

CR 2019/21

**International Court  
of Justice**

**Cour internationale  
de Justice**

**THE HAGUE**

**LA HAYE**

**YEAR 2019**

*Public sitting*

*held on Thursday 12 December 2019, at 4.30 p.m., at the Peace Palace,*

*President Yusuf presiding,*

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

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**VERBATIM RECORD**

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**ANNÉE 2019**

*Audience publique*

*tenue le jeudi 12 décembre 2019, à 16 h 30, au Palais de la Paix,*

*sous la présidence de M. Yusuf, président,*

*en l'affaire relative à l'Application de la convention pour la prévention et la répression  
du crime de génocide (Gambie c. Myanmar)*

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**COMPTE RENDU**

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

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*Présents :* M. Yusuf, président  
Mme Xue, vice-présidente  
MM. Tomka  
Abraham  
Bennouna  
Cançado Trindade  
Mme Donoghue  
M. Gaja  
Mme Sebutinde  
MM. Bhandari  
Robinson  
Crawford  
Gevorgian  
Salam  
Iwasawa, juges  
Mme Pillay  
M. Kress, juges *ad hoc*  
  
M. Gautier, greffier

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

H.E. Mr. Abubacarr Marie Tambaou, Attorney General and Minister of Justice, Republic of The Gambia,

*as Agent;*

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

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

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

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

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

Mr. Andrew Loewenstein, Attorney-at-Law, Foley Hoag LLP, member of the Bar of Massachusetts,

Mr. Arsalan Suleman, Attorney-at-Law, Foley Hoag LLP, member of the Bars of New York and the District of Columbia,

*as Counsel and Advocates;*

H.E. Mr. Chernoh Marenah, Solicitor General, Ministry of Justice,

Mr. Hussein Thomasi, Ministry of Justice,

Ms Bafou Jeng, Ministry of Justice,

Mr. Amadou Jaiteh, Permanent Mission of the Republic of The Gambia to the United Nations,

Mr. Peter Tzeng, Attorney-at-Law, Foley Hoag LLP, member of the Bars of New York and the District of Columbia,

Ms Yasmin Al Ameen, Attorney-at-Law, Foley Hoag LLP,

Ms Jessica Jones, Barrister-at-Law, Matrix Chambers, London,

*as Counsel;*

H.E. Mr. Omar G. Sallah, Ambassador and Permanent Representative of the Republic of The Gambia to the Organisation of Islamic Cooperation,

H.E. Mr. Youssef Aldobeay, Assistant Secretary General for Political Affairs, Organisation of Islamic Cooperation,

***Le Gouvernement de la République de Gambie est représenté par :***

S. Exc. M. Abubacarr Marie Tambadou, *Attorney General* et ministre de la justice de la République de Gambie,

*comme agent ;*

M. Paul S. Reichler, avocat, cabinet Foley Hoag LLP, membre des barreaux de la Cour suprême des Etats-Unis d'Amérique et du district de Columbia,

M. Philippe Sands, QC, professeur de droit international à l'University College de Londres, avocat, Matrix Chambers (Londres),

M. Payam Akhavan, LL.M, SJD (Université de Harvard), professeur de droit international à l'Université McGill, membre du barreau de l'Etat de New York et du barreau de l'Ontario, membre de la Cour permanente d'arbitrage,

Mme Tafadzwa Pasipanodya, avocate, cabinet Foley Hoag LLP, membre des barreaux de New York et du district de Columbia,

M. Pierre d'Argent, professeur ordinaire, Université catholique de Louvain, membre de l'Institut de droit international, Foley Hoag LLP, membre du barreau de Bruxelles,

M. Andrew Loewenstein, avocat, cabinet Foley Hoag LLP, membre du barreau du Massachusetts,

M. Arsalan Suleman, avocat, cabinet Foley Hoag LLP, membre des barreaux de New York et du district de Columbia,

*comme conseils et avocats ;*

S. Exc. M. Chernoh Marenah, *Solicitor General*, ministère de la justice,

M. Hussein Thomasi, ministère de la justice,

Mme Bafou Jeng, ministère de la justice,

M. Amadou Jaiteh, mission permanente de la République de Gambie auprès de l'Organisation des Nations Unies,

M. Peter Tzeng, avocat, cabinet Foley Hoag LLP, membre des barreaux de New York et du district de Columbia,

Mme Yasmin Al Ameen, avocate, cabinet Foley Hoag LLP,

Mme Jessica Jones, avocate, Matrix Chambers (Londres),

*comme conseils ;*

S. Exc. M. Omar G. Sallah, ambassadeur et représentant permanent de la République de Gambie auprès de l'Organisation de la coopération islamique,

S. Exc. M. Youssef Aldobeay, sous-secrétaire général aux affaires politiques, Organisation de la coopération islamique,

H.E. Mr. Hassan Ali Hassan, Director of Legal Affairs, Organisation of Islamic Cooperation,

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

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

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

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

Ms Hasina Begum,

Ms Hamida Khatun,

Mr. Yousuf Ali,

*as Advisers;*

Mr. Scott Edmonds, Cartographer, International Mapping,

Ms Vickie Taylor, Cartographer, International Mapping,

*as Technical Advisers;*

Ms Elise Barber, Washington, DC,

Ms Nancy Lopez, Washington, DC,

*as Assistants;*

Mr. Mark van Melle,

Mr. Erik Alexander van Houwelingen,

Mr. Robby Veltmeijer,

*as Security Officers.*

***The Government of the Republic of the Union of Myanmar is represented by:***

H.E. Ms Aung San Suu Kyi, Union Minister for Foreign Affairs of the Republic of the Union of Myanmar,

*as Agent;*

H.E. Mr. Kyaw Tint Swe, Union Minister for the Office of the State Counsellor of the Republic of the Union of Myanmar,

*as Alternate Agent;*

H.E. Mr. Kyaw Tin, Union Minister for International Cooperation of the Republic of the Union of Myanmar,

*as Senior member of the delegation;*

S. Exc. M. Hassan Ali Hassan, directeur des affaires juridiques, Organisation de la coopération islamique,

M. Hassan Abedin, conseiller du secrétaire général, Organisation de la coopération islamique,

Mme Yasmin Ullah, présidente du réseau de droits de la personne Rohingya,

Mme Razia Sultana, directrice de l'Arakan Rohingya National Organization et coordinatrice du réseau Free Rohingya Coalition,

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

Mme Hasina Begum,

Mme Hamida Khatun,

M. Yousuf Ali,

*comme conseillers ;*

M. Scott Edmonds, cartographe, International Mapping,

Mme Vickie Taylor, cartographe, International Mapping,

*comme conseillers techniques ;*

Mme Elise Barber (Washington DC),

Mme Nancy Lopez (Washington DC),

*comme assistantes ;*

M. Mark van Melle,

M. Erik Alexander van Houwelingen,

M. Robby Veltmeijer,

*comme agents de sécurité.*

***Le Gouvernement de la République de l'Union du Myanmar est représenté par :***

S. Exc. Mme Aung San Suu Kyi, ministre des affaires étrangères de la République de l'Union du Myanmar,

*comme agent ;*

S. Exc. M. Kyaw Tint Swe, ministre de l'Union pour le bureau du conseiller d'Etat de la République de l'Union du Myanmar,

*comme agent suppléant ;*

S. Exc. M. Kyaw Tin, ministre de l'Union pour la coopération internationale de la République de l'Union du Myanmar,

*comme membre principal de la délégation ;*

Mr. Christopher Staker, member of the Bar of England and Wales, 39 Essex Chambers,

Mr. William Schabas, OC, MRIA, Professor of International Law, Middlesex University and Professor of International Criminal Law and Human Rights, Leiden University,

Ms Phoebe Okowa, Professor of Public International Law, Queen Mary University of London, Advocate of the High Court of Kenya, member of the Permanent Court of Arbitration,

*as Counsel and Advocates;*

Mr. Andreas Zimmermann, LL.M (Harvard), Professor of International Law, University of Potsdam, Director of the Potsdam Centre of Human Rights, member of the Permanent Court of Arbitration,

Ms Catherine Dobson, member of the Bar of England and Wales, 39 Essex Chambers,

*as Counsel;*

H.E. Mr. Soe Lynn Han, Ambassador of the Republic of the Union of Myanmar to the Kingdoms of Belgium and the Netherlands,

Mr. Chan Aye, Director-General, International Organizations and Economic Department, Ministry of Foreign Affairs,

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

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

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

Ms Leena Ghosh, Advisor to the Alternate Agent, Senior Peace Adviser, National Reconciliation and Peace Center,

Ms Aye Thida Myo, Minister Counsellor, Permanent Mission of Myanmar to the United Nations, New York,

Ms Myo Pa Pa Htun, Minister Counsellor, Permanent Mission of Myanmar to the United Nations, Geneva,

Mr. Zaw Naing Win, Deputy Director/Personal Staff Officer to the Agent,

Ms Phoo Pwint Ko Ko, Counsellor, Myanmar Embassy, Kingdom of Belgium,

Mr. Thu Rein Saw Htut Naing, Assistant Director, International Organizations and Economic Department, Ministry of Foreign Affairs,

Mr. Swe Sett, Assistant Director/Personal Staff Officer to the Alternate Agent,

Mr. Chan Aye, First Secretary, Myanmar Embassy, Kingdom of Belgium,

Ms May Myat Noe Naing, First Secretary, Myanmar Embassy, Kingdom of Belgium,

Mr. Kyaw Kyaw Lwin, Third Secretary, Permanent Mission of Myanmar to the United Nations, Geneva,

M. Christopher Staker, membre du barreau d'Angleterre et du pays de Galles, 39 Essex Chambers,

M. William Schabas, OC, MRJA, professeur de droit international à l'Université du Middlesex et professeur de droit pénal international et des droits de l'homme à l'Université de Leyde,

Mme Phoebe Okowa, professeure de droit international public à la Queen Mary University of London, avocate près la Haute Cour du Kenya, membre de la Cour permanente d'arbitrage,

*comme conseils et avocats ;*

M. Andreas Zimmermann, LL.M. (Université de Harvard), professeur de droit international à l'Université de Potsdam, directeur du centre des droits de l'homme de l'Université de Potsdam, membre de la Cour permanente d'arbitrage,

Mme Catherine Dobson, membre du barreau d'Angleterre et du pays de Galles, 39 Essex Chambers,

*comme conseils ;*

S. Exc. M. Soe Lynn Han, ambassadeur de la République de l'Union du Myanmar auprès des Royaumes de Belgique et des Pays-Bas,

M. Chan Aye, directeur général du service des organisations internationales et de l'économie, ministère des affaires étrangères,

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

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

Mme Thi Da Oo, directrice générale, bureau de l'*Attorney General*,

Mme Leena Ghosh, conseillère auprès de l'agent suppléant, conseillère principale pour la paix, Centre pour la réconciliation nationale et la paix,

Mme Aye Thidar Myo, ministre conseillère, mission permanente du Myanmar auprès de l'Organisation des Nations Unies à New York,

Mme Myo Pa Pa Htun, ministre conseillère, mission permanente du Myanmar auprès de l'Organisation des Nations Unies à Genève,

M. Zaw Naing Win, directeur adjoint du cabinet de l'agent,

Mme Phoo Pwint Ko Ko, conseillère, ambassade du Myanmar au Royaume de Belgique,

M. Thu Rein Saw Htut Naing, sous-directeur du service des organisations internationales et de l'économie, ministère des affaires étrangères,

M. Swe Sett, sous-directeur du cabinet de l'agent suppléant,

M. Chan Aye, premier secrétaire, ambassade du Myanmar au Royaume de Belgique,

Mme May Myat Noe Naing, première secrétaire, ambassade du Myanmar au Royaume de Belgique,

M. Kyaw Kyaw Lwin, troisième secrétaire, mission permanente du Myanmar auprès de l'Organisation des Nations Unies à Genève,

Mr. Zaw Thet, Head of Branch II, Protocol Department, Ministry of Foreign Affairs,

Mr. Kyaw Tin, Legal Consultant,

Mr. Thihan Myo Nyun, Legal Consultant,

Ms Tint Tint Tun, aide to the Agent,

Dr. Thet Lel Swe Aye, physician to the Agent,

*as Members of the delegation;*

Mr. Icarus Chan, Assistant to the Secretariat,

Mr. Matthew Christopher Terry, Assistant to the Secretariat,

Ms Alison Onyango, Assistant to Counsel and Advocates,

*as Assistants;*

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

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

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

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

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

*as Security Officers.*

M. Zaw Thet, chef du service II, service du protocole, ministère des affaires étrangères,

M. Kyaw Tin, consultant juridique,

M. Thihan Myo Nyun, consultant juridique,

Mme Tint Tint Tun, assistante de l'agent,

D<sup>r</sup> Thet Lel Swe Aye, médecin de l'agent,

*comme membres de la délégation ;*

M. Icarus Chan, assistant au secrétariat,

M. Matthew Christopher Terry, assistant au secrétariat,

Mme Alison Onyango, assistante des conseils et avocats,

*comme assistants ;*

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

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

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

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

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

*comme agents de sécurité.*

The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to hear the second round of oral observations of Myanmar on the Request for the indication of provisional measures by The Gambia. I shall now give the floor to Mr. Staker. You have the floor.

Mr. STAKER:

**LACK OF PRIMA FACIE JURISDICTION OF THE COURT; LACK OF PRIMA FACIE STANDING  
OF THE GAMBIA; INAPPROPRIATENESS OF THE PROVISIONAL  
MEASURES REQUESTED**

1. Mr. President, Members of the Court, I will respond to the points made by counsel for The Gambia this morning in relation to issues of prima facie jurisdiction and prima facie standing, and the form of the provisional measures requested.

2. The first sub-issue of prima facie jurisdiction relates to the matter of The Gambia acting in these proceedings as a proxy or organ of an international organization, rather than in its capacity as a State party to the Genocide Convention.

3. We made the point during the first round that these proceedings are brought on behalf of and are funded by the OIC.

4. One thing we do find striking is that in its second round this morning, The Gambia said nothing about funding. Yesterday, I said that it is unknown which States have donated what to the voluntary fund, or whether the donors are even confined to States. This morning might have been an opportunity for The Gambia to provide some transparency in that respect, but there was complete silence. Not only do we still not know precise amounts contributed by individual donors, we do not even know if the donors include non-State entities such as international organizations, NGOs or even private individuals. We do not even know if The Gambia is spending a single penny of its own resources on these proceedings.

5. It is accepted that The Gambia signed the Application instituting proceedings in its own name. However, it is clear from the documents I took you to yesterday that these proceedings are brought on behalf of the OIC, and that the proceedings are financed by an OIC controlled fund. I will not take you to all that evidence again. The situation is expressed particularly clearly in the 24 November OIC press release at tab 3.17 of the judges' folder. It states in terms that

“The Gambia, as Chair of the [*ad hoc* OIC] Committee *was* tasked with submitting the case to the ICJ, following a decision by the OIC Heads of State”. The meaning is plain. The decision to bring these proceedings was brought by the OIC Heads of State, and the OIC tasked The Gambia to bring them. The Gambia was so tasked in its capacity as chair of the *ad hoc* Committee. The fact that The Gambia brings these proceedings on behalf of the OIC has been announced in official OIC documents, statements made by The Gambia in the General Assembly and by the law firm representing The Gambia in these proceedings, as well as in the media.

6. The Gambia may now claim otherwise, but this is a bare assertion that is contradicted by the evidence. It may well be that there is more to the background to the adoption of these OIC resolutions than Myanmar can know. If so, explanations and evidence could have been provided by The Gambia, which unlike Myanmar was a party to the various developments within the OIC relating to this matter. It has provided none, and in the circumstances the Court can only base its decision on the evidence before it.

7. I would finally note in this respect that The Gambia did not argue today that it would be legitimate for it to bring these proceedings on behalf of the OIC. The Gambia seems to concede that point.

8. The second sub-issue of *prima facie* jurisdiction concerns the existence of a dispute. Mr. d’Argent claimed this morning that the various OIC resolutions made clear to *Myanmar* that there was a dispute with *The Gambia* under the Genocide Convention. I do not need to repeat all that I said yesterday. They do not.

9. Mr. d’Argent referred this morning to the March 2019 OIC Resolution 4/46-MM on The Situation of the Muslim Community in Myanmar<sup>1</sup>. However, that resolution also does not mention specifically the Genocide Convention. It contains general references to genocide (as well as for instance crimes against humanity), but as I submitted yesterday, this Court has no jurisdiction in this case over violations of customary international law aspects of genocide. The OIC resolution does not identify a dispute concerning the interpretation, application or fulfilment of the Genocide Convention, within the meaning of Article IX.

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<sup>1</sup> OIC/CFM-46/2019/MM/RES/FINAL, pp. 14-25 (English).

10. I therefore maintain the position that the 11 October Note Verbale did not call for a response, either at all, or in any event within a month.

11. Mr. President, Members of the Court, I then turn to the issue of standing.

12. Counsel for The Gambia once again blurs the crucial difference between the right to invoke another State's responsibility and the question whether a State has standing before this Court. This difference is important as the general right to invoke another State's responsibility under customary international law is much broader, given that the question of standing before this Court is clearly regulated by this Court's Statute and its established jurisprudence.

13. Let me recall that the ILC's then Special Rapporteur himself considered that what is now Article 48 of the ILC's draft Articles on State Responsibility was in many parts no codification of the *lex lata* but merely constituted a progressive development of international law<sup>2</sup>. Secondly, the ILC has made it clear that Article 48 of the draft Articles was without prejudice to the general principle that "the implementation of State responsibility is *in the first place* an entitlement of the 'injured State'"<sup>3</sup>, or as the ILC's former Special Rapporteur on the matter put it in unequivocal terms, the priority of specially affected States ought to be recognized when it comes to reactions to violations of *erga omnes* norms<sup>4</sup>.

14. The progressive development provided for in Article 48, paragraph 2, of the ILC's Articles on State Responsibility<sup>5</sup> was thus merely intended to ensure that where there is *no* State at all that is individually injured, some third entity is available to invoke the responsibility of the violating State in the interest of the beneficiaries of that obligation breached.

15. However, in cases like the one before you now, in which there is a specifically affected State, namely Bangladesh — a finding which the Applicant notably did not rebut this morning — it is that especially affected State that has the right to invoke the responsibility of the State that has

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<sup>2</sup> ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), Art. 48, p. 127, para. 12.

<sup>3</sup> ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), Art. 42, p. 117, para. 1 (*emphasis supplied*).

<sup>4</sup> J. Crawford, *State Responsibility – The General Part* (2013), p. 367.

<sup>5</sup> ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), Art. 48, p. 127, para. 12.

allegedly breached its obligations. In such a situation it is neither necessary, nor indeed desirable, that any other State should then be able to invoke such responsibility as well.

16. Therefore, our submission is not that a non-injured State was generally barred in any conceivable situation from bringing a claim before this Court. Rather, we submit that it is not possible to circumvent the principle that it is the right of an injured State to decide if, and eventually how, to invoke the responsibility of another State, and that the right of non-injured States to invoke such responsibility is subsidiary. This is also highlighted by Article 45 of the ILC's Articles on State Responsibility.

17. According to Article 45 of the ILC Articles on State Responsibility, no State may invoke State responsibility if the injured State has either waived its claim or acquiesced in the lapse of the claim. We submit that the same must hold true when the specially affected State has, by entering a reservation to Article IX of the Genocide Convention, waived its right to vindicate the responsibility of the alleged wrongdoer before the Court.

18. Mr. President, that now brings me to the relevance of Myanmar's Article VIII reservation which, Professor d'Argent, I feel, misunderstands. What he did accept is that Myanmar's reservation has a bearing on the ability to seise the Court. And indeed how could it be otherwise, given that the clear wording of Article VIII, namely in French and Spanish, uses terms typically used in relation to court proceedings<sup>6</sup>, and its drafting history shows that various attempts to limit the scope of seisin to only some of the organs of the United Nations were rejected<sup>7</sup>. So there is agreement between the Parties on that point.

19. Professor d'Argent did claim, however, that Myanmar's interpretation is not bona fide. Yet, on the contrary, it is The Gambia's interpretation of Article VIII and Myanmar's reservation thereto that is not in line with accepted principles of treaty interpretation, since it empties both Article VIII as well as the reservation, to which The Gambia did not object, of any relevance.

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<sup>6</sup> B. Schiffbauer in C. Tams, et al. (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), Art. VIII, p. 275, MN 13.

<sup>7</sup> For a detailed survey of the drafting history of Article VIII of the Genocide Convention, see B. Schabas, *Genocide in International Law* (2nd ed., 2009), pp. 535-538; see in particular ECOSOC, *Ad hoc Committee on Genocide, Draft Articles for the Inclusion in the Convention on Genocide proposed by the Delegation of China*, UN doc. E/AC.25/9 of 16 Apr. 1948, as well as UN doc. A/C.6/SR.101, UN doc. A/C.6/215/Rev.1, and finally UN doc. A/C.6/SR.102.

20. As a matter of fact, contrary to what you heard this morning, Myanmar's argument based on its Article VIII reservation is not depriving Article IX of any meaning. Rather, it is Myanmar's interpretation that brings Article VIII and Article IX in line. Otherwise, the fact that Article VIII governs the seisin of the Court, which we understand is now accepted by The Gambia, would be redundant and completely useless.

21. As you will recall, Article VIII provides that *any* State — I repeat: *any* State — may seise the Court once acts of genocide are in the process of being committed. It is thus Article VIII — not Article IX — that might imply that any State party, even if not specially affected, might seise the Court, and thus allow for some kind of *actio popularis*. In other words, if there is any possibility of an *actio popularis* under the Genocide Convention: *if* — then that is the effect of Article VIII rather than of Article IX .

22. This obvious effect of Article VIII has so far simply not been relevant, given that in all previous cases under the Genocide Convention, it was the specially affected State, be it Bosnia or Croatia, that had brought the case. What is even more is that none of the cases which the Court has so far dealt with under the Genocide Convention involved a reservation to Article VIII. Thus, the Court has never had to pronounce upon on the relevance of Article VIII for the seisin of the Court.

23. But in this case, where Myanmar has made a reservation to Article VIII, the effect must be that the Court cannot be seised of a case under the Genocide Convention by a non-injured, non-specially affected State, in circumstances where the respondent State has an Article VIII reservation but has not made a reservation to Article IX.

24. It is obvious that where a contracting party has neither a reservation to Article VIII nor to Article IX, the distinction between the seisin of the Court, regulated by Article VIII and as accepted by The Gambia, and the Court's jurisdiction, governed by Article IX, is somewhat academic. But, as I said yesterday<sup>8</sup>, *a* valid seisin is a necessary precondition for the exercise of the Court's jurisdiction. The effect of Myanmar's reservation to Article VIII is that this provision has to be read as providing that not *any* contracting party may seise the Court with a dispute it might have with Myanmar.

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<sup>8</sup> CR 2019/19, p. 57, para. 70 (Staker).

25. Myanmar's reservation to Article VIII on that interpretation therefore has the legal effect of limiting the right to seise the Court to those contracting parties that are specifically affected by the alleged violations of the Genocide Convention, provided at least that the Court has jurisdiction under Article IX. Finding otherwise would *render not only* Article VIII completely redundant and obsolete, but also, and more importantly, the reservation that Myanmar made to Article VIII — a reservation that has been accepted by The Gambia.

26. To summarize: in contrast, for instance, to Article 33 of the European Convention on Human Rights, the Genocide Convention on this interpretation distinguishes between a broad power to seise the Court on the one hand, regulated by Article VIII, and a more limited compromissory clause in Article IX on the other.

27. And it is exactly this difference that explains the fact that Myanmar, while entering a reservation to Article VIII of the Genocide Convention, did *not* at the same time enter a reservation to Article IX. The effect of the reservation to Article VIII is to preclude the seisin of the Court by “any Contracting Party”; that is to say, parties to the Genocide Convention that are not injured States. It thus has the effect to preclude any form of *actio popularis* by *any* not specially affected contracting party to the Genocide Convention. On the other hand, it does not preclude the Court from exercising jurisdiction provided that it was seised by an injured State — and providing that the Court has jurisdiction.

28. Hence, Bangladesh being *a* specially affected State<sup>9</sup> — which is another qualification that The Gambia has not challenged during its pleadings — Bangladesh is not barred by the Article VIII reservation from seising this Court on this possible interpretation, since Bangladesh, unlike The Gambia, is not just any State within the meaning of Article VIII of the Convention. Had it not been for Bangladesh's own Article IX reservation, the Court would have had jurisdiction and it is that reservation to Article IX, which, again, did not appear in the submissions this morning.

29. And it is exactly the purpose of the reservation to Article VIII to preclude attempts to circumvent the limitations on the Court's jurisdiction under Article IX. And I submit that it is not contrary to the principle of good faith to limit attempts to bring an *actio popularis* through the

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<sup>9</sup> CR 2019/19, p. 53, para. 56 (Staker).

making of a reservation to Article VIII, given that this Court has upheld, time and again, that Article IX reservations which exclude the Court's jurisdiction *in toto* are permissible under the Genocide Convention.

30. Let us also note that even Professor Sands, who is proud of the concept of *actio popularis*, accepts that a State may validly except such a right to bring a case without being specially affected by an alleged treaty violation. Let us assume for a minute that Senegal had entered a reservation when acceding to the United Nations Convention against Torture (UNCAT) to the effect that only injured States may bring a case before the Court under Article 30 of that convention. Under those circumstances, any State would have been barred unless the State could claim to be specially affected by Senegal's violations of the Convention against Torture. And it is exactly the same limited effect that Myanmar's Article VIII reservation has, when it comes to the ability of States parties to seize the Court with a case under Article IX.

31. Let me end by noting the repeated attempts of Professor Sands to frighten the Court as to what might be the possible effects of a decision in this case denying provisional measures, stating that it might put the Court in the wilderness for two decades. Apart from the fact that, as the saying goes, fear is a bad adviser, it is worth recalling that the Court has not shied away from making findings that a State was either not responsible for genocide, or that genocide had not happened in the first place, even where those findings were contrary to findings previously made by other actors, including other organs of the United Nations — and we submit that this *is* the essential function of the Court as the principal judicial, rather than political, organ of the United Nations.

32. Moreover, the reference to your *South West Africa* Judgment is also misplaced for other reasons. For one, in that case the effect of the Judgment was that no State whatsoever could bring a case against South Africa for the violations of the mandate. In contrast thereto, in this case, specially affected States might bring a case against Myanmar provided there is a valid jurisdictional bond under Article IX. And beyond this, Myanmar also accepts that even where a specially affected State such as Bangladesh is not able to bring a case given its own Article IX reservation, it might still take countermeasures against Myanmar provided Myanmar were to commit a violation of the Genocide Convention.

33. Mr. President, finally, I turn to the wording of the provisional measures requested by The Gambia.

34. Mr. Sands suggested this morning that the provisional measures concerning preservation of evidence and granting access to UN bodies is “consistent with the jurisprudence of the Court” and that “[i]t builds on the . . . *Frontier Dispute* case<sup>10</sup>”. But this was said without analysis.

35. The comparison with that case is not apt. That case, as the Court will recall, concerned a dispute between the Republic of Upper Volta (now Burkina Faso) and the Republic of Mali concerning part of their common frontier. Consistently with the Court’s jurisprudence in other cases concerning the use of force, the Court addressed its Order in identical terms to both parties: to refrain from action which might extend or aggravate the dispute, or which might impede the gathering of evidence; to withdraw their forces behind lines to be agreed and to continue to observe the recently agreed ceasefire; and, in regard to administration of the disputed areas, to refrain from modifying the situation which had prevailed before the armed actions giving rise to the conflict.

36. There was nothing novel in the provisional measures ordered in the *Frontier Dispute* case. They were framed with care to ensure balance between the parties and to avoid prejudging the outcome of the case<sup>11</sup>. Their object was to seek to preserve the rights of both parties<sup>12</sup>. There is nothing in the Order which paves the way for the use of the Court’s limited jurisdiction under Article 41 to impose on the parties new obligations under international law. Indeed, the Court was at pains to emphasize in the *Frontier Dispute* case, that the Court is not empowered, at the stage of provisional measures, to modify the situation which prevailed before the armed actions leading to the filing of the parties’ requests<sup>13</sup>. The Court’s powers are confined to safeguarding existing rights *of* each Party, not imposing new obligations.

37. The use of provisional measures to create new substantive obligations *of* Member States goes beyond the power in Article 41 to preserve the respective rights of parties to a dispute and has no support in the jurisprudence of this Court.

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<sup>10</sup> *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, pp. 12-13.

<sup>11</sup> *Ibid.*, p. 11, para. 30.

<sup>12</sup> *Ibid.*, p. 10, para. 21.

<sup>13</sup> *Ibid.*, p. 11, para. 29.

38. As was noted by this Court in its Judgment in *LaGrand*<sup>14</sup>, the power of the Court, under Article 41, to indicate provisional measures is based on the necessity, when circumstances call for it, to safeguard and avoid prejudice to the rights of the parties as determined by the final judgment of the Court. This idea of “preservation” is probably the most essential element in the concept of provisional measures. It requires the Court to look both at the risk of irremediable prejudice being caused to the applicant as well as the risk of causing irremediable prejudice to the respondent, if it turns out that interim relief should not have been granted.

39. Therefore the Court must carefully consider the consequences that might follow, were it to indicate the measures sought.

40. And it is therefore submitted that the Court should be wary of indicating provisional measures in cases where there is a complex situation on the ground, in relation to which various diplomatic and practical initiatives are in play, without sufficient understanding of the effects that such provisional measures might have. For instance, whatever the reasons may be for the lack of significant repatriations so far, there is widespread support for the principle that repatriations should occur. It must be questioned what would be the effect on such support of a finding by this Court that those returning to Myanmar would be at imminent risk of genocide.

41. The provisional measures hearing, by its nature, is limited in scope and does not afford an opportunity for the Court to weigh all the advantages and all the disadvantages of different courses of action. Where there is an urgent need for something specific to preserve the rights of a party, the appropriateness of a provisional measure focused on that specific matter may be obvious. However, the Court is simply not in a position to make such assessments in relation to measures expressed in broad and general terms, the precise implications of which in practice cannot be known. I elaborated yesterday on the problems of the provisional measures proposed by The Gambia in this case.

42. Mr. President, Members of the Court, that concludes my observations. I would now invite you to call on Professor Schabas.

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<sup>14</sup> *LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 502, para. 102.

The PRESIDENT: I thank Mr. Staker for his statement. And I shall now give the floor to Professor Schabas. You have the floor.

Mr. SCHABAS: Thank you, Mr. President, for giving me the floor again in these proceedings on provisional measures.

#### **LACK OF A PLAUSIBLE CLAIM**

1. Mr. President, Your Excellencies, there have been many references to the Fact-Finding Mission set up by the Human Rights Council. Indeed the case set before you by The Gambia relies entirely on the reports of the Fact-Finding Mission. For this reason, this morning The Gambia sought to defend the criticisms that were made on the Observations about the quality of the report of the Fact-Finding Mission. Yesterday I criticized the Fact-Finding Mission, amongst other things, for the allegation in the report recently issued in 2019 that genocidal intent had strengthened. You may recall on Tuesday's hearing, counsel for The Gambia laid considerable emphasis on this observation as a way of bolstering the argument favouring provisional measures. This morning it was suggested that I had actually not studied the report adequately and that I had missed some important paragraphs and relevant portions. I would not want the Court to think that I made such a statement here without thoroughly reviewing the Fact-Finding Mission report. I have studied that report, the recent one, which is about 200 pages long, as well as the longer one from the previous year, more than 400 pages in length. I have read every paragraph. Mr. Reichler referred to paragraph 9 where the Fact-Finding Mission set out its summary explanation for why it thought genocidal intent was strengthening in 2019 compared to 2018. Members of the Court may already have noticed that when he actually recited the reasons, the word "continuation" appeared more than once. Paragraph 9 speaks of

*"continued denial of their citizenship and ethnic identity, the living conditions to which it subjects them, its failure to reform laws that subjugate the Rohingya people, the continuation of hate speech directed at the Rohingya, its prior commission of genocide and its disregard for accountability in relation to the 'clearance operations' of 2016 and 2017".*

We find all of these points in the 2018 report. There is nothing new. They are the same allegations. The indicators that were pointed to in the 2018 report are the same that were repeated in the 2019 report. If anything, the 2018 report, with its description of the conflict in 2017, of the deaths,

of the abuses, all of those allegations, is much worse in the 2018 report than in the 2019 report. This explains my conclusion that it was only the opinion of the Fact-Finding Mission to use the label “genocide” and to affirm that there was genocidal intent that is strengthened. My suggestion to the Court is that it not take into account the claim in the report of 2019 that the genocidal intent that it purports to identify has strengthened.

2. Mr. President, Members of the Court, this morning we were shown slides relating to the position of the United Nations High Commissioner for Refugees (UNHCR). There were two slides that were shown, by my recollection. The implication seemed to be that Myanmar had presented the Court with a partial picture, or that perhaps it had even attempted to mislead the Court. Some of you may have noticed, if you have studied the slides, that the references were to documents from the United Nations High Commissioner for Refugees from 2018, one of them quite early in the year 2018, indeed almost two years ago. Whereas, the document that Myanmar referred to yesterday was more recent, it was dated November 2019 — one month ago. It clearly indicated that the reality on the ground is fluid and that there is ongoing and meaningful engagement between the parties attempting to deal with a difficult situation. In fact, the UNDP (United Nations Development Programme), and the United Nations High Commissioner for Refugees, in the most recent report of November 2019, outlined the main challenges facing communities in Rakhine State and the need to address these in order to repatriate those who are displaced. The report indicated three short-term next steps that the parties need to undertake. The United Nations High Commissioner for Refugees expressed continued commitment to assess the needs of those who are displaced and how they might be met by the Government of Myanmar.

3. This morning, counsel for The Gambia produced a news clipping indicating a deployment of troops before the events of late August 2017, the implication being that the army’s operations on 25 August 2017 and the subsequent days had been planned well in advance. Whatever the time of deployment, the fact remains that there were more than 30 attacks launched simultaneously on 25 August 2017. These were obviously not planned by the authorities of Myanmar. Let me also remind the Court that the internal armed conflict started with the earlier ARSA attacks, in October 2016, 10 months before the deployment that was referred to in the newspaper clipping shown to you this morning. It should go without saying that there would have been several

deployments and rotations of personnel during this period. There is nothing sinister about this. If anything, the presentation of such a news clipping shows the risks associated with a selective approach to the facts in Rakhine State.

4. Counsel for the Applicant made many comments this morning about what was labelled the failure of Myanmar to deny certain allegations of a factual nature. We were told that this is not a proceeding on the merits. We have been warned not to engage in such a debate by Practice Direction XI. Yesterday, I quite clearly said that, with reference to the case law of the Court, establishing that one or more of the punishable acts listed in Article II of the Genocide Convention had never been a problem to litigants. For that reason, I made it clear that I would therefore not concern myself with this dimension of the case but, rather, direct my attention to the part that The Gambia had virtually ignored in its submissions and what is really the essence of this case, which is the mental element.

5. This morning, the Applicant went through, rather methodically, a list of “indicators” that was considered by the Fact-Finding Mission in reaching its conclusion about genocidal intent. This list appears to be derived from a detailed matrix which has been prepared by the United Nations Office on Genocide Prevention, presided over by the Special Adviser on the Prevention of Genocide. The relevant document was entitled “Framework of Analysis for Atrocity Crimes: A tool for prevention” and it is referred to in several paragraphs of the 2019 report. This confirms, by the way, that the list of indicators developed by the Office of Genocide Prevention was in fact inspired by this matrix of factors, the Framework of Analysis adopted in New York, by the Office on Genocide Prevention. I checked my records yesterday evening to confirm that I had personally assisted in the preparation of this document, the Framework of Analysis, joining the two special advisers and the professionals at sessions where these were discussed and developed.

6. I have always been intrigued by the list. *People* engaged in the field of genocide have struggled for many years to see if a formula, some sort of framework could be developed that could identify the potential, the warning signs of genocide. It is always a problem because the lists that are prepared, the attempts at preparing a list, inevitably consist of long recitals of human rights violations that indeed may be present, and in fact are inevitably present, if the genocide takes place. But *they* are also present in so many other environments and in so many other contexts where

genocide has not taken place, is not taking place and is highly, highly unlikely to take place. These lists of indicators are very long. There are many countries represented in this room; I dare say that virtually every country where people in this room come from will tick several of the boxes on those lists of indicators of genocidal risk factors. *To confirm this, one need only* read the reports of the treaty bodies of the United Nations and the reports under the universal periodic review submitted to the Human Rights Council. The Special Adviser uses the list to identify situations. I mentioned yesterday and it was not challenged, contested or explained by the counsel for the Applicant this morning that the Special Adviser has not referred to Myanmar for 15 months and in that same time has issued declarations on several other situations in the world that are very far from being situations where there is a serious risk of genocide.

7. We could return to the discussion in the report that was referred to by Mr. Reichler in his submission this morning. The indicators that were cited begin with “extreme brutality”. We can well imagine how many countries will generate evidence of extreme brutality. The second was the organized nature of the activities or of the acts. Again, this is present in *many* situations. The third is sexual violence — a phenomenon that regrettably occurs in many parts of the world and that we all condemn unequivocally. The fourth, hate speech. Let me linger on that point for a few minutes. Mr. President, Members of the Court, hate speech is a phenomenon that is not reserved to Myanmar. Not only do we have hate speech in many parts of the world, in many countries, but debates rage about how robust the legal intervention to address it should be. Some countries insist that it may even fall within the protected domain of freedom of expression.

8. As an example, counsel referred to a Facebook page from 2017. We did not debate this on Tuesday and Wednesday, although it was a significant feature in the Fact-Finding Mission’s report of 2018, and might well have been an object of some discussion in the earlier, *in-the* first phase of the proceedings. The Fact-Finding Mission each year has issued a short report as well as a long report. I have referred to the long report, consisting of hundreds of pages, but there is a much shorter report issued each year of about 20 pages. The reason for the long report, as I am sure many Members of the Court are aware, is to circumvent the rule within the United Nations on the length of reports. *The* short report is the official document, the one that is formally presented to the Human Rights Council. The short report, in 2018, had a very summary discussion of genocide, to

which I referred the Court in my presentation yesterday. I had attempted to draw the Court's attention to the relevant paragraphs, because of the hesitant way in which the (Fact-Finding) Mission referred to genocide. In its paragraphs dealing with war crimes and crimes against humanity, it was quite unequivocal and said: war crimes *and* crimes against humanity had been committed. Whereas when it turned to genocide, it was less certain, less definitive, saying that this was something to be determined by a court. In its explanation for genocidal intent — and this is where we return to the hate speech issue — it referred to only one fact, which was a reference by the Tatmadaw commander (the military Commander-in-Chief) to “clearance operations” and cited this famous Facebook post. In discussing the inferences of intent (at paragraph 86 of the 2018 report), it recalled “the statement made by the Tatmadaw Commander-in-Chief that the ‘clearance operations’ *were not a response to a concrete threat* from ARSA, but to the ‘unfinished job’ of solving the ‘long-standing’ ‘Bengali problem’”. The paragraph then has a reference, right in the text, to paragraph 35, except when one turns to paragraph 35 it does not quite say the same thing. It refers to the Facebook post of 2 September 2018, said to be at the height of the operations; this must be a typographical mistake because the height of the operations was 2017, not 2018. Then the Facebook quote says the following, according to paragraph 35: “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.” This is the damning evidence of genocidal intent, allegedly. There is no reference here to “clearance operations”, despite what was said later in the report, and the suggestion that this reference in the Facebook post was to “clearance operations”. And, just to be clear, there is no confusion about this, the text that I have just cited — the one that does not refer to clearance operations — in paragraph 35 of the short report for 2018, appears again with no change in paragraph 753 of the long report, that accompanies the short report. Again, there is no reference to “clearance operations”. All I can say is that the Fact-Finding Mission was not very careful in its reference to the Facebook post, despite the fact that this allegation seemed to it to be crucial — central — to its claim of genocidal intent.

9. Be that as it may, the statement on the Facebook post is one to which many different meanings can be attached. It certainly could not be described as hate speech — not the sort of thing

that we hear about circulating on Facebook and other social media in many parts of the world. May I remind the Court that, in the past, it has also been presented with allegations of hate speech or of genocide incitement, made to support charges that the Genocide Convention has been breached. In the *Croatia v. Serbia* case, counsel for the respondent, dealing with the counter-claim by Serbia, referred to the famous, the notorious Brioni conference, during which the President of Croatia had made statements that left open a possible interpretation that they were genocidal in nature. And this Court dismissed the argument, recognizing that under the circumstances and taking into account the context, it was unreasonable to draw such a conclusion. And I would submit that the same should be the case with regard to the Facebook post, presented this morning as an example of hate speech and, in the report of the Fact-Finding Mission, as evidence of genocidal intent.

10. There are no doubt many examples of hate speech circulating on social media within Myanmar. Counsel for the Applicant referred to this in the Tuesday session but left, in my view, *an* impression that was not sufficiently clear for the Court, that these were examples from private individuals. This was not government hate speech, these were individuals sending Tweet messages and so on, on social media. And again this is a phenomenon that is not reserved to Myanmar — of private individuals indulging in forms of hate speech through social media and on the internet, and I am sure that some of it goes on in the very city in which we sit today. Myanmar is not an exception to this, but nor does evidence of such speech make any meaningful contribution to the thesis that the State harbours a genocidal intent.

11. Let me continue with the remainder of the list of indicators that were provided. The fifth of them is discriminatory policies about citizenship and residency. This is clearly an important grievance of the refugee population, who have made grants of citizenship a condition for their return and apparently have refused to return until the matter is addressed in a satisfactory manner. But again, the existence of discriminatory plans and policies dealing with citizenship and mobility and entry to the country is hardly the monopoly of Myanmar in our modern world.

12. The sixth indicator — it is really related to the hate speech issue — is the tolerance of public rhetoric of hate speech. Again, examples in other countries come to mind.

13. And finally, the failure to prosecute. You have the explanation as to the difficulty of prosecution, but this too is a problem that we confront in many parts of the world. I should point

out that Article VI of the Genocide Convention specifically contemplates the form of accountability that counsel for The Gambia, this morning, dismissed. Article VI of the Convention states:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

And we know the answer to that criterion, which is not fulfilled in this case. It is clear that the Convention creates a strong presumption that it is in fact the State where the crimes took place, where the crimes should be prosecuted, i.e. the State that bears the responsibility.

14. Some new documents were put into the judges' folder today and were suggested to have some relevance to the proceedings. The first — a press release from the United States Department of the Treasury that lists some military leaders in Myanmar, as well as individuals in other countries. I am not quite sure from the remarks of the counsel for The Gambia what exactly this was intended to prove, because I did not find any references to genocide in the document. I am struck by the fact that this was all presented in the context of a discussion of accountability and it was related somehow to the manner in which a pardon had been given to those convicted with regard to summary execution. Of course, this issue was addressed very directly by the Agent for Myanmar in yesterday's hearing. And, you will recall that she expressed the fact that many in Myanmar were dismayed by the pardon. The reference by Mr. Reichler to the US Treasury as a moral authority for the denunciation of Myanmar and then the reference to pardoning perpetrators has a whiff of hypocrisy because we have examples from other countries, including his own, of governments pardoning perpetrators. Let he who is without sin cast the first stone.

15. Counsel for the Applicant then turned to these appalling images of a group of men being summarily executed. This was sensationalist and quite gratuitous. It is difficult to understand what point The Gambia was attempting to make or why those photographs were submitted. Yesterday, the Agent for Myanmar spoke of how the perpetrators of this summary execution had been brought to justice and convicted of crimes. What exactly was the point in dispute? Why did you and the people in the Court room have to see those pictures?

16. Let me say a word about the issue of the mass graves because I was the one who raised the point in yesterday's proceedings. I made it in the context of discussing the total number of deaths in the recent period and I noted — and this is in the transcript<sup>15</sup>: “The Fact-Finding Mission, moreover, provides numerous aerial photographs, yet nowhere does it point to any evidence of mass graves.” In his remarks this morning, Mr. Reichler translated this sentence into the suggestion that I said “there are no mass graves”<sup>16</sup>. As you can see, I never said there were no mass graves. I said there is *no mention* of them by the Fact-Finding Mission with regard to the aerial photographs. So we were pointed today to a news report from Associated Press (AP) that apparently located five mass graves, although the news report does not clarify exactly where they were or how many bodies we are talking about. With that being said, why did the Fact-Finding Mission not refer to the mass graves with reference to the AP story? Why is this not mentioned in the report of the Fact-Finding Mission?

17. Yesterday, I said that this was the first application of Genocide Convention where an estimate of the total number of victims was not provided by the Applicant. The silence of the Applicant in the oral proceedings continued into the second round. You may recall that, yesterday, I anticipated that my colleagues from The Gambia would answer that it is not a numbers' game and, indeed, that point was made by Mr. Sands. But beyond that, the only contribution to the discussion was the remark that there are ample authorities that an attack on a relatively small number can be sustained as genocide. The example — it was not given this morning, but it is in the footnote of the transcript, which we received a little over an hour ago — is to the Srebrenica massacre. The reference is in the *Karadžić* decision and in the Judgment of this Court. That is all. There are no other authorities. I do not believe they exist. Recently, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia attempted, as he had done on other occasions, to invoke the Srebrenica precedent in order to charge the crime of genocide with respect to much lower levels of killing than that in Srebrenica — *levels of killings similar to the ones that were mentioned on Tuesday, drawn from the report of the Fact-Finding Mission, and the judges have consistently refused to follow him.*

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<sup>15</sup> CR 2019/19, p. 37, para. 48 (Schabas).

<sup>16</sup> CR 2019/20, p. 21, para. 46 (Reichler).

18. A final point, and this is a bit awkward, personally painful for me as the reference to an interview that I did with Al Jazeera several years ago. I suppose I should be flattered that counsel for the Applicant thinks my views are so authoritative, although I suspect the intent was more to embarrass myself or my client. I did, as I recall, a one-hour interview with a journalist from Al Jazeera; two clips for a matter of seconds were taken from the interview. The journalist persistently tried to get me to apply the word “genocide” to the situation in Myanmar at the time — I believe it was done in late 2012 or perhaps the beginning of 2013 — and I just as consistently refused. Because I have never said that a genocide was taking place in Myanmar; I have never said that. The journalist then posed a hypothetical question, saying that — if certain things were established — would it be frivolous to use the word: it is to that, that I answered “no”. My views will be a lot clearer if we could get a copy of the tape of the entire interview, but it is hardly important. Really, the issue before this Court is not what I or anyone else may have said or thought about genocide. It is about the facts, about the international law and the interpretation that this Court gives to the Genocide Convention.

#### **Plausibility in genocidal intent**

19. Mr. President, Members of the Court, may I now turn to the issue of the content of the provisional measures with reference — as has been made by counsel on several occasions — to the 1993 Orders of the Court: the first in April 1993, and then the second in September 1993, which really just confirmed the Order of April 1993. These Orders of course ultimately led to findings of the Court in the 2007 Judgment. I think it is important in understanding the weight that should be given to the Orders of 1993 — the way in which we understand them — to appreciate the context in terms of the legal development of the crime of genocide. Because in 1993, when those Orders were issued, there was really no case law on the subject of genocide. There was the Advisory Opinion of 1951, of course, which was concerned primarily with the issue of reservations and of entry into force of the Convention — and *not* with the interpretation of Article II, which is really at the core of the issues before the Court here. I think, in 1993, it was unclear as to whether the Court would adopt a broad interpretation of the scope of Article II of the Convention, as many had urged over the years, or a narrow one. That only became clear many years later. Moreover, and I have

taken the time, as I am sure some of you have, in recent days, to review the debates, the proceedings, the oral hearings, and the issuance of the Orders in 1993 — to see just how summary they were; how quickly the proceedings took place; how the issue of whether summary, provisional measures orders should be proposed or not, was not really contested because both sides asked for it. Both sides. *There* was nobody there arguing that, maybe, it was not appropriate and raising some of the concerns in such circumstances to which Mr. Staker referred only a few minutes ago. And it was certainly not unreasonable in 1993, for the Court to issue an order based on a relatively low threshold given the uncertainty, the unknown, about how the issue of genocide would be dealt with on the merits and the novelty of the situation that was underway in April of 1993 in the former Yugoslavia.

20. I beg the Court to indulge me just a little deviation into the history of the Convention and the notion of genocide in order to illustrate this point. Yesterday, I had wanted to mention an anniversary, as counsel did on 10 December, mentioning that it was Human Rights' Day. Yesterday, 11 December, was the 73rd anniversary of the genocide resolution of 1946 that ultimately led to the adoption of the Convention itself. I was concerned yesterday that I had run out of time, I am not so worried about that today. To understand why the definition of genocide is narrow — I am not talking about the interpretation, I am talking just about the text — we need to go back 75 years to the London Conference, when the concept of crimes against humanity was codified for the purpose of prosecution in the Nuremberg Tribunal. Much has been written about this, including a wonderful book by someone who is here in the courtroom: Philippe Sands' book, *East West Street*. Explaining the major contribution of the Nuremberg Tribunal to the progressive development of international law, when he reported back to President Truman, the prosecutor, Robert Jackson — who was also a Justice of the US Supreme Court — said “[t]he most significant results of applying these *definitions as the law of nations* are to outlaw *wars of aggression* and to *lift to the level of an international offense the persecution of minorities for the purpose* of clearing the *road* to war”<sup>17</sup>. Note that Robert Jackson refers not to the persecution of minorities as such, but to the more limited purpose of clearing the road to war. To understand what he meant, we

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<sup>17</sup> “Preface”, in *Report of Robert H. Jackson, United States Representative to the International Conference in Military Trials: London, 1945, US Department of State, Washington, DC, 1949, p. ix.*

have to consult the transcript of the London Conference. There, discussing the scope of *the crime of crimes against humanity*, Jackson said:

“ordinarily we do not consider that the acts of a government toward its citizens warrant our interference. We have some regrettable circumstances in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution *to individuals or to States* only because the concentration camps *and the deportations* were in *pursuance* of a common plan or enterprise of making unjust or illegal war in which we became involved.” (Jackson report, p. 333<sup>18</sup>.)

Raphael Lemkin, about whom we have spoken on previous days — the man who coined the term “genocide” — was in Nuremberg when the judgment of the International Military Tribunal (IMT) was issued, and he was very disturbed by this limitation on crimes against humanity. There is an account from a former prosecutor — I am sure some of you had the occasion to meet him over the years: the late Henry King — describing the encounter with Lemkin in the lobby of the Grand Hotel, the day after the judgment was issued. He said: “Lemkin was very upset. He was concerned that the decision of the IMT — the Nuremberg court — did not go far enough in dealing with genocidal actions. This was because the IMT limited its judgement to war time genocide and did not include peace time genocide”<sup>19</sup>. (~~Case Western Journal, Vol. 40, 2007, pp. 13–14~~). And Lemkin rushed back to New York and lobbied at the United Nations General Assembly, convincing three representatives of member States — India, Cuba and Panama — to propose a resolution recognizing genocide as a crime under international law that can be committed in peacetime, as well as in time of war. In November 1946, the resolution was proposed by the Cuban ambassador, Ernesto Dihigo, and he said in his speech in the Sixth Committee of the General Assembly that

“At the Nuremberg trials, it *had not been* possible to *punish certain cases of* genocide because *they had been* committed before the *beginning of the* war. Fearing that such crimes *might* remain unpunished, owing to the principle *non crimen sine lege*, the representative of Cuba asked that genocide be declared *an international* crime. *This was the purpose of the resolution.*” (A/C.6/84, 22 November 1946.)

And so there were two resolutions adopted 73 years ago: resolution 95, confirming the principles that were established in the Charter of the Tribunal and in the judgment, and resolution 96, on the subject of genocide — the crime of genocide. Resolution 96 — as the Cuban ambassador

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<sup>18</sup> “Minutes of Conference Session of July 23, 1945, in *ibid.*, p. 333.

<sup>19</sup> Henry T. King Jr., “Origins of the Genocide Convention”, in *Case Western Reserve Journal of International Law*, 2007, Vol. 40, pp. 13-14.

explained — was to fill a gap in resolution 95, the gap of crimes against humanity. But the gap was only partially filled in 1948 with the adoption of the Convention. The Convention made clear that it was applicable to peacetime as well as wartime, in effect answering Lemkin's concern, but the Convention does not codify a broad protection of minorities from persecution, it only protects minorities from destruction. The price to pay for agreement on a convention — the Convention that the Court is now seised with — was a narrow definition of genocide confined not to the persecution of minorities but only to their physical destruction. This has been confirmed in the case law of this Court.

21. In the 1990s, international criminal law went through a period of rapid development. Among the evidence that marked this new period was the Application filed before this Court and the issuance of provisional measures Orders of April 1993 and of September 1993, the establishment of the Yugoslavia Tribunal in May of 1993, and the conclusion of the work of the International Law Commission (ILC) on a draft statute for a permanent court under the leadership of its Special Rapporteur, Professor Crawford, as he then was. Subsequently, there was a dramatic expansion, both as to the institutional mechanisms for prosecution and the substantive content of the law. War crimes were extended to non-international armed conflicts and crimes against humanity were extended to apply in time of peace as well as in war. This progressive development of the law was entrenched in Articles 7 and 8 of the Rome Statute. It may seem somewhat paradoxical that, in such a period of dynamism and development, the definition of genocide, in Article 6, which is essentially identical to Article II of the Convention, did not undergo the same evolution. But at the Rome Conference, there was no interest in amending the definition of genocide, despite decades of criticism of its narrowness and limited scope. This was actually easy to understand. With the expansion of crimes against humanity to peacetime — the very issue that has prompted Lemkin's initiative at the first session of the General Assembly, there was little if any reason to enlarge the definition of genocide. There was no longer a gap to be filled. Nevertheless, efforts have continued by those hoping that the definition of genocide will be broadened to encompass a broader range of acts and, to accompany this, an understanding of genocidal intent that goes beyond physical destruction and extends to acts of persecution. Twice in this Court, in recent years, in the *Bosnia* and the *Croatia* cases, counsel have urged such an expansion — and

twice they have failed. The Gambia's Application and the submission made this week reminds me of the words of an American baseball player, known for his pithy aphorisms, who once said: this is a case of "déjà vu all over again".

22. Why do I insist on this historical perspective? Because at the heart of the debate is whether the Court should maintain its position, "solidly rooted in its jurisprudence", to borrow its own expression, or take a new direction. And while this debate will be a feature if the case ever goes to the merits, it is also extraordinarily relevant to the debate on provisional measures.

23. As I said, these issues were not debated at the provisional measures stage in 1993. Both parties requested them. Yugoslavia's response to Bosnia's application was that they wanted provisional measures too, against the Bosniacs. And this is why those Orders are of very limited relevance and assistance in addressing the issues today, some 26 years later. The fact that the issues relating to atrocities perpetrated against minorities committed in peacetime would be addressed by an expansion of the definition of crimes against humanity could not have been known to the Court in 1993, or to the parties. Today, we have a situation — lamented by counsel for the Applicant, we heard more of that this morning — as it was lamented by counsel for the applicants in the *Croatia* and the *Bosnia* cases, where there is a demanding standard for proof of genocidal intent. I will not repeat my remarks on this of yesterday. But it is clear that, today, the Court imposes such a demanding standard, whereas that was not clear by any means in 1993. It does not seem to be sound judicial policy, in 2019, that there should be a low standard for an order of provisional measures if the applicant confronts a very high and demanding standard on the merits. The criteria for the indication of provisional measures should correspond in some way to the criteria for success on the merits. I am not here speaking about the prima facie issue but rather about the plausibility issue. The plausibility issue at the provisional measures stage must bear a relationship to the likelihood of success on the merits. This is the point. It is clear that, on this issue, there is a serious difference in the position of The Gambia and of Myanmar that the Court will need to address in its decision. But again, at the risk of repeating myself, there is a problem with a legal mechanism whereby the standard for provisional measures is very low and is out of all proportion to any likelihood of success on the merits.

24. Counsel for the Applicant tried to contend that genocidal intent may coexist with other intents. He made reference to the Court's case law. But the Court's case law was not addressing the coexistence of genocidal intent with other intents. It was saying that acts characterized as ethnic cleansing might also be considered genocidal if there was genocidal intent. I think this is quite different from the point counsel was making. And I do not believe that it is in conflict in any way with what the Court said about drawing inferences from patterns of conduct. Here is what the Court said. The hour is late. I am not going to read the citations. I apologize to the Court for some of the hasty preparation. We had three hours *after the* morning session to get our texts together. The relevant paragraphs, they were cited this morning: paragraph 190 in the *Bosnia* decision, paragraph 163 in the *Croatia* decision.

25. The *Croatia* decision, commenting on the earlier ruling in the *Bosnia* decision and endorsing it, says that the Court has no reason to depart from its previous conclusions. In order to determine whether the forced displacements constitute genocide, it will seek to ascertain whether those forced displacements took place in such circumstances that they were calculated to bring about the physical destruction of the group.

26. Many features of the circumstances alleged in the Application, including the relatively small number of deaths compared with the overall population, the huge migration flows, and the presence within Myanmar of many hundreds of thousands who have not been subject to violent attacks with lethal consequences or other threats to life since the events of September 2017, argue against the inference that such "forced displacements" took place in such circumstances that they were calculated to bring about the physical destruction of the group.

27. Thank you, Mr. President, Members of the Court, for your attention. Mr. President, may I respectfully ask if you would give the floor to Her Excellency the Agent for Myanmar.

The PRESIDENT: I thank Professor Schabas for his statement. I shall now give the floor to the Agent of Myanmar, Her Excellency Ms Aung San Suu Kyi, to make a closing statement on behalf of Myanmar. You have the floor, madam.

Daw AUNG SAN SUU KYI:

### STATEMENT BY THE AGENT

1. Mr. President and Members of the Court, it is not disputed that Myanmar — like the United Kingdom or the United States — has a military justice system. The Constitution of Myanmar cannot and should not be ignored, if we are serious about establishing constitutional democracy and rule-of-law in Myanmar. International criminal tribunals take four to eight years to undertake investigations of core international crimes, sometimes longer. Just over two years have passed since the serious internal armed conflict against the ARSA, and the second court-martial is now underway. The Gambia has not challenged the quality of the military justice in the *Inn Din* case, only the pardon, which many of us regret. The ongoing Gutar Pyin court-martial in Buthidaung Township should be allowed to run its course. I am confident that there will be further courts martial after the submission of the final report of the Independent Commission of Enquiry in a few weeks.

2. Mr. President, it is vital for Myanmar's present and future that our civilian and military criminal justice systems function in accordance with our Constitution. Where a country has a military justice system, neutralizing this system by externalizing justice in effect surgically removes a critical limb from the body — the limb that helps armed forces to self-correct, to improve, to better perform their functions within the constitutional order.

3. Mr. President, Members of the Court, in my opening statement yesterday, I mentioned that international justice is a practice that affirms our common values, and that we look to justice as a champion of reconciliation and harmony that will assure the security and rights of all peoples. Allow me, in this context, to mention one example of what we are doing on the ground in Northern Rakhine to further reconciliation between communities.

4. In January 2019, the “In Transformation Initiative” (ITI) — directed by Mr. Roelf Mayer, a transitional justice leader in South Africa — launched the “Rakhine Transformation Project” that aims at preventing the recurrence of historical violence and paving the way for sustainable, voluntary return of peoples displaced by violence. In the words of Mr. Meyer himself, *I quote*: “nine months after its inception, and despite increased fighting in the area between the AA and the military, the project has gained sufficient traction in Maungdaw for it to be regarded as sustainable”.

5. Mr. President, recalling the words about football in paragraph 18 of the opening statement of the Agent of The Gambia, allow me to present these pictures from a football match. Organized by the ITI, a football tournament recently took place at the Myoma athletic field in Maungdaw Town. Players and spectators are a mix from different communities in Maungdaw Township, the area at the centre of the 2016-2017 internal armed conflict in Rakhine. Adults and children, proud, enthusiastic, laughing and, most important of all, together. This is what we are striving to nurture in Rakhine, what we are endeavouring to foster throughout Myanmar, our country of great diversity, great potential, and great challenges.

6. Mr. President, Members of the Court, I pray the decision you make, with the wisdom and vision of justice, will help us to create unity out of our diversity, to develop the potential of our people, and to meet the challenges of a nation in quest of sustainable peace and development. Steps that generate suspicion, sow doubts, or create resentment between communities who have just begun to build a fragile foundation of trust could undermine reconciliation. Ending the ongoing internal armed conflict between the Arakan Army and Myanmar's Defence Services is of the utmost importance for our country. But it is equally important to avoid any reignition of the 2016-2017 internal armed conflict in Northern Rakhine.

7. Mr. President, Members of the Court, I now conclude by formally presenting to you the final submissions of Myanmar. These are as follows:

“In accordance with Article 60, paragraph 2, of the Rules of Court, for the reasons given during the hearing from 10 to 12 December 2019 and any other reasons the Court might deem appropriate, Myanmar requests the Court:

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

8. Mr. President and Members of the Court, that concludes Myanmar's observations. I thank you for your kind attention, and I also thank the staff of the Registry for all assistance offered to our delegation.

The PRESIDENT: I thank the Agent of Myanmar. The Court takes note of the submissions of Myanmar which you have just read out on behalf of your Government.

This brings the present series of sittings to an end. I would like to thank the Agents, counsel and advocates of the two Parties for their statements. In accordance with the usual practice, I shall request both Agents to remain at the Court's disposal to provide any additional information the Court may require. The Court will render its Order on the Request for the indication of provisional measures as soon as possible. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Order at a public sitting. Since the Court has no other business before it today, the sitting is declared closed.

*The Court rose at 5.55 p.m.*

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