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KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal places high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

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Scope

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

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The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ)** is to provide a platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

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GAMBIA v. MYANMAR: ESTABLISHING THE CRIME OF GENOCIDE AT THE INTERNATIONAL COURT OF JUSTICE

AISHA SANI MAIKUDI*

Abstract

In a highly unusual move, The Gambia on 11 November 2019 with the full support of the 57-member Organization for Islamic Cooperation (OIC), filed a lawsuit at the International Court of Justice (ICJ), accusing Myanmar of perpetrating a genocide on ethnic Rohingya Muslims which forced hundreds of thousands to flee the Asian nation. This case is the first time a State with no direct link to the alleged atrocities has instigated proceedings under the Genocide Convention. The article begins by considering the origins of the Rohingya Muslims crisis. It then looks at whether the ICJ has jurisdiction to consider the case on its merits and critically analyses the specific challenge of Gambia's extensive reliance on UN fact-finding reports to establish the crime of Genocide at the ICJ. The article proffers that although Article 50 of the United Nations Charter empowers the ICJ to entrust any individual, bureau, or commission to carry out an enquiry or give an expert opinion, the ICJ will almost certainly not feel bound by the legal conclusions of the Fact Finding Mission or any other fact-finding body.

Keywords: International Law- International Court of Justice- Genocide- Rohingya- United Nations-Security Council- International Criminal Court.

Introduction

The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),¹ commonly referred to as the Bengali genocide case² is a case currently being heard by the International Court of Justice (ICJ). Gambia with the backing of the 57 members of the Organization of Islamic Cooperation (OIC) on 11 November 2019, lodged a 45-page application with the ICJ against Myanmar, initiating the case³. The application alleged that Myanmar has committed mass murder, rape and destruction of communities against the Rohingya

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¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar). Available at <<https://www.icj-cij.org/en/case/178>>. Retrieved 10 March 2020.

² Solomon, Niharika Mandhana and Feliz. "Bengali Genocide Case Against Myanmar Opens Before U.N. Court". *Wall Street Journal*. Retrieved 10 December 2019; "Fallen rights icon at UN court for Bengali genocide case". *AP News*. 10 December 2019. Retrieved 10 March 2020.

³"The Republic of The Gambia institutes proceedings against the Republic of the Union of Myanmar and asks the Court to indicate provisional measures " (Press release). International Court of Justice, 11 November 2019. Retrieved 7 March 2020. Under Article 94 of the UN Charter, all member countries must abide by ICJ decisions in cases to which they are a party, and in the event of non-compliance, the UN Security Council may decide upon measures to be taken to give effect to the judgment.

group in Rakhine state since about October 2016 and that Myanmar's atrocities against the Rohingya in Rakhine State violate various provisions of the Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention")⁴. Gambia, which ratified the convention in 1978, brought the case under Article 9 of the convention⁵, which allows for disputes between parties "relating to the responsibility of a State for genocide" and related acts to be submitted to the ICJ by any party.

This is not the first time that a non-injured State has sought to enforce obligations *erga omnespartes* at the ICJ, but Gambia's filing marks the first time that a country without any direct connection to the alleged crimes has used its membership in the Genocide Convention⁶ to bring a case before the ICJ.⁷ The case before the ICJ is not a criminal case against individual alleged perpetrators and it does not involve the International Criminal Court (ICC), because Myanmar is not a member of the Rome Statute, the ICC's founding treaty, so only the UN Security Council can refer all grave crimes in Myanmar to the ICC for investigation⁸. Rather, the case is "state-to-state" litigation between United Nations (UN) member states governed by legal provisions in the UN Charter, the ICJ Statute, and the Genocide Convention.

Background to the Study

The Bengali people are a Muslim Indo-Aryan⁹ ethnic minority in Buddhist majority Myanmar who, in recent years, have faced mass persecution and ethnic cleansing that has been described as a genocide.¹⁰ The Tatmadaw's well-documented crimes against the Rohingya and other ethnic minority groups in Myanmar span decades.¹¹ In April 2017, the UN Human Rights Council established the Independent

⁴UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277

⁵*Ibid.*

⁶*Ibid.*

⁷Also in November, a group of Rohingya and Latin American human rights organizations filed a criminal case in Argentina against Myanmar's top military leaders for crimes committed in Rakhine State. The case was filed using the principle of universal jurisdiction – an avenue for crimes so serious that all states have an interest in addressing them.

⁸ An ICC referral remains critical to address the full scope of criminality in Rakhine State and in Kachin and Shan States, where the military has used many of the same brutal tactics against other ethnic minorities. See, UN Human Rights Council, 'Myanmar: UN Fact Finding Mission Releases its Full Account of Massive Violations by Military in Rakhine, Kachin and Shan States'. Available at: <<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23575&LangID=E>>. Retrieved 10 March 2020.

An ICC referral would also give the court jurisdiction to address alleged criminality by ethnic armed groups in Myanmar.

⁹ Haque, Md Mahbulul (2 October 2017). "Bengali Ethnic Muslim Minority and the 1982 Citizenship Law in Burma". *Journal of Muslim Minority Affairs*. 37 (4): 454–469

¹⁰Is refugee crisis 'textbook ethnic cleansing?'. 24 April 2018. Retrieved 7 March 2020 – via www.bbc.com; Factbox: Myanmar on trial for Rohingya genocide – the legal cases". *Reuters* 21 November 2019. Retrieved 7 December 2019 – via <www.reuters.com>; Report of Independent International Fact-Finding Mission on Myanmar 27 August 2018". *ohchr.org*. Retrieved 7 March 2020.

¹¹The Rohingya Muslims: Ending a Circle of Exodus? At <<https://www.hrw.org/report/1996/09/01/rohingya-muslims-ending-cycle-exodus>>. Retrieved 10 March 2020.

International Fact-Finding Mission (Fact-Finding Mission) on Myanmar¹² to investigate alleged human rights abuses by military and security forces. The Fact-Finding Mission issued an initial summary report in August 2018¹³, followed by a 444 page report of detailed findings in September.¹⁴

Among other things, the Fact-Finding Mission¹⁵ found that after an armed group called the Arakan Rohingya Salvation Army launched a series of small-scale attacks against government military outposts on 25 August 2017, a government campaign aimed at Rohingya communities in Rakhine State resulted in at least 10,000 deaths and caused 725,000 Rohingya to flee, mainly to neighbouring Bangladesh. The Myanmar authorities termed their actions “clearance operations”,¹⁶ meant to eliminate a terrorist threat. The Fact-Finding Mission described a campaign of indiscriminate killing and maiming, rampant sexual violence, and widespread destruction of Rohingya villages—a “human rights catastrophe”, but one long in the making because of a history of state-sanctioned discrimination against the Rohingya, a Muslim minority in a predominantly Buddhist country.

The Fact-Finding Mission¹⁷ concluded that the actions of Myanmar’s forces constituted crimes against humanity and war crimes. It also found sufficient evidence to warrant the investigation and prosecution of senior officials for the crime of genocide. Among other recommendations, the Fact-Finding Mission urged the UN Security Council to refer the situation to the International Criminal Court (ICC)¹⁸ or to establish an ad hoc international criminal tribunal. After the Fact-Finding Mission issued its Summary report¹⁹, a Pre-Trial Chamber of the ICC determined that²⁰ the ICC has jurisdiction over the alleged deportation of Rohingya individuals from Myanmar to Bangladesh, because the crime of deportation was completed in an ICC member country and possibly over additional other crimes; ICC prosecutor Fatou Bensouda has since announced a²¹ preliminary examination

¹²UN Human Rights Council, *Situation of human rights in Myanmar : resolution adopted by the Human Rights Council*, 3 April 2017, A/HRC/RES/34/22, available at: < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/081/98/PDF/G1708198.pdf?OpenElement>>. Retrieved 10 March 2020. Myanmar refused to admit the fact Finding Mission into its territory.

¹³UN Human Rights Council, *Report of the Independent International Fact finding Mission in Myanmar: resolution adopted by the Human Rights Council*, 12 September 2018, A/HRC/RES/39/64, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/274/54/PDF/G1827454.pdf?OpenElement>. Retrieved 10 March 2020.

¹⁴UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact finding Mission on Myanmar: resolution adopted by the Human Rights Council*, 17 September 2018, A/HRC/RES/39/CRP.2, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf. Retrieved 10 March 2020

¹⁵*Ibid.*

¹⁶*Ibid.*

¹⁷*Ibid.*

¹⁸ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6. Myanmar is not a party to the Rome Statute.

¹⁹*Op.cit.* See note 11.

²⁰ICC-RoC46(3)-01/18. Available at: https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF

²¹Statement of ICC Prosecutor , Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of Rohingya people from Myanmar to Bangladesh. Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya>. Retrieved 12 March 2020

into the situation. In November, the ICC judges gave Prosecutor Fatou Bensouda authorization to open an investigation into crimes against humanity, notably the forced deportation in 2017 of more than 740,000 Rohingya into Bangladesh, an ICC member. The judges also ruled that the prosecutor can investigate other crimes, including future crimes,²² if they are within the ICC's jurisdiction and are sufficiently linked to the situation described in the prosecutor's request²³, which focused on crimes committed during two waves of violence, in 2016 and 2017 in Rakhine State, since Bangladesh became an ICC member in June 2010. The Fact-Finding Mission also recommended targeted sanctions against government officials and an arms embargo. The Chair of the Fact-Finding Mission, Marzuki Darusman, addressed the Security Council in October 2018 (over the objections of China and Russia) to reiterate these conclusions.²⁴

In September 2018, the UN Human Rights Council created the Independent Investigative Mechanism for Myanmar²⁵ to collect evidence of the most serious international crimes and prepare files for criminal prosecution "to facilitate and expedite fair and independent criminal proceedings" in national, regional, or international courts. Myanmar announced at the General Assembly that it "reject[s] the establishment of the new Investigation Mechanism (IIM) set up to bring Myanmar to tribunals to which we object strongly," and that "we do not recognize nor will we cooperate with this mechanism."²⁶ In the meantime, the UN Human

Rights Council responded by establishing a mechanism²⁷ to collect and preserve evidence of international law violations in Myanmar²⁸.

In July 2018, the Myanmar government established the "International Commission of Enquiry," with the participation of two international members, including

²²Situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar. Opening of an ICC investigation into the situation in Bangladesh/Myanmar 14 November 2019. Available at <https://www.icc-cpi.int/itemsDocuments/QandA-bangladesh-myanmar-eng.pdf>. Retrieved 12 March 2020.

²³ICC-01/19-7. Request for authorization of an investigation pursuant to Article 15. Available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/19-7>. Retrieved 12 March 2020.

²⁴UN Security Council, 8381st Meeting, SC/13552, 24 October 2018. Head of Human Rights UN Fact-Finding Mission on Myanmar Urges Security Council to Ensure Accountability for Serious Violations against Rohingya available at: <https://www.un.org/press/en/2018/sc13552.doc.htm>. Retrieved 12 March 2020.

²⁵*Op cit* note 12. See also, UN Human Rights Council, Independent Investigative Mechanism for Myanmar. Available at: <https://www.ohchr.org/EN/HRBodies/HRC/IIMM/Pages/Index.aspx>. Retrieved 12 March 2020.

²⁶ Myanmar - Union Minister of the State Counsellor Addresses General Debate, 74th Session. Available at: <https://www.youtube.com/watch?v=xN5sfPNJGeg>. Retrieved 12 March 2020.

²⁷UN Human Rights Council, Report of the Detailed Findings of the Independent International Fact finding Mission on Myanmar: *resolution adopted by the Human Rights Council*, 17 September 2018, A/HRC/RES/39/CRP.2, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf. Retrieved 12 March 2020.

²⁸Polina Levina Mahnad, 'An Independent Mechanism for Myanmar: A Turning Point in the Pursuit of Accountability for International Crimes'. Available at: <https://www.ejiltalk.org/a-turning-point-in-the-pursuit-of-accountability-for-international-crimes/>. Retrieved 12 March 2020.

the chair who said ²⁹that “there will be no blaming, [...] no finger-pointing of anybody.” This commission has yet to deliver any results, and likely not³⁰ given its own lack of credibility³¹ and the resounding failure of previous government commissions. Myanmar authorities have also taken steps to erase evidence of crimes, notably bulldozing over numerous Rohingya villages³² to make way for military installments.³³

In November 2019, the government announced it had formed yet another mechanism³⁴, this time a Special Unit on International Criminal Justice in order to strengthen internal capacity and expertise, and provide legal opinion to relevant Ministries on issues related to international criminal law, under the State Counsellor’s office, including two military officers. However, the Myanmar government’s handling of the Inn Din case³⁵ on the ability of the military’s court of inquiry created in March 2019³⁶ to address allegations of human rights violations in northern Rakhine State committed by its own soldiers and the UN documented structural obstacles to criminal accountability in Myanmar– including the lack of independence of Myanmar’s judges, as well as the current constitutional and legal framework that prevents the civilian authorities from holding the military or its

²⁹Myanmar’s New Rohingya Panel Pledges Impartiality in Probe of Atrocious. Available at: <<https://www.rfa.org/english/news/myanmar/myanmars-new-rohingya-panel-pledges-impartiality-in-probe-of-atrocities-08162018162341.html>>. Retrieved 12 March 2020.

³⁰Human Rights Watch, ‘Myanmar: Disband Panel on Crimes Against Rohingya’. Available at: <<https://www.hrw.org/news/2018/12/19/myanmar-disband-panel-crimes-against-rohingya>> Retrieved 12 March 2020.; In November 2018, Myanmar’s commander-in-chief, Sr. Gen. MinAung Hlaing, pardoned seven Tatmadaw soldiers who had served seven months of their 10-year prison sentences for their role in a massacre of Rohingya in Inn Din village. They served less prison time than Wa Lone and Kyaw Soe Oo, the two Reuters journalists who uncovered the killings and who were convicted by a Yangon court of obtaining state secrets in a proceeding that highlighted the lack of independence of Myanmar’s judiciary. Both journalists spent a total of 17 months in prison before their May 2019 amnesty and release available at Human Rights Watch, Shayna Bauchner, ‘Where his blood fell’ A Rohingya Widow’s Call for Justice. Available at: <https://www.hrw.org/news/2019/09/02/where-his-blood-fell>. Retrieved 12 March 2020.

³¹International Commission of Jurists, ‘Myanmars Government Commissioned Inquiry Still Cannot Deliver Justice or Accountability.’ Available at: <<https://www.icj.org/myanmars-government-commissioned-inquiry-still-cannot-deliver-justice-or-accountability/>>. Retrieved 12 March 2020.

³²Human Rights Watch, ‘Burma: 40 Rohingya Villages Burned Since October.’ Available at: <<https://www.hrw.org/news/2018/12/19/myanmar-disband-panel-crimes-against-rohingya>>. Retrieved 12 March 2020.

³³Simon Lewis, ‘Myanmar builds Military Bases where Rohingya Once lived and Prayed: Amnesty’. Available at: <https://www.reuters.com/article/us-myanmar-rohingya/myanmar-builds-military-bases-where-rohingya-once-lived-and-prayed-amnesty-idUSKCN1GO001>. Retrieved 12 March 2020.

³⁴The Irrawaddy, ‘Two Myanmar Military Officers Join International Criminal Justice Unit for ICJ Defense’. Available at: <<https://www.irrawaddy.com/news/burma/two-myanmar-military-officers-join-intl-criminal-justice-unit-icj-defense.html>>. Retrieved 12 March 2020.

³⁵The Irrawaddy, ‘Myanmar Military Court Begin Trial of Soldiers Over Conduct During ARSA Clash in 2017’. Available at: <<https://www.irrawaddy.com/news/burma/myanmar-military-court-begin-trial-soldiers-conduct-arsa-clash-2017.html>>. Retrieved 12 March 2020.

³⁶Reuters, ‘Myanmar Military Court to Probe Rohingya Atrocity Allegations’. Available at: <<https://www.reuters.com/article/us-myanmar-rohingya-military/myanmar-military-court-to-probe-rohingya-atrocity-allegations-idUSKCN1QZ11K>>. Retrieved 12 March 2020.

members accountable for human rights violations significantly dim the prospects for any credible justice mechanism in Myanmar.³⁷

The Gambia accuses Myanmar of engaging in a systematic policy of oppression and persecution against the Rohingya, a Muslim minority in a predominantly Buddhist country, that reaches back decades. “The aim is to get Myanmar to account for its action against its own people: the Rohingya”, Justice Minister Abubacarr Tambadou told a news conference in The Hague.³⁸ Based on the Application, the ICJ will be asked to focus on military campaigns³⁹ carried out against the Rohingya since 2016, which are estimated to have caused more than 10,000 deaths and more than 700,000 people to seek refuge in Bangladesh. The state government deems them illegal immigrants, but the Rohingya people argue that they have lived in the area for generations and that this treatment is unfair to the Muslims.⁴⁰

While the Security Council has been engaged on the issue both in its chamber and traveling in 2018 to the sprawling refugee camp at Cox's Bazar in Bangladesh and flying over Rakhine state, it has not taken action, such as imposing economic sanctions or an arms embargo on the Myanmar military. This has been primarily because of opposition from China — a veto-wielding member of the 15-nation council and ally of the Myanmar government.

Jurisdictional Basis for Gambia to Sue Myanmar at the ICJ

Under Article IX of the 1948 Convention on the Prevention and Punishment of Genocide (Genocide Convention)⁴¹, any contracting party may submit a dispute between it and another contracting party relating to the interpretation, application or fulfilment of the Genocide Convention to the ICJ, including disputes about the responsibility of a state for genocide. Thus, any state party to the Genocide Convention may bring a claim against another state party if it feels it failed to uphold its obligations in preventing and punishing the crime of genocide.

Myanmar is a party to the Genocide Convention⁴². Fifteen states have lodged reservations relating to Article IX⁴³ but Myanmar has not. It has instead made reservations to Articles VI and VIII of the Genocide Convention⁴⁴, neither of

³⁷UN Human Rights Council, Report of the Detailed Findings of the Independent International Fact finding Mission on Myanmar: *resolution adopted by the Human Rights Council*, 17 September 2018, A/HRC/RES/39/CRP.2, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf. Retrieved 12 March 2020.

³⁸ <https://ca.reuters.com/article/worldNews/idUSKBN1XL18S>

³⁹Termed “clearance operations” by Myanmar.

⁴⁰World Court Acts to Prevent Rohingya genocide”. *BBC News*. 23 January 2020. Retrieved 14 March 2020

⁴¹ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277

Genocide Convention, which was adopted in 1948 in the aftermath of the Holocaust.

⁴²*Ibid.*

⁴³*Ibid.*

⁴⁴*Ibid.*

which is an obstacle to pursuing an ICJ case. any state party to the treaty may bring a claim against another state party if it feels it failed to uphold its obligations in preventing and punishing the crime of genocide

Myanmar is a party to the Genocide Convention⁴⁵. Article IX of the Genocide Convention⁴⁶ provides that any contracting party may submit a dispute between it and another contracting party relating to the interpretation, application or fulfilment of the Convention to the ICJ, including disputes about the responsibility of a state for genocide. Fifteen states have lodged reservations relating to Article IX⁴⁷ but Myanmar has not. It has instead made reservations to Articles VI and VIII of the Genocide Convention⁴⁸, neither of which is an obstacle to pursuing an ICJ case.

Article VI requires that persons charged with genocide be tried by a competent tribunal of the state in which the offense took place or by an “international penal tribunal”. Myanmar’s reservation does not disclaim the obligation to prosecute perpetrators of genocide but indicates that Myanmar considers its own courts to have exclusive jurisdiction over such cases. Myanmar’s reservation to Article VI might therefore exclude certain claims that could arise in the future,⁴⁹ but it poses no general bar to ICJ jurisdiction.

Article VIII provides that contracting parties “may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide”. Myanmar is the *only* contracting party to have made a reservation to Article VIII, and the precise legal effect of such a reservation is unclear. It surely cannot function to prevent other states from calling upon a competent UN organ to take action. As Giorgio Gaja⁵⁰ has written, Article VIII retains only an expository character and does not add to the powers of UN organs or affect their exercise. In view of the fact that Myanmar declined to opt-out of Article IX when it ratified the Genocide Convention in 1956, it would be nonsensical to interpret the reservation to Article VIII as amounting to non-acceptance of the ICJs jurisdiction

Thus, there is a jurisdictional basis for the ICJ to adjudicate a dispute about Myanmar’s compliance with the Genocide Convention—above all, the obligation of the state itself not to commit genocide. To be sure, the ICJ’s jurisdiction would not extend to claims about crimes against humanity, war crimes, or other human rights violations, but the underlying facts relating to such claims would overlap substantially with those relating to genocide and receive a hearing.

⁴⁵*Ibid.*

⁴⁶*Ibid.*

⁴⁷*Ibid.*

⁴⁸*Ibid.*

⁴⁹For example, if Myanmar were to refuse to surrender an alleged perpetrator to the ICC.

⁵⁰see *The UN Genocide Convention: A Commentary* (Paola Gaeta, ed) (OUP 2009) at 400.

While the case may take many years to reach a final ruling, in the interim, Gambia has asked the ICJ for an order for provisional measures⁵¹ “to protect the rights of the Rohingya group and those of The Gambia under the Genocide Convention, and to prevent the aggravation or extension of the dispute pending the final judgment of the ICJ.”⁵² Among the provisional measures that Gambia has requested the ICJ to order as a matter of extreme urgency are that Myanmar should immediately take all measures to prevent all genocidal acts; Myanmar should ensure that the military does not commit any genocidal acts; and Myanmar should not destroy or render inaccessible any events related to the underlying application. Gambia has also asked the ICJ to require Myanmar and Gambia to provide the ICJ with a report on steps taken to implement a provisional measures order no later than 4 months from its issuance.

The ICJ held a public hearing on the request for provisional measures on December 10-12, 2019 in The Hague, Netherlands.⁵³ On 23 January 2020, the ICJ issued an order on The Gambia's request for provisional measures. The order “indicated” (i.e., issued) provisional measures ordering Myanmar to prevent genocidal acts against the Rohingya Muslims during the pendency of the case, and to report regularly on its implementation of the order⁵⁴. The ICJ issued a procedural order on the same date, setting filing deadlines of 23 July 2020 for The Gambia's Memorial, and 25 January 2021 for Myanmar's responsive Counter-Memorial.⁵⁵ On 18 May 2020, the ICJ issued an extension for The Gambia's memorial and set a filing deadline of 23 October 2020. Similarly, an extension was granted to Myanmar set at 23 July

⁵¹ The ICJ's provisional measures orders are legally binding on the parties. Myanmar's explicit recognition of the ICJ's authority should dispense with any legal question as to whether the government needs to comply with the court's orders and decisions. Other UN bodies could take steps to increase the power of the ICJ's order and, by extension, increase the political cost should Myanmar fail to comply. Under article 41(2) of the ICJ Statute, the court's provisional measures orders are automatically sent to the UN Security Council. Such an order would increase pressure on the Security Council to take concrete action in Myanmar, including through a binding resolution to address some of the indicators of genocidal intent outlined in the comprehensive 2018 report of the UN Independent Fact Finding Mission. For example, the Security Council could pass a resolution directing Myanmar to lift restrictions on Rohingya's freedom of movement, eliminate unnecessary restrictions on humanitarian access to Rakhine State, repeal discriminatory laws, and ban practices that limit Rohingya access to education, health care, and livelihoods. Thus far, the Security Council has been deadlocked on Myanmar, in part because of China's support for Myanmar's leadership and its veto power. Eckhard Hellbeck, ‘Provisional Measures of the International Court of Justice-Are They Binding’. Available at: <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/ilsa9&div=11&id=&page=>>> Retrieved 15 March 2020.; The UN General Assembly can also reinforce the weight of an ICJ order on Myanmar by passing a resolution urging the government to comply with its terms ‘General assembly Welcomes International Court of Justice Opinion on Chagos archipelago, Adopts Text Calling for Mauritius’ Complete Decolonization. Available at: <https://www.un.org/press/en/2019/ga12146.doc.htm/>.

⁵² International Court of Justice. ‘Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) - Request for the indication of provisional measures.’ Available at: <<https://www.icj-cij.org/en/case/178>>. Retrieved 15 March 2020.

⁵³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) - Request for the indication of provisional measures - The Court to hold public hearings from Tuesday 10 to Thursday 12 December 2019” International Court of Justice. Retrieved 24 August 2016

⁵⁴ Paddock, Richard C. (23 January 2020). “U.N. Court Orders Myanmar to Protect Rohingya Muslims”. *The New York Times*. Retrieved 15 March 2020.

⁵⁵ International Court of Justice. <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-02-00-EN.pdf>>. Retrieved 22 November 2020.

2021.⁵⁶ The order largely only replicated existing "state obligations under the Genocide Convention," and did not include the broader measures and statements that The Gambia had requested.

Establishing the Crime of Genocide

Establishing that the crime of genocide has taken place under the Genocide Convention requires demonstrating a) genocidal intent and b) genocidal acts, meaning the state had the intent to destroy a national, ethnic, racial, or religious group in whole or in part.

Firstly, Gambia's application identifies two elements of Myanmar's persecution of the Rohingya as "particularly indicative of genocidal intent": its systematic denial of legal rights to Rohingya, notably restrictions on their ability to marry and bear children and severe restrictions on freedom of movement, including detention camps, and its support for, and participation in, pervasive hate campaigns aimed at demonizing and dehumanizing the group.

Secondly, for the genocidal acts, the application points to incidents from the October 2016 and August 2017 "clearance operations" including mass executions of Rohingya men, women, and children; the systematic burning of Rohingya villages "with the intent to destroy the group in whole or in part"; the targeting of children; and the commission of rape and sexual violence on a massive scale.

The application highlights continuing attacks on the Rohingya, notably the destruction of more than 30 villages between November 2018 and May 2019 and the denial to Rohingya of access to food as evidence of ongoing acts of genocide. It also notes the Fact-Finding Mission's recent warning that the 600,000 Rohingya still in Myanmar live under the threat of further genocidal acts by Myanmar⁵⁷. Gambia has asked the ICJ to declare that Myanmar has and continues to breach its obligations under the Genocide Convention⁵⁸; must cease ongoing genocidal acts and fully respect its obligations moving forward; must ensure that perpetrators of genocide are held to account before a competent tribunal; and must provide reparations to Rohingya victims of genocidal acts, including "allowing the safe and dignified return" of those who have been forcibly displaced and "respect for their full citizenship and human rights and protection against discrimination, persecution

⁵⁶ *International Court of Justice*. <<https://www.icj-cij.org/files/case-related/178/178-20200526-PRE-01-00-EN.pdf>>. Retrieved 22 November 2020

⁵⁷ UN Independent International Fact-Finding Mission on Myanmar calls on UN Member States to remain vigilant in the face of the continued threat of genocide. Available at: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25197&LangID=E>>. Retrieved 25 November 2020.

⁵⁸ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

and other related acts.” Gambia has also asked that Myanmar offer assurances and guarantees of non-repetition of violations of the Genocide Convention⁵⁹.

Proving that the genocide has taken place poses a daunting challenge for the Gambia at the ICJ. This is because of Gambia’s extensive reliance on UN fact-finding reports, combined with the absence of prior or parallel international criminal proceedings relating to these events. The Application made it apparent that Gambia would ask the ICJ to rely on a range of fact-finding. In September 2018, the Fact Finding Mission presented a comprehensive analysis of the Rohingya’s status as a protected group, genocidal acts, and indicators of genocidal intent and concluded that “the actions of those who orchestrated the attacks on the Rohingya read as a veritable check-list”⁶⁰ on how to destroy the target group in whole or in part. The Fact-Finding Mission further concluded in 2019 that “the State of Myanmar breached its obligation not to commit genocide under the Genocide Convention.”⁶¹ The September 2018 Fact Finding Report notes the possibility of sharing these records with “competent authorities carrying out credible investigations”⁶².

It is important to note the distinction between giving weight to factual findings by a UN fact-finding body and deferring to its legal conclusions. It is typical for fact-finding bodies to offer legal conclusions on the basis of their investigations, but it rests with the ICJ to identify the applicable law and draw its own legal conclusions from the established facts, whether the ICJ has adduced those facts from primary documents, live witness testimony, or, indeed, the assessments of a fact-finding body. The Gambia refers not only to the factual findings of the Fact Finding Mission, but also to its conclusions about genocidal intent. It has argued that these legal assessments—not only the Fact Finding Mission’s factual findings—should be given significant weight, and there was back-and-forth between the parties during the provisional measures hearing about the value of legal conclusions by the Fact Finding Mission or the special rapporteur. The fact that the Fact Finding Mission considers that the evidence demonstrates genocidal intent—or that any other international actor or State has made that determination—should have very limited value for the ICJ. As may be the case when an expert appears before the ICJ, it can be unhelpful for an expert to reach the ultimate legal question that the ICJ must decide, rather than limiting the scope of testimony to information that bears on that question. In such situations, the ICJ may find itself at pains to demonstrate its independence. The provisional measures hearing confirmed the central role that UN

⁵⁹ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277

⁶⁰ UN Human Rights Council, Report of the Detailed Findings of the Independent International Fact finding Mission on Myanmar: *resolution adopted by the Human Rights Council*, 17 September 2018, A/HRC/RES/39/CRP.2, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf. Retrieved 12 March 2020.

⁶¹ *Ibid.*

⁶² *Ibid* at para 32.

fact-finding reports will play. The key question is the extent to which the ICJ will be willing to give weight to the findings in such reports.

When the ICJ is asked to rely on third-party findings of fact, it has shown a greater willingness to give weight to findings generated through a court-like process. When evidence has not been tested in an adversarial setting, it is more difficult to predict the extent to which the ICJ will be willing to credit such evidence. Although the ICJ has identified various factors to assess the reliability of information in fact-finding reports, the soundness of those criteria is open to question, and the ICJ has not always explained their application in practice. The issues surrounding reliance on third-party fact-finding reports may be of lesser importance when it comes to provisional measures, where the evidentiary burden is necessarily more forgiving than at the merits stage. The interesting question will be how the ICJ decides to address the findings of fact that are presented:

A. Reliance on Evidence Obtained Through a Court-like Process

Past cases offer guidance about when the ICJ will give weight to the evidence gathered by other fact-finding bodies, and the ICJ has distinguished between different types of fact-finding processes. For example, in the *Armed Activities*⁶³ case between the DRC and Uganda, the ICJ indicated its willingness to give “special attention” to “evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information”.⁶⁴ That description fit the Porter Commission, a judicial inquiry established by the Government of Uganda that operated with court-like procedures⁶⁵. The ICJ ultimately relied on some of the evidence discussed in the Porter Commission’s report⁶⁶, including statements against interest by Ugandan military officials.⁶⁷ It also gave substantial weight to the Porter Commission’s assessment of the alleged smuggling, looting, and illegal exploitation of resources by Ugandan military personnel.⁶⁸

The ICJ reinforced this approach in *Bosnia v Serbia*,⁶⁹ where it explained its readiness to accept factual findings made at the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁷⁰ The ICJ concluded that “it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial,

⁶³*Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*; *Request for the Indication of Provisional Measures*, International Court of Justice (ICJ), 1 July 2000.

⁶⁴*Ibid* at para 61.

⁶⁵International Court of Justice: <https://icj-cij.org/public/files/case-related/116/116-20050420-ORA-01-01-BI.pdf>. Retrieved 14 March 2020.

⁶⁶*Ibid*

⁶⁷*Ibid* at para 78.

⁶⁸*Ibid* at paras 237-242.

⁶⁹<https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>

⁷⁰*Ibid* at para 214.

unless they have been upset on appeal”.⁷¹ The ICJ went so far as to indicate that ICTY findings about “the existence of the required intent” were “entitled to due weight”.⁷² The ICJ took a similar approach to ICTY findings in *Croatia v Serbia*.⁷³

It is significant that in its case law the ICJ has only on one occasion—with respect to Srebrenica—made a finding of genocide⁷⁴. That conclusion rested heavily on the ICJ’s assessment of the *Blagojević*⁷⁵ and *Krstić*⁷⁶ cases at the ICTY. The only successful prosecution of a genocide case under the Genocide Convention at the ICJ was brought by Bosnia and Herzegovina against Serbia in 1993. It took four years for the court to issue its decision largely in favor of Bosnia. In 2007, the ICJ ruled that there was genocide in Srebrenica enclave in Bosnia and Herzegovina and that Serbia violated its duty to prevent genocide⁷⁷. The ICJ also ruled that Serbia violated its duty to punish genocide by failing to surrender Bosnian Serb general Ratko Mladic, one of the architects of the Srebrenica genocide, to the International Criminal Tribunal for the former Yugoslavia for prosecution. Serbia finally surrendered Mladic to the Yugoslav tribunal in 2011.⁷⁸ In the case against Myanmar, the ICJ will not be able to draw upon findings established by parallel criminal proceedings. The Prosecutor of the ICC has opened an investigation⁷⁹ into the situation, but these efforts are unlikely to outpace the ICJ case. The same could be said for the recently-filed universal jurisdiction action⁸⁰ in Argentina.

B. Reliance on Evidence Not Obtained Through Adversarial Fact-Finding Process

Based on the Application and the presentations made during the provisional measures hearing, UN fact-finding reports will take center stage in the ICJ case against Myanmar, including reports from the UN Special Rapporteur on the situation of human rights in Myanmar,⁸¹ the UN Special Advisor on the Prevention of Genocide,⁸² and, above all, from the Independent International Fact Finding Mission on Myanmar established by the UN Human Rights Council in March 2017. The Fact Finding Mission produced four major reports, including a 444 page

⁷¹*Ibid* at para 223.

⁷²*Ibid* at para 223.

⁷³*Ibid* at para 182.

⁷⁴*Op.cit* note 66. See para 297.

⁷⁵ICTY: <https://www.icty.org/x/cases/blagojevic_53/ind/en/bla-ji020122e.pdf>. Retrieved 15 March 2020.

⁷⁶ICTY: <<https://www.icty.org/en/case/krstic>>. Retrieved 15 March 2020.

⁷⁷Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) <<https://www.icj-cij.org/en/case/91>>. Retrieved 15 March 2020.

⁷⁸Human Rights Org: <<https://www.hrw.org/news/2011/05/31/icty-qa-case-against-ratko-mladic>>. Retrieved 15 March 2020.

⁷⁹<https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF>. Retrieved 15 March 2020.

⁸⁰<<https://www.theguardian.com/world/2019/nov/14/myanmars-aung-san-su-kyi-faces-first-legal-action-over-rohingya-crisis>>. Retrieved 15 March 2020.

⁸¹*Op.cit* n13

⁸²*Op.cit* n14

report⁸³ in September 2018 and a follow up report⁸⁴ in September 2019. The Application draws extensively on the work of the Fact Finding Mission, and The Gambia referred to many of the Fact Finding Mission findings during the provisional measures hearing.

In principle, the ICJ's starting point will likely be that such reports are *not* entitled to the same deference that it has shown to ICTY judgments, since the evidence will not have been obtained or tested through an adversarial, court-like process. However, this does not mean the evidence set forth in these reports will not be given weight—indeed, they may be given substantial weight. Nonetheless outcome will likely require the ICJ to focus on the methods and methodologies adopted by the Fact Finding Mission and other fact-finding bodies, especially because Myanmar has challenged⁸⁵ their credibility, completeness, and impartiality, and has established⁸⁶ a fact-finding body of its own.

There are relatively few instances of the ICJ relying on the work of non-adversarial UN fact-finding bodies. In *Armed Activities*,⁸⁷ the ICJ drew not only on the report of the quasi-judicial Porter Commission,⁸⁸ but also on reports from the UN Secretary-General, special rapporteurs, and a Panel of Experts established by the UN Security Council to monitor the alleged illegal exploitation of the DRC's natural resources. Faced with these materials, the ICJ outlined certain factors relevant to assessing their weight, reliability, and value. It explained that it would “treat with caution . . . materials emanating from a single source” but would give weight to evidence that has gone unchallenged “by impartial persons for the correctness of what it contains”.⁸⁹ The ICJ then found that the various reports before it furnished “sufficient and convincing evidence” to determine whether or not Uganda had engaged in the illegal exploitation of the DRC's resources⁹⁰ and that the record contained “ample credible and persuasive evidence” of looting and exploitation that engaged the responsibility of Uganda, even if that evidence did not establish a government policy.⁹¹ Some commentators⁹² have harshly criticized the ICJ's approach in *Armed Activities*⁹³ as a “total delegation” of its fact-finding responsibility, and it is difficult at points in that judgment to determine whether the

⁸³<https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf>. Retrieved 15 March 2020.

⁸⁴<https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf>. Retrieved 15 March 2020.

⁸⁵<<https://www.nytimes.com/2019/09/17/world/asia/myanmar-leader-war-crimes.html>. Retrieved 15 March 2020.

⁸⁶<<https://www.icj.org/wp-content/uploads/2018/09/Myanmar-COI-cannot-deliver-justice-or-accountability-Advocacy-Analysis-brief-2018-ENG.pdf>>. Retrieved 15 March 2020.

⁸⁷ *Supra*, see note 63.

⁸⁸ *Op.cit*, see note 65.

⁸⁹ *Supra*, note 63 at para 61.

⁹⁰ *Ibid*, see para 237.

⁹¹ *Ibid*, see paras 242-243.

⁹² Available at: <<https://nyujilp.org/wp-content/uploads/2013/02/40.S-Halink.pdf>> Retrieved 15 March 2020.

⁹³ *Supra*, see note 63.

ICJ credited information in third-party reports in their own right, rather than merely to corroborate the Porter Commission⁹⁴. This left unclear the ICJ's willingness to assign probative value to the findings of non-adversarial fact-finding mechanisms.

Another example of reliance on non-adversarial fact-finding comes from *Bosnia v Serbia*.⁹⁵ The ICJ relied on a 1999 report by the UN Secretary-General⁹⁶ and emphasized that the “care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation” lent “considerable authority” to the document, which gave “substantial assistance” to the ICJ.⁹⁷ The ICJ in *Bosnia v Serbia*⁹⁸ did not similarly single out the Report of the Commission of Experts that was established at the request of the UN Security Council in 1992. Instead, it explained that the value of all third-party reports depended on the “source of the item of evidence”⁹⁹, “the process by which it has been generated”¹⁰⁰ and the “quality or character” of the item, such as statements against interest or uncontested facts.¹⁰¹ In the 2007 judgment, the ICJ referred to the Commission of Experts report in relation to when specific towns or villages came under attack, the types of weaponry used, fatality estimates, and prisoner conditions. However, the Court often referred to the Commission of Experts report alongside its summaries of Bosnia's arguments, leaving it unclear whether the ICJ was adopting the report's findings as its own.

In *Croatia v Serbia*,¹⁰² the ICJ reiterated the factors from *Bosnia v Serbia*¹⁰³ that it would use to determine the probative value of third-party reports.¹⁰⁴ The Commission of Experts report¹⁰⁵ did not feature in the 2015 judgment, but the ICJ singled out a UN Special Rapporteur report¹⁰⁶ as meriting “evidential weight” because of “the independent status of its author” and the fact that it was “prepared at the request of organs of the United Nations, for purposes of the exercise of their functions”. The ICJ further noted that Croatia had not challenged the objectivity of the report¹⁰⁷. The ICJ then relied on its findings to determine that killings

⁹⁴*Op.cit.*, see note 65.

⁹⁵*Supra*, see note 69.

⁹⁶The Fall of Srebrenica Report. Available at: <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_549_1999.pdf> Retrieved 15 March 2020.

⁹⁷See para 230. In the provisional measure hearings, counsel for The Gambia quoted this language to suggest that it similarly could describe the FFM reports (CR 2019/18, p 22, paras 6-7)—a proposition open to question.)

⁹⁸*Supra*, see note 69.

⁹⁹for instance, partisan or neutral

¹⁰⁰for instance, an anonymous press report or the product of a careful court or court-like process

¹⁰¹*Supra*, see note 69 para 227

¹⁰²International Court of Justice: <<https://www.icj-cij.org/en/case/118/judgments>>. Retrieved 15 March 2020.

¹⁰³*Supra*, see note 69.

¹⁰⁴*Supra*, see note 102 at paras 189-191

¹⁰⁵*Supra*, see note 69.

¹⁰⁶*Ibid.*

¹⁰⁷*Supra*, see note 102 at para 459.

constituting the *actus reus* of genocide were carried out by Croatian armed forces against Serb civilians¹⁰⁸.

From the foregoing, the issue is, will the Fact Finding Mission's methodological transparency be enough to persuade the ICJ to rely on its factual findings? On some points, the ICJ may be able to examine the underlying evidence used by the Fact Finding Mission, such as satellite imagery or government documents. However, much of the evidence consists of confidential interviews with victims and other witnesses. This poses a greater challenge for the ICJ, since giving weight to such accounts—or broader findings based on them—means deferring to the credibility and value assessments made by the Fact Finding Mission, unless the victims and witnesses that gave such accounts are called to testify in the ICJ proceedings. One need only review the ICJ's discussion of the witness statements submitted in *Croatia v Serbia*¹⁰⁹ to appreciate its concerns about out-of-court testimony that is provided without details relevant to credibility and value.¹¹⁰ It is unclear whether the Fact Finding Mission would be able to provide the ICJ with the confidential summary records of interviews and meetings—or whether this would be sufficient.

Conclusion

Ultimately, it is important to be realistic about the ICJ's capacities and limitations when it comes to fact-finding, and it is worth recalling that the UN Charter clearly envisions that the ICJ might rely on fact-finding by others: Article 50 empowers the ICJ to entrust any individual, bureau, or commission to carry out an enquiry or give an expert opinion. Relying on findings of fact made by a third-party at the ICJ's direction is not such a far cry from relying upon the findings of fact by an entity established by another UN organ or subsidiary body—especially if the ICJ has the opportunity to directly question those involved. The ICJ may want to explore this possibility. Thus, when the case proceeds, the ICJ will need to confront its approach to reliance on third-party reports. One path forward may be for the ICJ or the parties to consider calling as witnesses those individuals involved in compiling the fact-finding reports presented to the ICJ. This would give the ICJ an opportunity to explore the strengths and weaknesses of their findings through testimony. In the end, the ICJ will almost certainly not feel bound by the legal conclusions of the Fact Finding Mission or any other fact-finding body

¹⁰⁸*Ibid* see para 493.

¹⁰⁹*Ibid*, see paras 192-199.

¹¹⁰See also Judge Donoghue's Declaration. Available at <<https://www.icj-cij.org/files/case-related/118/118-20150203-JUD-01-07-EN.pdf>> Retrieved 15 March 2020.

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