rohingya to an invasive species, claiming: “[t]he African catfish have a very great population and they eat each other and destroy nature” and that “[t]hese catfish are not allowed into the country to breed”,<sup>69</sup>
- the distribution of literature by monks in Rakhine State directing ethnic Rakhine not to “do business with” or “associate” with “Bengalis” and claiming that the “Bengalis who dwell on Arakanese land, drink Arakanese

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<sup>67</sup> *Ibid.*, para. 85.

<sup>68</sup> *Ibid.*, para. 696.

<sup>69</sup> *Ibid.*, para. 90; Dr. Kjell Anderson, “The Enemy Next Door: Hate Speech in Burma,” *The Sentinel Project* (17 October 2014), available at <https://thesentinelproject.org/2014/10/17/the-enemy-next-door-hate-speech-in-burma/>.

water, and rest under Arakanese shadows are now working for the extinction of the Arakanese”<sup>70</sup>;

- the dissemination of the publication *Fear of Extinction of the Race*, which exhorts people to “protect their race and religion,” calls for not patronizing Muslim shops, an act it describes as akin to “watering poisonous plants,” and warns, using a racially charged slur used to denote dark skin or foreign ancestry, “[i]f we are not careful, it is certain that the whole country will be swallowed by the Muslim Kalars”;<sup>71</sup>
- the publication of the book *Influx viruses – The Illegal Muslims in Arakan*, which, among other things, refers to the Rohingya as “hairy with long beards” and to “Bengali Kalars ... swallowing other races”<sup>72</sup>; and
- the publication of the magazine *Paccima zone*, whose patrons and committee members include government and police officials, and which has published articles with such titles as “Black tsunami in a pitiful disguise” and “Slow invasion” that refer to the Rohingya as the “common enemy” of all Myanmar ethnic groups.<sup>73</sup>

40. This pervasive campaign of dehumanization has included appeals for extreme measures against the Rohingya. On 26 June 2012, for example, the Rakhine Nationalities Development Party (RNDP), which at the time held the majority of seats in the Rakhine State legislature,<sup>74</sup> called for a “final solution” to deal with the threat posed by what it referred to as the “present population of Bengali.”<sup>75</sup>

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<sup>70</sup> Human Rights Watch, “*All you can do is Pray*”: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State (2013), available at [https://www.hrw.org/sites/default/files/reports/burma0413\\_FullForWeb.pdf](https://www.hrw.org/sites/default/files/reports/burma0413_FullForWeb.pdf), p. 25.

<sup>71</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 697 & n. 1510.

<sup>72</sup> *Ibid.*, para. 700.

<sup>73</sup> *Ibid.*, paras. 701-702.

<sup>74</sup> The Rakhine Nationalities Development Party held 18 seats out of 35 seats in the Rakhine (Arakan) State parliament. See The Burma Fund UN Office, *Burma’s 2010 Elections: A comprehensive report* (January 2011), available at [http://www.burmalibrary.org/docs11/BurmaFund-Election\\_Report-text.pdf](http://www.burmalibrary.org/docs11/BurmaFund-Election_Report-text.pdf), p. 34, table 3.

<sup>75</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 713.

41. The UN Fact-Finding Mission observed that the RNDP “praised Hitler and argued that inhuman acts” are “sometimes necessary to maintain a race.”<sup>76</sup> In November 2012, its magazine referred to the need to take “a decisive stand on the issue of Bengali Muslims” and warned that “if we do not courageously solve these problems, which we have inherited from several previous generations, and instead hand them over to the next generation, we will go down in history as irresponsible.”<sup>77</sup> It stated:

Although Hitler and Eichmann were the greatest enemies of the Jews, they were probably heroes to the Germans. America had to drop nuclear bombs on Hiroshima and Nagasaki. Why? If inhumane acts are sometimes permitted to maintain a race, a country and the sovereignty ... our endeavours to maintain the Rakhine race and the sovereignty and longevity of the Union of Myanmar cannot be labelled as inhumane.<sup>78</sup>

42. The Myanmar Government itself has spread, as well as condoned, similarly extremist anti-Rohingya propaganda. Myanmar’s Ministry of Immigration and Population (now the Ministry of Labour, Immigration and Population) has employed the following slogan as its motto since 1995: “The earth will not swallow a race to extinction but another race will.”<sup>79</sup>

43. In August 2011, during parliamentary discussion of the issuance of registration cards to members of the Rohingya group, Myanmar’s Minister of Immigration stated: “Our Ministry is trying its best to uphold the slogan ‘Race is not swallowed by the earth but by another race.’”<sup>80</sup>

44. In June 2012, the spokesperson of the President of Myanmar posted a statement on his Facebook account warning of the arrival of “Rohingya terrorists” who the Myanmar military would “completely destroy.”<sup>81</sup> He stated:

We don’t want to hear any humanitarian or human rights excuses. We don’t want to hear your moral superiority, or so-called peace and loving kindness. (Go and look at Buthidaung, Maungdaw areas in Rakhine

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<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.* (citing Rakhine Nationalities Development Party, *Toe Thet Yay Journal*, Vol. 2, No. 12 (2012)).

<sup>78</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 713.

<sup>79</sup> *Ibid.*, paras. 698-699.

<sup>80</sup> *Ibid.*, para. 699.

<sup>81</sup> *Ibid.*, para. 705.

State. Our ethnic people are in constant fear in their own land. I feel very bitter about this. This is our country. This is our land.)<sup>82</sup>

45. Investigative reporting by *The New York Times* disclosed in October 2018 that the “Myanmar military were the prime operatives behind a systematic campaign on Facebook that stretched back half a decade and that targeted the country’s mostly Muslim Rohingya minority group.”<sup>83</sup> This involved “hundreds of military personnel who created troll accounts and news and celebrity pages on Facebook and then flooded them with incendiary comments and posts timed for peak viewership.”<sup>84</sup> The head of cybersecurity policy at Facebook said the company had found “clear and deliberate attempts to covertly spread propaganda that were directly linked to the Myanmar military.”<sup>85</sup>

46. Myanmar has specifically sought to instil hatred of the Rohingya among its military recruits. The UN Fact-Finding Mission reported that in October 2012 soldiers received training on the “expansion of Islam” and the consequent “extinction of Buddhism.”<sup>86</sup> They were also given an anti-Muslim presentation entitled “Fear of extinction of the race” that referred to the need to “protect our race and religion as much as possible.”<sup>87</sup>

### **C. The Commission of Genocidal Acts Against the Rohingya as a Group**

47. As set out below, and as will be described in greater detail over the course of these proceedings, Myanmar’s persecution against the Rohingya population as a group escalated dramatically in October 2016, when its military and security forces commenced so-called “clearance operations” against Rohingya villages, leading to the genocidal acts that are the subject of this Application.

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

<sup>83</sup> “A genocide incited on Facebook, with Posts from Myanmar’s Military,” *The New York Times* (15 October 2018), available at <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html>.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 716.

<sup>87</sup> *Ibid.*

## 1. The “Clearance Operations” that Began on 9 October 2016

48. In the early hours of 9 October 2016, a small number of Rohingya, armed mainly with sticks, knives and a few firearms, reacting to Myanmar’s persecution of the group, attacked three Border Guard Police posts in northern Rakhine State.<sup>88</sup> Just hours later, the Tatmadaw, operating in coordination with the Myanmar Police Force and Border Guard Police, commenced what they called “clearance operations” targeted at Rohingya villages in a designated “lockdown zone” in central Maungdaw Township.<sup>89</sup> During these operations, Myanmar forces systematically shot, killed, forcibly disappeared, raped, gang raped, sexually assaulted, detained, beat and tortured Rohingya civilians, and burned down and destroyed Rohingya homes, mosques, madrassas, shops and Qur’ans.<sup>90</sup> As they committed these crimes, the perpetrators called their victims “people from Bangladesh,”<sup>91</sup> “Bengali,”<sup>92</sup> and “Kalar.”<sup>93</sup>

49. The first such “clearance operation” was conducted at Wa Peik village.<sup>94</sup> Six military vehicles entered the village and began systematically killing Rohingya villagers.<sup>95</sup> One survivor recalled: “When the soldiers entered the village, they started shooting. ... I saw them shoot at people as they fled.”<sup>96</sup> Another recounted: “The military would go in a house,

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<sup>88</sup> *Ibid.*, paras. 1009, 1011, 1020, 1036, 1069. UNGA, Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/HRC/34/67 (14 March 2017), para. 64. At the time, the group of Rohingya attackers did not have a name. After the attack, the group called itself the Faith Movement (Harakah Al-Yaqin). In March 2017, the group rebranded itself as the Arakan Rohingya Salvation Army (ARSA). See UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1010-1012.

<sup>89</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1069, 1072; UN OHCHR, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT* (3 February 2017), available at <https://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf> [hereinafter UN OHCHR, *Flash Report* (2017)], p. 7.

<sup>90</sup> See generally UN Fact-Finding Mission, *Report of Detailed Findings* (2018), paras. 1069-1095; UN OHCHR, *Flash Report* (2017), pp. 13-40.

<sup>91</sup> UN OHCHR, *Flash Report* (2017), p. 15.

<sup>92</sup> UN Fact-Finding Mission, *Report of Detailed Findings* (2018), para. 1075.

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

<sup>94</sup> Human Rights Watch, *Burma: Military Burned Villages in Rakhine State* (13 December 2016), available at <https://www.hrw.org/news/2016/12/13/burma-military-burned-villages-rakhine-state>.

<sup>95</sup> Matthew Smith, “Bringing Burma Back from the Brink,” *Wall Street Journal* (15 February 2017), available at <https://www.wsj.com/articles/bringing-burma-back-from-the-brink-1487181031>.

<sup>96</sup> *Ibid.*

then it would set on fire, then they went to another house, and fire would start. Everywhere they went a fire would start and smoke would rise.”<sup>97</sup>

50. The next day, 10 October 2016, Myanmar security forces carried out a “clearance operation” at Doe Tan, a village located in Maungdaw Township.<sup>98</sup> A survivor recounts:

The military came to our village on 10 October in the morning. First they started shooting into the air, people were scared and came out of their homes, and then they started killing people. They were shooting at people. We were all trying to flee, I was running and at that point I was shot and fell into the paddy field. Since I was running I am not sure on which side the bullet entered and where it exited. My cousin helped me and brought me home and treated my wound. My father was killed at the same time as I was shot.<sup>99</sup>

51. In some villages, the military used helicopters to shoot members of the Rohingya group.<sup>100</sup> Survivors describe how bullets “rained” on them whilst they tried to run away.<sup>101</sup>

52. During these operations, the military carried out mass executions of Rohingya men and boys. The UN Fact-Finding Mission reported that at the village of Dar Gyi Zar, “Tatmadaw soldiers captured a group of up to 200 men, women and children, and took them to a paddy field, where they were told to kneel.”<sup>102</sup> After beating them and ordering the men to remove their shirts, the military “separated from the group” the “men and boys of approximately 12 years or older.”<sup>103</sup>

53. The women and children were taken to a house where they “heard repeated gunfire and the screams of the men and boys outside.”<sup>104</sup> When they emerged from the house after the

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<sup>97</sup> Amnesty International, “*We Are at Breaking Point*”: Rohingya: Persecuted in Myanmar, Neglected in Bangladesh (19 December 2016), available at <https://www.amnesty.org/download/Documents/ASA1653622016ENGLISH.PDF>, p. 29.

<sup>98</sup> UN OHCHR, *Flash Report* (2017), p. 14.

<sup>99</sup> *Ibid.*

<sup>100</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1084; UN OHCHR, *Flash Report* (2017), p. 15.

<sup>101</sup> UN OHCHR, *Flash Report* (2017), p. 15.

<sup>102</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1085-1086.

<sup>103</sup> *Ibid.*, para. 1086.

<sup>104</sup> *Ibid.*

soldiers had left, the women saw “[t]he bodies of the men and boys had been put in a pile, or series of piles, and burned using hay, harvested rice, and the removed shirts.”<sup>105</sup>

54. The Myanmar military proceeded to systematically burn and destroy entire Rohingya villages, with an intention to destroy the group in whole or in part. The Office of the UN High Commissioner for Human Rights (“OHCHR”) concluded, based on analysis of “testimonies as well as the satellite imagery analysis from three independent sources,” that Myanmar security forces had “deliberately targeted the entire Rohingya population in the area.”<sup>106</sup> These findings were corroborated by evaluations conducted by international human rights organizations. Amnesty International concluded: “Satellite images demonstrate widespread destruction of homes and other civilian properties – in some cases, entire villages have been destroyed.”<sup>107</sup> This included the destruction by fire of at least 1,262 buildings across 12 villages from October to November 2016.<sup>108</sup> Human Rights Watch’s separate analysis concluded that approximately 1,500 buildings in Rohingya villages were burned between 10 October and 23 November 2016.<sup>109</sup>

55. A “major cause of deaths was due to burning of houses.”<sup>110</sup> The OHCHR reports that “[n]umerous testimonies collected from people from different villages” have “confirmed that the army deliberately set fire to houses with families inside.”<sup>111</sup> In some cases, the military “pushed Rohingya into already burning houses.”<sup>112</sup> The OHCHR also reported instances where “the army or Rakhine villagers locked an entire family, including elderly and disabled people, inside a house and set it on fire, killing them all.”<sup>113</sup>

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<sup>105</sup> *Ibid.*, para. 1087.

<sup>106</sup> UN OHCHR, *Flash Report* (2017), pp. 41-42.

<sup>107</sup> Amnesty International, “*We Are at Breaking Point*”: Rohingya: Persecuted in Myanmar; Neglected in Bangladesh (19 December 2016), available at <https://www.amnesty.org/download/Documents/ASA1653622016ENGLISH.PDF>, p. 25.

<sup>108</sup> *Ibid.*

<sup>109</sup> Human Rights Watch, *Burma: Military Burned Villages in Rakhine State* (13 December 2016), available at <https://www.hrw.org/news/2016/12/13/burma-military-burned-villages-rakhine-state>.

<sup>110</sup> UN OHCHR, *Flash Report* (2017), pp. 16-17.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

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

56. In one such case, an 11-year old girl from Yae Khat Chaung Gwa Son village reported:

After entering our house, the army apprehended us. They pushed my mother on the ground. They removed her clothes, and four officers raped her. They also slaughtered my father, a prayer leader, just before raping my mother. After a few minutes, they burnt the house with a rocket, with my mother inside. All this happened before my eyes.<sup>114</sup>

57. In some instances, the military tied Rohingya to trees and burned them alive.<sup>115</sup> A survivor from Yae Khat Chaung Gwa Son village recounts:

The military dragged my grandmother and grandfather out of their house. First they were severely beaten, then tied to a tree. The military then put dried grass, woods around them and set them on fire.<sup>116</sup>

58. Children, including infants, were deliberately targeted. According to the OHCHR, victims ranged in ages “from newborns to teenagers.”<sup>117</sup> They included children who were “killed by live ammunition or stabbed while at home; while fleeing to safety; or while in farms or fields.”<sup>118</sup>

59. A mother of four from Pwint Hpyu Chang reported:

I fled together with my four children. I was holding and carrying the two youngest. My two oldest children, my daughter who was six years old and my son who was 10, were behind me. When the armed men were running after me, I hid behind some trees and bushes. The men caught my two oldest children and killed them. They used a knife of the kind we use to slaughter goats. I saw this from where I was hiding.<sup>119</sup>

60. Another survivor recounted:

In Kyet Yoe Pyin I saw the military killing a newborn baby of a distant relative. She was about to deliver the baby just after the military entered the village. We were all inside the house and the military made us come

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

<sup>115</sup> See, e.g., UN OHCHR, *Flash Report* (2017), p. 17.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*, p. 18.

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

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



out. My relative could not come out as she was in labour so they dragged her out and hit her stomach with a big stick. They killed the baby by stomping on it with their heavy boots. Then they burned the house.<sup>120</sup>

61. A survivor from the same village recounts: “They held me tight and I was raped by one of them. My five-year old daughter tried to protect me, she was screaming, one of the men took out a long knife and killed her by slitting her throat.”<sup>121</sup>

62. Myanmar military and security forces committed sexual violence on a massive scale, including rape, gang rape, forced nudity, and sexual assault.<sup>122</sup> The OHCHR reported that the majority of the rape victims it interviewed were “raped by more than one soldier, usually three to four but even up to eight officers.”<sup>123</sup> It also found: “Rape by an individual soldier would typically occur alongside a gang rape – i.e. several women would be targeted for rape within a particular house, school or mosque and the majority of them would be gang raped while some were raped by only one individual.”<sup>124</sup>

63. At Kyet Yoe Pyin village, in Maungdaw Township, one survivor estimated that more than 100 females were raped.<sup>125</sup>

64. A survivor from Dar Gyi Zar village encountered 13 women: “They could not speak, they were just crying. They all had injuries. Their clothes had blood on them, around their private parts... they had marks on their necks from where they were held.”<sup>126</sup>

65. A mother who survived her village’s “clearance operation” gave the following account, as summarized by the UN Fact-Finding Mission:

One survivor described eight to ten Tatmadaw soldiers entering the house she was in and taking two young girls to the toilet. She held a child in her lap so that the Tatmadaw would realise that she was a mother and would not rape her. The soldiers threw the child aside; five to six

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<sup>120</sup> *Ibid.*

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

<sup>122</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1091-1092.

<sup>123</sup> UN OHCHR, *Flash Report* (2017), p. 21.

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

<sup>125</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1111.

<sup>126</sup> Amnesty International, “*We Are at Breaking Point*”: *Rohingya: Persecuted in Myanmar, Neglected in Bangladesh* (19 December 2016), available at <https://www.amnesty.org/download/Documents/ASA1653622016ENGLISH.PDF>, p. 25.

men raped her. She said that she had pain everywhere afterwards and bled until she reached Bangladesh. She heard that the two girls who were taken to the toilet died.<sup>127</sup>

66. A 14-year-old female survivor of a clearance operation described her experience as follows:

We were hiding in the forest and the soldiers took my sister, who was 12-years old, and eight other girls. Four of them were raped and killed. Then the soldiers took me. There were around 40 women and girls in the forest. I remember the first man who raped me, feeling all the pain. I became numb to the next three men and then I went unconscious. They were raping most of the women and girls.<sup>128</sup>

67. On 16 February 2017, after four months of systematic atrocities against members of the Rohingya group, the Myanmar Government declared an end to the “clearance operations.”<sup>129</sup> Thereafter, a Government Investigation Commission, led by Myanmar’s Vice-President, absolved the security forces of any wrongdoing and endorsed the “lawfulness and appropriateness of the response.”<sup>130</sup> To date, Myanmar has taken no steps to hold those responsible for these atrocities accountable.<sup>131</sup>

68. Despite the official end to the “clearance operations,” widespread persecution of the Rohingya – through the same tactics employed in those operations – continued. The humanitarian crisis faced by the Rohingya was further exacerbated by the Government’s prohibition of humanitarian assistance to the lockdown zone.<sup>132</sup> The worst was yet to come.

## **2. The Resumption of “Clearance Operations” on 25 August 2017**

69. Six months after the official end of the Myanmar State’s “clearance operations” against members of the Rohingya group, they were formally resumed. On 10 August 2017,

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<sup>127</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1093.

<sup>128</sup> *Ibid.*, paras. 1091-1092.

<sup>129</sup> *Ibid.*, paras. 1069-1070.

<sup>130</sup> *Ibid.*, para. 1071.

<sup>131</sup> *Ibid.*, para. 1564.

<sup>132</sup> *Ibid.*, para. 573; UNGA, Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/HRC/34/67 (14 March 2017), para. 66; Amnesty International, “*We Are at Breaking Point*”: *Rohingya: Persecuted in Myanmar, Neglected in Bangladesh* (19 December 2016), available at <https://www.amnesty.org/download/Documents/ASA1653622016ENGLISH.PDF>, pp. 7, 32.

Myanmar airlifted to Rakhine State more than 1,600 members of the Tatmadaw's 33rd and 99th Light Infantry Divisions ("LID") from northern Myanmar.<sup>133</sup> National media in Myanmar contemporaneously reported that these military forces were "going to northern Rakhine to carry out area clearance."<sup>134</sup> Other military units were also re-deployed to northern Rakhine State, and stationed in areas normally only guarded by Border Guard Police units.<sup>135</sup> These forces were accompanied by tanks, armoured personnel carriers, heavy artillery, helicopters and naval vessels.<sup>136</sup>

70. One survivor of the resumed "clearance operations" recounted:

My Rakhine neighbour said to me, "Now you Rohingya are doomed because the government is sending military from Yangon who are coming here to kill every Muslim. Someday in Rakhine State there will be no Rohingya Muslims at all."<sup>137</sup>

71. During these renewed "clearance operations," the Commander-in-Chief of Myanmar's armed forces, Senior-General Min Aung Hlaing, confirmed that this was indeed the objective of the operations: "The Bengali problem was a long-standing one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem."<sup>138</sup>

72. Myanmar's pretext for resuming "clearance operations" on 25 August 2017 was attacks on a military base and various security outposts by the Arakan Rohingya Salvation Army ("ARSA"), carried out largely by untrained individuals wielding sticks and knives, with a small number bearing arms and improvised explosive devices.<sup>139</sup>

73. Immediately following these incidents, Myanmar launched a coordinated second wave of "clearance operations" across northern Rakhine State, far more brutal and expansive than had been carried out previously. The UN Fact-Finding Mission concluded:

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<sup>133</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1151.

<sup>134</sup> *Ibid.*, para. 1151.

<sup>135</sup> *Ibid.*, para. 1153.

<sup>136</sup> *Ibid.*, paras. 1152, 1156.

<sup>137</sup> *Ibid.*, para. 1153.

<sup>138</sup> *Ibid.*, para. 753.

<sup>139</sup> *Ibid.*, para. 750.

The security forces' response was immediate, within hours, brutal and grossly disproportionate. Ostensibly to eliminate the 'terrorist threat' posed by ARSA, in the days and weeks that followed it encompassed hundreds of villages across Maungdaw, Buthidaung and Rathedaung Townships. The operations targeted and terrorised the entire Rohingya population....<sup>140</sup>

74. The UN Fact-Finding Mission concluded that the level of coordination of the attacks against members of the Rohingya group evidenced that it had been pre-planned by senior Government officials:

This level of build-up, both in quantity and nature, would have required significant logistical planning over a considerable period. It would have required decisions at the most senior levels of the Tatmadaw. The Mission has concluded that this preparation, the joint nature of the operations, and the deployment of the [Light Infantry Divisions] indicate that the "clearance operations," or at least the ability to carry out a large and widespread operation, was planned and ordered well in advance of 25 August 2017.<sup>141</sup>

75. The Myanmar military's *modus operandi* was similar to, but more extensive and brutal than, earlier "clearance operations."<sup>142</sup> Tatmadaw soldiers, accompanied by other security forces, entered Rohingya villages early in the morning whilst most villagers were asleep,<sup>143</sup> and fired rocket launchers, mortars, and bullets into Rohingya homes.<sup>144</sup> The Government forces then tortured, raped and killed the inhabitants, including those who tried to flee, before burning their homes to the ground, often with members of the Rohingya group inside.<sup>145</sup>

76. The UN Fact-Finding Mission determined:

Many Rohingya were killed or injured by indiscriminate shooting. Rohingya villages were approached without warning, usually from more than one direction, and often in the early morning, by armed Tatmadaw soldiers. They were often accompanied by other armed security forces, including the BGP, the Myanmar Police Force and riot police (known

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<sup>140</sup> *Ibid.*, para. 751.

<sup>141</sup> *Ibid.*, para. 1157.

<sup>142</sup> *Ibid.*, para. 752.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*, paras. 752, 961.

<sup>145</sup> *Ibid.*, paras. 884-911.

as *Ion htein*), and frequently by ethnic Rakhine civilians. Members of the security forces, primarily Tatmadaw soldiers of the Western Command and the 33<sup>rd</sup> and 99<sup>th</sup> LIDs, shot assault rifles towards the Rohingya villages from a distance, not targeting any particular military objective or making any distinction between ARSA fighters and civilians. Men, women and children were all shot at. Many victims referred to the volume of gunfire, with some describing it as “raining bullets.” Many were shot and killed or injured while attempting to flee.<sup>146</sup>

77. The UN Fact-Finding Mission documented “detailed accounts” of “corroborated mass killings” in which “hundreds, of men, women and children were killed” in “targeted attacks.”<sup>147</sup> Soldiers “shot individual persons, including at point blank range, and executed people, including those injured, by slitting their throats using long knives.”<sup>148</sup> In some places “these targeted killings occurred as Tatmadaw soldiers and other security forces systematically moved from house to house, pulling people out of their homes and executing them, or shooting then inside their houses, or as they left their houses, often in front of family members.”<sup>149</sup>

78. In Min Gyi, the Myanmar military “separated women and children from the men” and “systematically killed the men.”<sup>150</sup> At Chut Pyin, the soldiers “dragged people from houses and shot some of them at point blank range.”<sup>151</sup> Others were “killed by having their throats slit with large knives.”<sup>152</sup> At Maung Nu, the military seized the village’s male inhabitants and tied them up. The soldiers then “opened fire on the men and boys” and “slit their throats with knives.”<sup>153</sup>

79. As before, the Myanmar military and security forces did not spare Rohingya children. The UN Secretary-General’s annual report on children reports that during a “clearance operation” in Buthidaung Township, both “[m]en and boys were taken from

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<sup>146</sup> *Ibid.*, para. 884.

<sup>147</sup> *Ibid.*, para. 892.

<sup>148</sup> *Ibid.*, para. 893.

<sup>149</sup> *Ibid.*, para. 893.

<sup>150</sup> *Ibid.*, para. 766.

<sup>151</sup> *Ibid.*, para. 783.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*, para. 808.

houses.”<sup>154</sup> They “had their hands tied and were forced to lie down on the ground.”<sup>155</sup> Witnesses saw “the men and boys being killed one by one.”<sup>156</sup> At least “28 boys between the ages of 8 and 17 years old were killed.”<sup>157</sup>

80. At Koe Tan Kauk, in Rathedaung Township, escapees who returned to the village after the clearance operation found “bodies with throats cut and decapitated heads, including those of children.”<sup>158</sup> One survivor testified: “I found my six-month old son’s body lying next to my wife’s body. She had been shot. My baby son was stabbed in his stomach and his intestine and liver were coming out.”<sup>159</sup>

81. A woman from Kyein Chaung village, in northern Maungdaw Township, described how soldiers killed two of her children, while a third survived multiple stab wounds to her head:

Soldiers took to me into a house and beat me and my youngest child. He was one and a half years old, and 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. It was with a long knife, the length of a forearm.<sup>160</sup>

82. Another witness described the killing of women and children in Kyet Yoe Pyin, in Maungdaw Township: “A pregnant woman in labour was being assisted by a midwife as well as a number of other female relatives. I saw approximately five soldiers enter the house and heard a few gunshots.” She recounted: “Later I went back and saw the dead bodies of an elderly woman, the mother, a two-year old girl, and another girl who was 16 to 18 years old and the new-born baby.”<sup>161</sup>

83. A survivor from Kha Maung Seik village, in Maungdaw Township, described how:

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<sup>154</sup> UN Security Council, *Report of the Secretary-General on children and armed conflict in Myanmar*, UN Doc. S/2018/956 (29 October 2018), para. 15.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 837.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*, para. 894.

<sup>161</sup> *Ibid.*, para. 895.

When their parents were killed, and the children were standing alone, they [soldiers] threw the children in the river . . . We were watching from the other side of the riverbank. Even the newborns and the ones who could barely walk, they threw them in the river. It was not far from where we were hiding.<sup>162</sup>

84. Entire Rohingya villages were set afire and destroyed as part of the second wave of “clearance operations,” often with their inhabitants locked inside burning homes. By “analysing satellite imagery and witness accounts,” the UN Fact Finding Mission documented the “widespread, systematic, deliberate, organized and targeted destruction, mainly by fire, of Rohingya-populated areas” in the three northern Rakhine State townships of Maungdaw, Buthidaung, and Rathedaung.<sup>163</sup> Satellite imagery from August 2017 to March 2018 demonstrates that approximately 392 Rohingya villages were partially (214) or totally (178) destroyed by fire, during this period.<sup>164</sup>

85. The Mission identified approximately 37,700 individual structures as having been destroyed, the “vast majority” of which were “Rohingya homes.” Other buildings, including “markets, religious schools (madrassas) and mosques,” were destroyed as well.<sup>165</sup> Myanmar accomplished this immense level of destruction both “manually using flammable liquid and matches” and by using “launchers,” *i.e.*, “weapons firing a munition that explodes upon impact.”<sup>166</sup>

86. The UN Fact-Finding Mission “verified a pattern of Tatmadaw soldiers intentionally forcing people into houses that were either burning or about to be set alight, and even locking them inside.”<sup>167</sup> A witness from Ngan Chuang, in northern Maungdaw Township, who managed to escape, reported: “The military came into my village and burned the houses

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<sup>162</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. 67.

<sup>163</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 959.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*, para. 960.

<sup>166</sup> *Ibid.*, para. 905.

<sup>167</sup> *Ibid.*, para. 908.

with launchers. I was inside my house with my children when they locked the door from the outside.”<sup>168</sup>

87. Similarly, at Min Gyi, in Maungdaw Township, “soldiers took women and children to houses where they were raped and gang raped, after which the doors were locked and the houses set on fire.”<sup>169</sup> Most victims, including “young children who had accompanied their mothers, were unable to escape and burned to death.”<sup>170</sup>

88. The Mission obtained accounts of “people, including babies and children, being pushed or thrown into burning houses by soldiers.” For example, at Myin Hlut, in Maungdaw Township, a witness saw “two young children, six or seven years old, running out of a burning house, only to be pushed back in by soldiers.”<sup>171</sup>

89. At Kyauk Pan Du, in Maungdaw Township, a survivor witnessed a “group of approximately 10 women, children and elderly persons trying to escape a burning house, but being pushed back inside by soldiers.”<sup>172</sup> The same witness saw a soldier “stabbing a child, and then pushing the child inside the burning house.”<sup>173</sup> The entire Rohingya family was burned alive in the house.<sup>174</sup>

90. Tellingly, satellite imagery reveals that wherever the Tatmadaw carried out a “clearance operation” on a mixed ethnicity village or village tract, only the Rohingya settlements were targeted. Ethnic Rakhine people and habitations remained untouched.<sup>175</sup>

91. Widespread rape and sexual violence were again a hallmark of Myanmar’s “clearance operations.” The UN Fact-Finding Mission concluded that “[r]ape and other sexual and gender-based violence,” including gang rapes, sexually humiliating acts, sexual slavery and sexual mutilations, were “perpetrated on a massive scale.”<sup>176</sup> It determined that the “main

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<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*, para. 909.

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

<sup>171</sup> *Ibid.*, para. 910.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*, paras. 972-973.

<sup>176</sup> *Ibid.*, para. 920.



perpetrators were the Tatmadaw, although other security forces, and sometimes ethnic Rakhine men, were also involved.”<sup>177</sup>

92. The UN Fact-Finding Mission identified as a “notable pattern” the perpetration of “mass gang rape, involving multiple perpetrators and multiple victims in the same incident.”<sup>178</sup> These crimes were “commonly perpetrated 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>179</sup> During these attacks, “up to 40 women and girls were raped or gang raped together.”<sup>180</sup> The victims were “commonly raped by more than one perpetrator, frequently by many perpetrators, sometimes as many as ten.”<sup>181</sup>

93. One victim – eight months pregnant at the time – testified about the crimes committed by the Tatmadaw, some of whom she recognized from the local military camp: “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, both anally and vaginally. I counted all of them.”<sup>182</sup>

94. She then states: “Whilst they were raping me, they bit me on my breasts and neck. They left me tied to the tree. My mother found me in the evening. My unborn baby died.”<sup>183</sup>

95. The UN Fact-Finding Mission reported that “[m]any victims were killed after being raped,” with most having had their throats slit or burned to death.<sup>184</sup> It observed: “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>185</sup>

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<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*, para. 921.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*, para. 927.

<sup>185</sup> *Ibid.*

96. The Mission concluded: “Death may have been caused by genital trauma, especially when a woman had been gang raped, or women and girls may have been raped with instruments, such as knives or sticks, which caused internal organ damage, leading to death.”<sup>186</sup>

97. One rape victim, who had been gang raped with her sister, heard a member of the Tatmadaw say: “We are going to kill you this way, by raping. We are going to kill Rohingya. We will rape you. This is not your country.”<sup>187</sup>

98. The UN Fact-Finding Mission concluded: “the widespread sexual violence and the manner in which it was perpetrated was an intended effort, at least in part, to weaken the social cohesion of the Rohingya community and contribute to the destruction of the Rohingya as a group and the breakdown of the Rohingya way of life.”<sup>188</sup> The use of rape and sexual violence as an instrument of genocide – to destroy a group in whole or in part – is well-established in international law.<sup>189</sup>

### **3. Ongoing Genocidal Acts and Threats of Genocidal Acts Against the Rohingya Group**

99. Although Myanmar claims to have ended its most recent wave of “clearance operations,” the UN Fact-Finding Mission’s September 2019 report to the UN Human Rights Council found that the Rohingya “remain the target of a Government attack aimed at erasing the[ir] identity and removing them from Myanmar.”<sup>190</sup>

100. According to an analysis performed by UNOSAT, between November 2018, that is, after Myanmar claimed to have ended its “clearance operations,” and May 2019, 30 villages – located primarily in central Maungdaw and Buthidaung Townships – were destroyed

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<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*, para. 932.

<sup>188</sup> *Ibid.*, para. 941.

<sup>189</sup> ICTR, Trial Chamber I, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (2 September 1998), paras. 732-734.

<sup>190</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 2.

“mostly by burning.”<sup>191</sup> UNOSAT estimates that by April 2019 the number of destroyed structures had risen to approximately 40,600 across 416 settlements.<sup>192</sup>

101. On 10 July 2019, the UN Deputy High Commissioner for Human Rights stated: “In a continuation of attacks, it was reported that on 2 May and 9 May 2019 Rohingya homes and shops were burned in Maungdaw and Buthidaung townships.”<sup>193</sup> The Deputy High Commissioner also stated that “on 28 May 2019, reports alleged that the remaining Rohingya houses in Taung Bazar, Buthidaung township, were also burned to the ground.”<sup>194</sup> She further observed: “Our information suggests that the authorities have taken no steps to investigate these attacks.”<sup>195</sup>

102. Myanmar’s continuing attacks on the Rohingya group and ongoing destruction of Rohingya villages are accompanied by other efforts to make life for the Rohingya impossible. These include denying access to food. According to the UN Fact-Finding Mission, “[s]ince the ‘clearance operations’ began on 25 August 2017, the Government has severely restricted access to food for Rohingya in Rakhine State.”<sup>196</sup>

103. In March 2018, the UN Special Rapporteur on the situation of human rights in Myanmar reported that “there appears to be a policy of forced starvation in place, designed to make life in northern Rakhine unsustainable for Rohingya who remain.”<sup>197</sup> This is still the case. In 2019, the Committee on the Elimination of Discrimination against Women found that the remaining members of the local Rohingya group were “experiencing conditions of forced starvation, with security forces denying access to the remaining rice fields and markets.”<sup>198</sup> In

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<sup>191</sup> *Ibid.*, para. 128.

<sup>192</sup> *Ibid.*, para. 116.

<sup>193</sup> UN OHCHR, *Update on Myanmar at the 41st Session of the Human Rights Council: Statement by UN Deputy High Commissioner for Human Rights, Kate Gilmore* (10 July 2019), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24811&LangID=E>.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

<sup>196</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 156.

<sup>197</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>.

<sup>198</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 158 (quoting CEDAW, *Concluding observations on the exceptional report of Myanmar* (advance unedited version), UN Doc. No. CEDAW/C/MMR/EP/CO/1 (8 March 2019)).

July 2019, the FAO and WFP warned that food security in northern Rakhine State had become “precarious.”<sup>199</sup>

104. To implement its policy of forced starvation of the Rohingya group, Myanmar has engaged in widespread confiscation of agricultural lands on which the Rohingya grow subsistence crops essential to their survival. The UN Fact-Finding Mission determined that Myanmar is undertaking “a concerted effort” to “confiscate” these “lands from which it forcibly displaced hundreds of thousands of Rohingya.”<sup>200</sup> The ongoing land confiscations extend beyond the Rohingya villages that Myanmar destroyed during the “clearance operations.” The Mission reported that “Rohingya-owned and cultivated land” has now been “confiscated in areas of northern Rakhine State where Rohingya remained.”<sup>201</sup> According to the Mission’s findings, members of the Rohingya group are “no longer allowed to consume products from their own lands following the confiscation.”<sup>202</sup>

105. The UN Fact-Finding Mission reported that Rohingya farmers living in the village of Ah Lel Chaung in Buthidaung recounted that “security forces began harvesting Rohingya fields to the west of the village and took the crops away in trucks.”<sup>203</sup> The Mission further noted that Rakhine State’s Minister of Agriculture, Livestock, Forestry and Mining stated that an enterprise controlled by the Myanmar Government had overseen the harvesting and sale of 45,000 acres of what the Minister cynically described as “ownerless Bengali land.”<sup>204</sup>

106. To the same end, Myanmar security forces and members of ethnic Rakhine communities under their protection “routinely visit Rohingya villages to confiscate food, including crops and even humanitarian aid.”<sup>205</sup> The UN Fact-Finding Mission found that the Tatmadaw and ethnic Rakhine “deliberately kill[] or confiscate[] livestock, including cattle, goats and chickens, without permission or payment.”<sup>206</sup> An interviewee from Buthidaung

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<sup>199</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 159.

<sup>200</sup> *Ibid.*, para. 139.

<sup>201</sup> *Ibid.*, para. 123.

<sup>202</sup> *Ibid.*, para. 126.

<sup>203</sup> *Ibid.*, para. 123.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*, para. 161.

<sup>206</sup> *Ibid.*, para. 163.

Township stated: “the army would often come to the village, search houses for food and steal anything they could find.”<sup>207</sup>

107. Another Rohingya who was forced to flee Buthidaung Township reported:

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 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, as I was unable to pay them 100,000 Kyat. I was arrested at my home and after beating, they demanded 100,000 Kyat.<sup>208</sup>

108. In some areas, the military has “ordered villages not to cultivate their lands.”<sup>209</sup> A survivor of the “clearance operations” stated that afterwards: “The military and ethnic Rakhine occupied most of our lands and residents were ordered not to cultivate their lands... residents were starving and were on the brink of famine.”<sup>210</sup>

109. Based on the UN Fact-Finding Mission’s evaluation of the evidence that it had collected over the preceding year, its September 2019 report concluded that “many of the factors that contributed to the killings, rapes and gang rapes, torture, forced displacement and other grave human rights violations by the Tatmadaw and other government authorities that the Mission documented in its 2018 report are still present.”<sup>211</sup> The Mission found that “grave violations against the Rohingya continue” and that there is a “real and significant danger of the situation deteriorating further.”<sup>212</sup>

110. This recent report, submitted in mid-September 2019, leaves no doubt that the approximately 600,000 Rohingya who remain in Myanmar are in “real and significant danger” of further genocidal acts at the hands of the Myanmar State. According to the report: “there is a serious risk that genocidal actions may occur or recur, and that Myanmar is failing in its

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<sup>207</sup> *Ibid.*, para. 162.

<sup>208</sup> *Ibid.*, para. 164.

<sup>209</sup> *Ibid.*, para. 165.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*, para. 2.

<sup>212</sup> *Ibid.*, para. 58.

obligation to prevent genocide, to investigate genocide and to enact effective legislation criminalizing and punishing genocide.”<sup>213</sup> The risk to the Rohingya is especially grave because “the State continues to harbour genocidal intent.”<sup>214</sup> As a consequence, “the Rohingya people remain at serious risk of genocide under the terms of the Genocide Convention.”<sup>215</sup>

#### **IV. The Claims of The Gambia**

111. Based on the above, as well as the voluminous evidence to be presented over the course of these proceedings, The Gambia considers that Myanmar—through its State organs, State agents, and other persons and entities acting on the instructions of or under the direction and control of Myanmar—is responsible for violations of its obligations under the Genocide Convention, including Articles I, III, IV, V and VI. Violations of the Genocide Convention include, but are not limited to:

- committing genocide in violation of Article III(a);
- conspiracy to commit genocide in violation of Article III(b);
- direct and public incitement to commit genocide in violation of Article III(c);
- attempting to commit genocide in violation of Article III(d);
- complicity in genocide in violation of Article III(e);
- failing to prevent genocide in violation of Article I;
- failing to punish genocide in violation of Articles I, IV and VI; and
- failing to enact the necessary legislation to give effect to the provisions of the Genocide Convention and to provide effective penalties for persons guilty of genocide or of any of the acts enumerated in Article III, in violation of Article V.

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<sup>213</sup> *Ibid.*, paras. 9, 58.

<sup>214</sup> *Ibid.*, para. 238.

<sup>215</sup> *Ibid.*, para. 242.

## **V. The Relief Sought**

112. While reserving the right to revise, supplement or amend this Application, and subject to the presentation to the Court of the relevant evidence and legal arguments, 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.

## **VI. Request for Provisional Measures**

113. In accordance with Article 41 of the Statute of the Court, and Articles 73, 74 and 75 of the Rules of Court, The Gambia requests that the Court indicate provisional measures. In light of the nature of the rights at issue, as well as the ongoing, severe and irreparable harm being suffered by members of the Rohingya group, The Gambia requests that the Court address the request as a matter of extreme urgency.

114. This Application describes a brutal and continuing campaign of sweeping genocidal acts and measures, imposed by Myanmar against members of the Rohingya group, intended to destroy the group in whole or in part. Myanmar has perpetrated acts of genocide that collectively target the Rohingya by, *inter alia*, killing members of the group, including women and children; committing rape and other forms of sexual violence and perverse cruelty against Rohingya women and girls; and burning their homes and villages and confiscating their lands and livestock in a manner intended to deny them access to food, shelter and other essentials of life. These acts are committed against members of the Rohingya group solely on the basis of their ethnical, racial, or religious origin, with the intention of destroying them as a group, as such, in whole or in part, constituting flagrant violations of Myanmar's obligations under Articles I, III(a), III(b), III(c), III(d), III(e), IV, V and VI of the Genocide Convention.

115. Provisional measures are necessary in this case to protect against further, irreparable harm to the rights of the Rohingya group under the Genocide Convention, which continue to be violated with impunity. The Gambia requests that the Court indicate provisional measures to protect and preserve these rights, and to prevent aggravation or extension of the dispute concerning Myanmar's genocidal actions, pending the determination of the merits of the issues raised by the Application.

**A. Compelling Circumstances Require the Indication of Provisional Measures**

116. As described above, Myanmar has perpetrated, and is continuing to perpetrate, genocidal acts against members of the Rohingya group as such, solely on the grounds of their ethnical, racial or religious origin. Myanmar has acted with the intent to destroy in whole or in part the Rohingya as a protected group under the Genocide Convention by the following *ongoing* conduct, *inter alia*:

- killing members of the Rohingya group;
- raping and inflicting other forms of sexual violence on women and girls within the group;
- subjecting Rohingya men, women and children to torture, beatings and other forms of cruel treatment for the sole reason that they are members of the Rohingya group; and



- deliberately destroying or otherwise denying access to food, shelter and other essentials of life in a manner that is calculated to destroy the Rohingya group in whole or in part.

117. As set forth in this Application, Myanmar has denied any wrongdoing and resisted all calls by The Gambia and the international community to stop and alleviate the destruction and suffering of members of the Rohingya group, resulting from genocidal acts committed with the intent to destroy the group in whole or in part. It is clear that Myanmar has no intention of ending these genocidal acts and continues to pursue the destruction of the group within its territory. As the UN Fact-Finding Mission concluded as recently as mid-September 2019, all members of the Rohingya group who are situated today in Myanmar are at grave risk of further acts of genocide.

118. Instead of preventing these genocidal acts, or punishing the perpetrators as required by the Genocide Convention, Myanmar is deliberately destroying evidence of its wrongdoing to cover up the crimes. The UN Fact-Finding Mission documented that Myanmar has destroyed, buried and disposed of the remains of the Rohingya victims.<sup>216</sup> It has concluded that “mass demolition and terrain clearance throughout northern Rakhine State raise serious concerns about the potential destruction of evidence and its effect on future investigation into crimes, including the gravest crimes under international law.”<sup>217</sup>

## **B. Prima Facie Jurisdiction**

119. 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.”<sup>218</sup> In order to determine whether the Court has prima facie jurisdiction, the acts complained of must be prima facie “capable of falling within the provisions of [the

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<sup>216</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1000-1003.

<sup>217</sup> *Ibid.*, para. 1242.

<sup>218</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, para. 24.

Convention],” such that “the dispute is one which the Court could have jurisdiction *ratione materiae* to entertain.”<sup>219</sup>

120. As explained above, the jurisdiction of the Court is based on Article 36, paragraph 1, of its Statute and Article IX of the Genocide Convention. The Gambia and Myanmar are UN Member States and parties to the Genocide Convention. Both have accepted the jurisdiction of the Court under Article IX without any reservation. As set out in this Application, there is an existing dispute between The Gambia and Myanmar concerning the interpretation, application and fulfilment of obligations under the Genocide Convention. Therefore, the Court plainly has *prima facie* jurisdiction to indicate provisional measures.

### C. The Rights Whose Protection Is Sought and Their Plausible Character

121. The Court has “the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.”<sup>220</sup>

122. Addressing the “objects” of the Genocide Convention, the Court explained in 1951 that it:

was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this 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. In 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.<sup>221</sup>

123. On multiple occasions, the Court has acknowledged that “the norm prohibiting genocide [is] assuredly a peremptory norm of international law (*jus cogens*)”<sup>222</sup> and that “the

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<sup>219</sup> *Ibid.*, para. 30.

<sup>220</sup> Statute of the International Court of Justice, art. 41.

<sup>221</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 23.

<sup>222</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007*, p. 111, para. 161 (citing *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the*

rights and obligations enshrined by the Convention are rights and obligations *erga omnes*.”<sup>223</sup> Therefore, all States “have a legal interest” in the protection of the rights involved.<sup>224</sup>

124. Addressing the admissibility of the claims presented by Belgium against Senegal on the basis of the Convention against Torture, and having underscored its similarities with the Genocide Convention, the Court concluded:

The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.<sup>225</sup>

125. Such finding applies *mutatis mutandis* to the Genocide Convention and to the legal entitlement of The Gambia under it to seek compliance by Myanmar with its obligations.

126. The Gambia seeks to protect 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, from the genocidal acts prohibited under the Convention. At this stage of the proceedings, the Court does not need to establish definitively the existence of such rights; it is sufficient, for the purpose of indicating provisional measures, that such rights are plausible, *i.e.*, “grounded in a possible interpretation of the Convention.”<sup>226</sup> Protection of the rights that are the subject of the present request for provisional measures – which include the rights of the

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*Congo v. Rwanda*), *Jurisdiction and Admissibility, Judgment of 3 February 2006, I.C.J. Reports 2006*, p. 32, para. 64).

<sup>223</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996 (II)*, p. 616, para. 31; *see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015, I.C.J. Reports 2015*, p. 47, para. 87.

<sup>224</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), Second Phase, Judgment of 5 February 1970, I.C.J. Reports 1970*, p. 32, para. 33.

<sup>225</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Merits, Judgment of 20 July 2012, I.C.J. Reports 2012*, p. 450, para. 69.

<sup>226</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 152, para. 60.

Rohingya group to exist as a group – coincide with the very object and purpose of the Convention.

127. In addition to the rights of the Rohingya group and its members under the Genocide Convention, The Gambia 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. Considering the jurisprudence of the Court recalled above, such rights are entirely plausible and could be subsequently adjudged to belong to The Gambia. The Court has recognized “the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge.’”<sup>227</sup>

#### **D. Risk of Irreparable Harm and Urgency**

128. The Court “has the power to indicate provisional measures when there is a risk that 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.”<sup>228</sup> Especially, the Court has the power to indicate provisional measures “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.”<sup>229</sup> As the Court recently confirmed, “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>230</sup>

129. The indication of provisional measures does not require the Court “to establish the existence of breaches of the Genocide Convention,” nor is the Court at this stage required to “make definitive findings of fact or of imputability.”<sup>231</sup> The Gambia recognizes that, in

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<sup>227</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 23.

<sup>228</sup> *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Order of 3 October 2018*, para. 77.

<sup>229</sup> *Ibid.*, para. 78.

<sup>230</sup> *Ibid.* (citing *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).

<sup>231</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, paras. 44, 46.

deciding whether to indicate provisional measures, the Court is concerned “not so much with the past as with the present and with the future.”<sup>232</sup>

130. The Court previously indicated provisional measures when rights under the Genocide Convention were threatened by similar acts against a protected group.<sup>233</sup> Where past violations have occurred, the Court has found provisional measures appropriate when it is “not inconceivable” that they might occur again.<sup>234</sup> The Court has also ordered provisional measures in circumstances that were “unstable and could rapidly change” due to “ongoing tension and the absence of an overall settlement to the conflict,” and where the affected group remained vulnerable to human rights violations.<sup>235</sup>

131. There is no doubt that these requirements for the indication of provisional measures are satisfied here. All members of the Rohingya group in Myanmar are presently in grave danger of further genocidal acts because of Myanmar’s deliberate and intentional efforts to destroy them as a group, and the remaining Rohingya communities and individuals in Myanmar continue to face daily threats of death, torture, rape, starvation and other deliberate actions aimed at their collective destruction, in whole or in part. Myanmar’s ongoing atrocities against the Rohingya group, which are well documented by highly credible UN reports, *inter alia*, constitute a grave threat to their existence and place them in urgent need of the Court’s protection. As the UN Fact-Finding Mission concluded, “the brutality with which the underlying acts were carried out provides further support for a conclusion that they were committed with genocidal intent.”<sup>236</sup> In its September 2019 report, the Mission confirmed that “the Government continues to harbour genocidal intent and that the Rohingya remain under serious risk of genocide.”<sup>237</sup> This is an urgent situation that literally cries out for the Court’s protection.

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<sup>232</sup> *Ibid.*, p. 16, para. 25.

<sup>233</sup> *Ibid.*, pp. 24-25, para. 52.

<sup>234</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 1169, para. 89.

<sup>235</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 143.

<sup>236</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1433.

<sup>237</sup> UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 140.

## **E. Provisional Measures Requested**

132. On the basis of the facts set forth above, The Gambia, as a State party to the Genocide Convention, respectfully requests the Court, as a matter of extreme urgency, to indicate the following provisional measures, which are directly linked to the rights that form the subject matter of the dispute, pending its determination of this case on the merits:

- (a) Myanmar shall immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent all acts that amount to or contribute to the crime of genocide, including taking all measures within its power to prevent the following acts from being committed against 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.

133. The Gambia respectfully asks that this request for provisional measures be considered at the Court's earliest possible opportunity, including the scheduling of a hearing.

134. The Gambia reserves its right to request additional provisional measures to prevent irreparable harm to the rights at issue in this case, or to prevent further aggravation of the dispute between the Parties, should they become necessary, during the course of these proceedings.

**VII. Appointment of Judge *Ad Hoc***

135. In accordance with Article 31 of the Statute of the Court and Article 35(1) of the Rules of Court, The Gambia appoints Judge Navanethem Pillay as judge *ad hoc*.

**VIII. Reservation of Rights**

136. The Gambia reserves the right to revise, supplement or amend the terms of this Application, as well as the grounds invoked.


**IX. Appointment of Agent**

137. The Gambia has designated as its Agent The Honourable Abubacarr Marie Tambadou, Attorney General and Minister of Justice of the Republic of The Gambia.

138. Pursuant to Article 40, paragraph 1, of the Rules of Court, all communications relating to this case should be sent to: Consulate General of the Republic of The Gambia, Apollolaan 137, 1077 AR Amsterdam, The Netherlands.

139. I have the honour to assure the Court of my highest esteem and consideration.

The Hague, 11 November 2019



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Agent of the Republic of The Gambia