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Press Release

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

The Court indicates provisional measures in order to preserve certain rights claimed by The Gambia for the protection of the Rohingya in Myanmar

THE HAGUE, 23 January 2020. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, today delivered its Order on the Request for the indication of provisional measures submitted by the Republic of The Gambia in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*.

History of the proceedings

On 11 November 2019, the Republic of The Gambia (“The Gambia”) filed in the Registry of the Court an Application instituting proceedings against the Republic of the Union of Myanmar (“Myanmar”) concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention” or “Convention”). In its Application, The Gambia argues in particular that Myanmar has committed and continues to commit genocidal acts against members of the Rohingya group, which it describes as a “distinct ethnic, racial and religious group that resides primarily in Myanmar’s Rakhine State”. The Application contained a Request for the indication of provisional measures, seeking to preserve, pending the Court’s final decision in the case, the rights of the Rohingya group in Myanmar, of its members and of The Gambia under the Genocide Convention.

Conditions for the indication of provisional measures

It should be recalled that 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. The Court must also satisfy itself that the rights whose protection is sought are at least plausible and that there is a link between those rights and the measures requested. Further, the power of the Court to indicate provisional measures will be exercised only if there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision.

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

The Court notes that The Gambia seeks to found its jurisdiction on Article IX of the Genocide Convention¹. It observes in this regard that this provision makes its jurisdiction conditional on the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Convention.

At the outset, the Court rejects Myanmar's contention that there was no dispute between the Parties since The Gambia acted as a "proxy" for the Organisation of Islamic Cooperation ("OIC"). The Court notes that the Applicant instituted proceedings in its own name, and that it maintains that it has a dispute with Myanmar regarding its own rights under the Genocide Convention. The Court adds that the fact that The Gambia may have sought and obtained the support of other States or international organizations in its endeavour to seise the Court does not preclude the existence between the Parties of a dispute relating to the Convention.

Turning to the question whether, at the time of the filing of the Application, there appeared to exist a dispute between the Parties, the Court notes that, on 8 August 2019, the Independent International Fact-Finding Mission on Myanmar established by the Human Rights Council of the United Nations ("Fact-Finding Mission") published a report affirming "that Myanmar incurs State responsibility under the prohibition against genocide" and welcoming the efforts of The Gambia, Bangladesh and the OIC to pursue a case against Myanmar before the International Court of Justice under the Genocide Convention. The Court is of the view that the statements made by the Parties in September 2019 before the General Assembly of the United Nations, further to the publication of this report, suggest the existence of a divergence of views concerning the events which allegedly took place in Rakhine State in relation to the Rohingya.

As to whether the acts complained of by the Applicant are capable of falling within the provisions of the Genocide Convention, the Court recalls that The Gambia contends that Myanmar's military and security forces and persons or entities acting on its instructions or under its direction and control have been responsible, *inter alia*, for killings, rape and other forms of sexual violence, torture, beatings, cruel treatment, and for the destruction or denial of access to food, shelter and other essentials of life, all with the intent to destroy the Rohingya group, in whole or in part. The Court notes that Myanmar, for its part, denied that it has committed any of the violations of the Genocide Convention alleged by The Gambia, arguing in particular the absence of any genocidal intent. In the Court's view, at least some of the acts alleged by The Gambia are capable of falling within the provisions of the Convention.

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

The Court also rejects Myanmar's argument that its reservation to Article VIII of the Genocide Convention prevented The Gambia from seising the Court pursuant to Article IX of the Genocide Convention.

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

¹ Article IX of the Genocide Convention reads:

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

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

The Court then examines Myanmar's contention that The Gambia did not have prima facie standing to bring a case before it in relation to Myanmar's alleged breaches of the Genocide Convention because The Gambia was not specially affected by such alleged violations. The Court recalls that all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity; that common interest implies that the relevant obligations under the Genocide Convention are owed by any State party to all the other States parties to the Convention (obligations *erga omnes partes*). It follows that any State party to the Genocide 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*, and to bring that failure to an end. The Court thus concludes that The Gambia has prima facie standing to submit to it the dispute with Myanmar on the basis of alleged violations of obligations under the Genocide Convention.

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

Addressing the question whether the rights claimed by The Gambia on the merits, and for which it is seeking protection, are plausible, the Court observes that the provisions of the Genocide Convention are intended to protect the members of a national, ethnical, racial or religious group from acts of genocide or any other punishable acts enumerated in Article III. In the Court's view, the Rohingya in Myanmar appear to constitute a protected group within the meaning of the Genocide Convention.

The Court then recalls that, at the hearings, Myanmar stated that violations of international humanitarian law may have occurred during what it characterizes as "clearance operations" carried out in Rakhine State in 2017. The Court further refers to resolution 73/264 adopted on 22 December 2018 by the General Assembly of the United Nations, in which the latter condemned the widespread and systematic crimes committed by Myanmar forces against the Rohingya in Rakhine State, as well as to the reports of the Fact-Finding Mission affirming that there are reasonable grounds to conclude to the commission of genocide against the Rohingya. In the Court's view, these facts and circumstances are sufficient to find that the rights claimed by The Gambia and for which it is seeking protection — namely the right of the Rohingya group in Myanmar and of its members to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of The Gambia to seek compliance by Myanmar with its obligations not to commit, and to prevent and punish genocide in accordance with the Convention — are plausible.

Turning to the issue of the link between the rights claimed and the provisional measures requested, the Court finds that some of the provisional measures sought by The Gambia are aimed at preserving the rights claimed in the present case, and that therefore the requisite link has been established.

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

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

The Court notes that the reports of the Fact-Finding Mission have indicated that, since October 2016, the Rohingya in Myanmar have been subjected to acts which are capable of affecting their right of existence as a protected group under the Genocide Convention, such as mass killings, widespread rape and other forms of sexual violence, as well as beatings, the destruction of villages and homes, denial of access to food, shelter and other essentials of life. The Court is of the opinion that the Rohingya in Myanmar remain extremely vulnerable, observing in particular that the Fact-Finding Mission concluded in September 2019 that the Rohingya people remained at serious risk of genocide.

The Court takes note of the statement of Myanmar during the oral proceedings that it is currently engaged in repatriation initiatives to facilitate the return of Rohingya refugees present in Bangladesh and that it intends to promote ethnic reconciliation, peace and stability in Rakhine State, and to make its military accountable for violations of international humanitarian and human rights law. In the view of the Court, however, these steps do not appear sufficient in themselves to remove the possibility that acts causing irreparable prejudice to the rights invoked by The Gambia for the protection of the Rohingya in Myanmar could occur.

In light of these considerations, the Court finds that there is a real and imminent risk of irreparable prejudice to the rights invoked by The Gambia.

V. CONCLUSION (PARAS. 76-85)

From all of the above, the Court concludes that the conditions required by its Statute for it to indicate provisional measures are met.

OPERATIVE CLAUSE (PARA. 86)

The Court indicates the following provisional measures:

“(1) Unanimously,

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

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

(2) Unanimously,

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

incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide;

(3) Unanimously,

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

(4) Unanimously,

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

Composition of the Court

The Court was composed as follows: *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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Vice-President XUE appends a separate opinion to the Order of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court; Judge *ad hoc* KRESS appends a declaration to the Order of the Court.

A summary of the Order appears in the document entitled “Summary 2020/1”, to which summaries of the opinions and the declaration are annexed. This press release, the summary and the full text of the Order are available on the Court’s website (www.icj-cij.org), under the heading “Cases”.

Note: The Court’s press releases are prepared by its Registry for information purposes only and do not constitute official documents.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. The seat of the Court is at the Peace Palace in The Hague (Netherlands). The Court has a twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the parties concerned); and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system.

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