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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2022

Public sitting

held on Monday 21 February 2022, at 1.30 p.m., at the Peace Palace,

President Donoghue presiding,

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

VERBATIM RECORD

ANNÉE 2022

Audience publique

tenue le lundi 21 février 2022, à 13 h 30, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

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

COMPTE RENDU

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

Présents : Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte
Mme Charlesworth, juges
Mme Pillay
M. Kress, juges *ad hoc*

M. Gautier, greffier

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Ms Fatou L. Njie, Ministry of Justice, Republic of The Gambia,

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

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Ms Nancy Lopez, Washington, DC,

Ms Rachel Tepper, Washington, DC,

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Ms Myo Pa Pa Htun, Minister Counsellor, Embassy of Myanmar in Brussels,

Mr. Kyaw Thu Hein, Director, Ministry of Legal Affairs,

Mr. Thwin Htet Lin, Director, Ministry of Foreign Affairs,

Mr. Ngwe Zaw Aung, Director, Ministry of Legal Affairs,

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Ms Cho Nge Nge Thein, Deputy Director, Ministry of Legal Affairs,

Mr. Thurein Naing, Judge Advocate, Office of the Judge Advocate General,

Ms Ei Thazin Maung, Assistant Director, Ministry of Foreign Affairs,

Ms May Myat Noe Naing, First Secretary, Embassy of Myanmar in Brussels,

Ms Aye Chan Lynn, First Secretary, Embassy of Myanmar in Brussels,

Ms M Ja Dim, Assistant Director, Ministry of Legal Affairs,

Mr. Zin Myat Thu, Head of Branch (1), Ministry of Foreign Affairs,

Mr. Wunna Kyaw, Head of Branch (2), Ministry of Foreign Affairs,

Mr. Zaw Yu Min, Third Secretary, Embassy of Myanmar in Brussels,

Ms Mary Lobo,

Mr. Momchil Milanov, PhD student and teaching assistant, University of Geneva,

as Members of the Delegation.

Mme Cho Nge Nge Thein, directrice adjointe, ministère des affaires juridiques,

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Mme Aye Chan Lynn, première secrétaire, ambassade du Myanmar à Bruxelles,

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M. Zaw Yu Min, troisième secrétaire, ambassade du Myanmar à Bruxelles,

Mme Mary Lobo,

M. Momchil Milanov, doctorant et attaché d'enseignement à l'Université de Genève,

comme membres de la délégation.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today and will meet in the coming days to hear the Parties' oral arguments on the preliminary objections raised by the Respondent in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*. This afternoon, the Court will hear the first round of oral argument of Myanmar.

Owing to the ongoing concerns and restrictions related to the COVID-19 pandemic, the Court has decided to hold these oral proceedings in a hybrid format, under Article 59, paragraph 2, of its Rules. The Court will continue to fulfil its mission through all means at its disposal, pending the normalization of the health situation.

The Court has taken great care to ensure the smooth conduct of this hybrid hearing. The Parties participated in technical testing prior to the opening of the hearings. These tests were comprehensive and included, for example, tests of the interpretation system and the process for displaying exhibits. However, while these tests reduce the risk of technical difficulties, they cannot eliminate them. In the event that we experience such a difficulty, such as a loss of audio input from a remote participant, I may have to interrupt the hearing briefly to allow the technical team to solve the problem.

In a hybrid hearing such as this one, all judges are able to view the speaker and any exhibits, regardless of whether they are in the Great Hall or joining via video link. I would like to note that the following judges are present with me in the Great Hall of Justice: Vice-President Gevorgian, Judges Tomka, Abraham, Yusuf, Xue, Sebutinde, Iwasawa, Nolte and Charlesworth, and Judges *ad hoc* Pillay and Kress; while Judges Bennouna, Bhandari, Robinson and Salam are participating by video link. For reasons duly made known to me, Judge Cançado Trindade is unable to sit with us in these oral proceedings, either in person or by video link.

For this hybrid hearing, the Registrar informed both Parties that each of them could have up to four representatives present in the Great Hall of Justice at any time and that the Court would make available, should a Party so desire, an additional room in the Peace Palace from which other members

of the delegation could follow the proceedings via video link. The Registrar also informed the Parties that participation via video link would be available to members of each delegation who would not be present in the Peace Palace.

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Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. The Gambia chose Ms Navanethem Pillay, and Myanmar, Mr. Claus Kress. Ms Pillay and Mr. Kress were duly installed as judges *ad hoc* on 10 December 2019, during the phase of the present case that was devoted to the Request for the indication of provisional measures submitted by The Gambia.

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Before I summarize the principal procedural steps in this case, I note that the parties to a contentious case before the Court are States, not particular governments. The Court's judgments and its provisional measures orders bind the States that are parties to a case.

I shall now briefly recall the principal procedural steps in the case.

On 11 November 2019, The Gambia filed in the Registry of the Court an Application instituting proceedings against Myanmar concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, to which I shall refer as the "Genocide Convention" or the "Convention". To found the jurisdiction of the Court, The Gambia invokes Article 36, paragraph 1, of the Statute of the Court and Article IX of the Genocide Convention.

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

By an Order dated 23 January 2020, having heard the Parties, the Court indicated certain provisional measures addressed to Myanmar.

The Gambia filed its Memorial on 23 October 2020, within the time-limit as extended by the Court in its Order of 18 May 2020.

On 20 January 2021, Myanmar raised certain preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Consequently, by an Order of 28 January 2021, the Court fixed 20 May 2021 as the time-limit within which The Gambia could present a written statement of its observations and submissions on the preliminary objections raised by Myanmar. The Gambia filed its written statement on 20 April 2021, and the case thus became ready for hearing in respect of the preliminary objections.

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Pursuant to Article 53, paragraph 2, of its Rules, the Court decided, after consulting the Parties, that copies of the Preliminary Objections and the Written statement concerning those objections, as well as the documents annexed thereto, would be made accessible to the public on the opening of the oral proceedings. Further, in accordance with the Court's practice, these pleadings and documents annexed will be placed on the Court's website from today.

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I would now like to welcome the delegations of the Parties. I note the presence here in the Great Hall of Justice of the Agent of The Gambia and the Agent of Myanmar, each accompanied by members of their respective State's delegations. I further note that other members of the delegations of the Applicant and the Respondent will be participating in the hearing by video link.

In accordance with the arrangements on the organization of the proceedings which have been decided by the Court, the hearings will comprise a first and second round of oral argument. The first round will begin today with the statement of Myanmar, and will close on the afternoon of Wednesday 23 February 2022, following The Gambia's first round of oral pleading. Each Party has been allocated a period of three hours for the first round. The second round of oral argument will begin on the afternoon of Friday 25 February 2022 and conclude on the afternoon of Monday 28 February 2022. Each Party will have a maximum of one hour and a half to present its reply.

In this first sitting, Myanmar may, if required, avail itself of a short extension beyond 4.30 p.m. today, in view of the time taken up by my introductory remarks.

I shall now give the floor to the Agent of Myanmar, H.E. Mr. Ko Ko Hlaing. You have the floor, Your Excellency.

Mr. KO KO HLAING:

OPENING STATEMENT OF THE AGENT OF THE REPUBLIC OF THE UNION OF MYANMAR

1. Madam President, Mr. Vice-President, distinguished Members of the Court, it is a great honour for me to appear before the Court as the Agent of the Republic of the Union of Myanmar.

2. There have been some changes in the composition of the Court and representation of the Parties since the last public sitting in this case. It is my pleasure to congratulate Your Excellency President Donoghue and Your Excellency Vice-President Gevorgian on your elections, and Your Excellencies Judges Nolte and Charlesworth on your appointments. I would also like to extend my amicable respect to Their Excellencies Mr. Dawda Jallow and Mr. Hussein Thomasi, the new Agent and new Co-Agent for The Gambia.

3. I also appear before you as the new Agent of Myanmar, accompanied by the new Alternate Agent, Her Excellency Dr. Thi Da Oo, with the deepest trust that the Court, the principal judicial organ of the United Nations, will decide this matter impartially in accordance with the law.

4. Madam President, Members of the Court, the law that this Court must apply includes, of course, not only the substantive law governing relations between the States that appear before it, but also the rules of law governing the jurisdiction of the Court and the admissibility of cases brought before it.

5. Maintenance of the international rule of law requires that these latter norms of international law be respected as meticulously as any other legal norms. The institutions of the international legal order have been established by the common consent of a remarkably diverse community of nations. For the international legal order to continue to progress and develop, it is vital that all members of this diverse community can be confident that the limitations of what they have mutually consented to will be faithfully respected.

6. In arguing that the Court lacks jurisdiction, or that the case is inadmissible, Myanmar is therefore not thereby seeking to impede the judicial processes of the Court. On the contrary, it is

seeking to ensure the proper administration of justice. Myanmar raises these preliminary objections with utmost respect to the Court.

7. The arguments that this Court will be hearing over the next days are therefore important. They have significant implications for the future functioning of the Court in general. Indeed, they have implications for any inter-State case brought before any international court or tribunal.

8. Madam President, Members of the Court, the preliminary objections raised by Myanmar are genuinely preliminary. They are entirely independent of any question of the merits of The Gambia's claim that there has been a violation of the Genocide Convention[1]. The Court can and must put that question completely out of all consideration when deciding the issues now before it.

9. Paragraph 85 of the Provisional Measures Order[2] makes absolutely clear that these preliminary objections have not been prejudged or affected by the Court in any way. It is only now that the preliminary objections fall for decision. It is now that they call for the Court's careful and comprehensive consideration.

10. Because of this, I do not need to say anything today about the substance of The Gambia's claim. I would nevertheless take the opportunity to make one obvious point. The fact that Myanmar argues that the Court is without jurisdiction, and that the case is inadmissible, in no way means that Myanmar has no answer to The Gambia's case.

11. Furthermore, the Government of Myanmar remains committed to addressing the problems in northern Rakhine State, which have a long history. These problems are complex and include consequences of former colonial rule over Burma and India.

12. The Government of Myanmar is determined to solve these complex problems through peaceful means of negotiation and reconciliation. Tripartite diplomatic discussions between Myanmar, Bangladesh and China have been undertaken for preparation of the process for repatriations to Rakhine State from Bangladesh. Working groups from Myanmar and Bangladesh are now closely co-operating for verification of the list of displaced persons who want to be repatriated

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[1] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948, United Nations, *Treaty Series (UNTS)*, Vol. 78, No. 1021 (hereinafter the "Genocide Convention" or "Convention").

[2] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 3 (hereinafter the "Provisional Measures Order").

voluntarily in accordance with the bilateral agreement between these States. Preparations for the Pilot Project of Repatriation are being undertaken by the Government. Within Myanmar's territory, internally displaced persons (IDPs), in IDP camps in Rakhine State, are receiving the Covid-19 vaccination on par with other members of the population generally. Projects for closing IDP camps and arranging the return of IDPs back to their normal lives are underway. These ongoing developments demonstrate the will of our Government to find effective and constructive ways forward in Rakhine State.

13. The new provisional Government of Myanmar is also committed to respecting Myanmar's existing obligations as a Party in these proceedings. As a responsible Party, we are diligently implementing the provisional measures indicated by Court, and are submitting regular reports as called for in the Provisional Measures Order.

14. Madam President, distinguished Members of the Court, Myanmar raises four preliminary objections. Its arguments in relation to each of these have already been set out comprehensively in the written pleadings, to which the Court is respectfully referred. In accordance with the Court's Rules and Practice Directions[3], at this oral hearing, counsel for Myanmar will focus on points requiring further attention or emphasis.

15. Myanmar's arguments today will be presented in the following order. Dr. Staker will now present Myanmar's arguments on the first preliminary objection. He will be followed in turn by Professor Talmon, who will deal with the second preliminary objection, and then by Professor Kolb, who will take up the third preliminary objection. Finally, Dr. Staker will return to speak to the fourth preliminary objection.

16. Madam President, distinguished Members of the Court, I thank you for your kind attention, and I ask you, Madam President, to now call upon Dr. Staker. Thank you.

The PRESIDENT: I thank the Agent of Myanmar for his statement. I now invite Mr. Christopher Staker to take the floor.

[3] Rules of Court, Article 60, paragraph 1; Practice Direction VI.

Mr. STAKER: Thank you.

FIRST PRELIMINARY OBJECTION

Introduction

1. Madam President, Mr. Vice-President, Members of the Court, it is an honour for me to appear before you again.

2. At the outset, I must express my sadness at the passing in May last year of Judge James Crawford. So many of today's international lawyers were personally taught, inspired and encouraged by him. I have the privilege to be one of them.

3. I turn to the first preliminary objection. Myanmar contends that the Court lacks jurisdiction, or that the Application is inadmissible, because the real applicant in these proceedings is the Organisation of Islamic Cooperation, the "OIC". Article 34, paragraph 1, of the Statute provides that only States may be parties in cases before the Court. The OIC is an international organization, not a State.

4. This preliminary objection raises one main question of fact and one main question of law.

5. The question of fact is this: is The Gambia bringing this case on behalf of the OIC, such that the OIC is in fact the real applicant?

6. And the question of law is this: can a State bring a case before this Court on behalf of a third party which could not bring the case itself in its own name?

The question of fact

7. Madam President, Members of the Court, I begin with the question of fact.

8. The written pleadings set out the contents of many documents giving details of dealings between The Gambia and the OIC and its other Member States leading up to these proceedings.

9. These documents show that in May 2018, the OIC's Council of Foreign Ministers, one of its main organs, established an Ad Hoc Committee and appointed The Gambia as its chair[4]. I refer to this as the "Committee".

[4] Preliminary Objections of Myanmar (POM), 20 Jan. 2021, especially paras. 69-73.

10. In February 2019, this Committee adopted a plan of action which involved bringing a case before this Court against Myanmar under the Genocide Convention[5].

11. The following month, the Council of Foreign Ministers adopted a formal resolution endorsing the Committee's plan of action[6].

12. Then, in May 2019, the matter was considered at a conference of the Islamic Summit[7], the supreme authority of the OIC[8]. In its Final Communiqué[9], the Islamic Summit "urged upon the ad hoc Ministerial Committee led by the Gambia to take immediate measures to launch the case at the International Court of Justice on behalf of the OIC"[10].

13. Three key points are made here. First, that the bringing of this case was called for by the Islamic Summit. Secondly, that this case was to be brought by *the OIC Committee*, The Gambia being mentioned only as chair of that Committee. Thirdly, that the proceedings were to be brought *on behalf of the OIC*.

14. Then, on 4 July 2019, just over a month later, according to a press release of the Office of the President of The Gambia[11], The Gambia's Attorney General and Minister of Justice presented to the Cabinet "a paper on the OIC proposal for The Gambia to lead the international legal action against Myanmar at the International Court of Justice". The Cabinet approved that OIC proposal.

15. Three points emerge from this. First, The Gambia's decision to "lead" this legal action was pursuant to a direct proposal of the OIC. Secondly, The Gambia was to be "leading" this action, as opposed to taking this action in its own right. Thirdly, The Gambia accepted the OIC proposal over a month after the Islamic Summit had already decided that this case should be brought by the OIC Committee on behalf of the OIC.

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[5] POM, especially paras. 76-77, 81-84, 130; Written Observations of The Gambia on the Preliminary Objections of Myanmar (WOG), 20 Apr. 2021, para. 5.12.

[6] POM, especially paras. 78-80.

[7] POM, especially paras. 90-92.

[8] POM, para. 63.

[9] Memorial of The Gambia (MG), 23 Oct. 2020, Vol. VII, Ann. 205 (Final Communiqué of the 14th Islamic Summit Conference, 31 May 2019).

[10] POM, paras. 90-91.

[11] POM, especially paras. 95-96, and Ann. 120 (The Gambia, Office of the President, press release, "Cabinet approves transformation of GTTI into University of Science, Technology and Engineering", 6 July 2019).

16. Then, on 11 November 2019, the day that this Application instituting proceedings was filed, the legal representatives of The Gambia issued a press release[12] that was disseminated in six languages[13]. Its opening sentence states that The Gambia is "acting on behalf of the 57 Member States of the [OIC]". It subsequently states: "The OIC appointed The Gambia, an OIC member, to bring the case on its behalf."

17. This wording must surely have been very carefully chosen and approved by the client.

18. We thus have express statements both from the supreme authority of the OIC and by The Gambia's legal representatives that these proceedings are brought on behalf of the OIC. Other documents contain similar statements.

19. Statements to the effect that this case is brought *by the OIC*, or *by the OIC Committee*, have been made in a further resolution of the OIC Council of Foreign Ministers in 2020[14], and by Bangladesh's Foreign Minister[15] and Foreign Ministry[16], the Prime Minister of Malaysia[17], the OIC Journal[18], an OIC press release[19], the OIC Twitter account[20] and the NGO, Fortify Rights[21].

20. Statements that *the OIC decided* to bring this case have been made in the OIC Journal[22] and an OIC press release[23], and by the Foreign Ministry of Bangladesh[24], the Foreign Minister of

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[12] POM, paras. 106-109, and Ann. 132 (Foley Hoag LLP, "Foley Hoag Leads The Gambia's Legal Team in Historic Case to Stop Myanmar's Genocide Against the Rohingya", 11 Nov. 2019).

[13] POM, para. 108, and Anns. 133-138.

[14] POM, paras. 130-131, and Ann. 106 (OIC Res. No. 59/47-POL, "On the Work of the OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas", Nov. 2020, ninth preambular paragraph).

[15] POM, para. 122, and Ann. 114 (Bangladesh, Ministry of Foreign Affairs, "Speech of Hon'ble Foreign Minister on the Inauguration Ceremony of the OIC Youth Capital — Dhaka 2020", updated 28 July 2020).

[16] POM, para. 83, and Ann. 110 (Bangladesh, Ministry of Foreign Affairs, press release, "OIC Okays Legal Action Against Myanmar at the International Court of Justice (ICJ) in Abu Dhabi", 4 Mar. 2019).

[17] POM, paras. 101-102.

[18] POM, especially para. 84.

[19] POM, especially paras. 124-125.

[20] POM, especially para. 126.

[21] POM, especially para. 149.

[22] POM, especially para. 84.

[23] POM, paras. 111-112.

[24] POM, especially para. 81.

Malaysia[25] and the United Nations Special Rapporteur on the situation of human rights in Myanmar[26].

21. Statements that The Gambia brings these proceedings *on behalf of the OIC* have been made in a resolution of the OIC Council of Foreign Ministers[27] and by the Office of the President of The Gambia[28], the Vice-President of The Gambia in a statement to the United Nations General Assembly[29] and the respective Foreign Ministries of Bangladesh[30], Malaysia[31] and the Maldives[32], as well as in media reports in numerous countries[33], and on the websites of various other governments and NGOs, as well as that of the United Nations[34].

22. Statements that The Gambia has been "tasked" or "chosen" by the OIC to bring these proceedings have been made by the Office of the President of The Gambia[35], an OIC press release[36] and in the media[37].

23. Statements that The Gambia, in bringing these proceedings, is acting *in its capacity as chair of the OIC Committee* have been made, expressly or impliedly, in a resolution of the OIC Council of Foreign Ministers[38], by the Malaysian Foreign Ministry[39] and in three OIC press releases[40].

24. Further statements that The Gambia is "leading" this action, or that this is a "collective" action — thereby suggesting that The Gambia is not acting in its own right — have been made by

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[25] POM, especially para. 114.

[26] POM, especially paras. 97-98.

[27] POM, para. 133.

[28] POM, especially paras. 93-94.

[29] POM, paras. 103-104.

[30] POM, para. 110 (twice).

[31] POM, para. 117.

[32] POM, para. 120.

[33] POM, paras. 149, 157 and 158.

[34] POM, para. 149.

[35] POM, especially para. 93, referring to "OIC tasks The Gambia to lead ICJ case against Myanmar".

[36] POM, especially paras. 111-112.

[37] POM, paras. 157 *(The New York Times)* and 158 *(Dhaka Tribune)*.

[38] POM, para. 133.

[39] POM, para. 117.

[40] POM, paras. 111, 115 and 116.

the Office of the President of The Gambia[41], the Vice-President of The Gambia[42] and the Bangladesh Foreign Ministry[43].

25. Documents annexed to the preliminary objections also indicate that the costs of bringing these proceedings are met by a special fund set up by the OIC, to which voluntary contributions are made, and which The Gambia does not control[44]. A press report of December 2020 says that the then donors were Bangladesh, Saudi Arabia, Turkey, Nigeria, Malaysia and the Islamic Solidarity Fund[45]. Nothing indicates that The Gambia itself will bear any of the costs and, indeed, there are indications that it will not[46].

26. Madam President, Members of the Court, what does The Gambia say about these matters?

27. Astonishingly, it says nothing. It gives no alternative account of events and no explanations of these documents. It provides no additional facts. It gives no reasons for not addressing these facts.

28. The Gambia's written observations annex but a single new document relevant to these facts: a press release issued by The Gambia's Justice Ministry on 11 November 2019[47]. This new document in fact says that The Gambia has stepped forward "on behalf of the 57 Member States" of the OIC, "with the mandate" of that organization. It is thus consistent with the statements referred to before.

29. Beyond this, The Gambia makes only general and unparticularized assertions, unsupported by any evidence.

30. The Gambia states that there is "no basis in fact" for the contention that it brings these proceedings at the behest of the OIC[48], that it alone took the decision to initiate these proceedings on its own behalf, and that all that the OIC did was to endorse The Gambia's decision[49]. Where is the evidence of this? We have seen documents indicating that it was only after the Islamic Summit

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[41] POM, especially paras. 93-94.

[42] POM, paras. 103-104.

[43] POM, especially paras. 81 and 88-89.

[44] POM, paras. 118, 124, 127, 132 and 146.

[45] POM, paras. 136-137.

[46] POM, paras. 136, 137, 144, 157 and 158.

[47] The Republic of The Gambia, Ministry of Justice, press release, 11 Nov. 2019; WOG, Ann. 2, referred to in WOG, para. 2.22.

[48] WOG, para. 2.11.

[49] WOG, para. 2.20

decided that the OIC Committee should bring this case on behalf of the OIC that The Gambia's cabinet then approved the OIC's proposal that The Gambia lead the case. In November 2020, The Gambia's Justice Minister in fact himself referred to this case as an initiative of the OIC[50]. If explanations can be given, The Gambia does not supply them.

31. The Gambia then contends that it was "instrumental" in the adoption of the OIC resolution establishing the OIC Committee and that in recognition of this it was made chair of the Committee[51]. Again, where is the evidence? The mere fact that a State is appointed chair of a committee does not of itself mean that it was instrumental in the establishment of that committee or was the main proponent of action taken by the committee[52]. The material before the Court does not in fact indicate exactly who made or supported which proposals, when. Myanmar cannot know this, and The Gambia provides no details. Indeed, there are suggestions that main actors may have included Bangladesh[53], or a contact group headed by Saudi Arabia[54]. Another document refers to the OIC as having previously been looking for a State to bring these proceedings[55].

32. The Gambia then maintains that it, and not the OIC, has full control and direction of the case[56]. What evidence is there of this? The material before the Court does not indicate who is making what decisions. We do know that three senior OIC officials were members of The Gambia's delegation at the provisional measures hearing[57] and it seems that the OIC Committee met some days before The Gambia's Memorial was filed[58]. We know that The Gambia briefs the OIC on the progress of the case[59]. One OIC document acknowledges The Gambia's prerogative to choose the legal representatives[60], but does this not suggest that this prerogative was *conferred* by the OIC?

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[50] POM, para. 135, and Ann. 124 (The Gambia, Ministry of Justice on Twitter (@Gambia_MOJ), 30 Nov. 2020).

[51] WOG, para. 2.18.

[52] POM, paras. 152-156.

[53] POM, para. 151, and Ann. 161 (*Daily Sun* (Bangladesh), "Challenges Ahead For Bangladesh", 3 Jan. 2020).

[54] POM, para. 119, and Ann. 164 (*Arab News* (Saudi Arabia), "OIC contact group discusses Rohingya protection with UN chief", 1 Mar. 2020).

[55] POM, para. 156 footnote 120, and Ann. 162 (Vox, "The top UN court ordered Myanmar to protect the Rohingya. An expert explains what it means", 24 Jan. 2020). Also POM, para. 159.

[56] WOG, para. 2.5.

[57] POM, para. 147.

[58] POM, para. 128.

[59] POM, para. 99 (paras. 7 and 11 of the report). Also POM, para. 143.

[60] POM, para. 99 (para. 8 of the report).

33. Finally, The Gambia says that it merely "sought and obtained the support of" the OIC[61]. However, documents referring to "support" being given to The Gambia are hardly inconsistent with the statements to which I have referred, let alone proof to the contrary.

34. Madam President, Members of the Court, in cases before the Court, there will rarely be a question as to whether the applicant State acts as a proxy for a third party. However, where there is, the burden must be on the applicant State to prove that this is not the case, rather than on the respondent to show the contrary[62].

35. Obvious reasons of fairness require this. It is the applicant State that knows the details of its relationship and dealings with the third party. Myanmar cannot know the particulars of The Gambia's dealings with the OIC and its other Member States[63]. The Gambia does know and its failure to provide any evidence is telling.

36. Furthermore, as a matter of principle, it must be for an applicant to establish the facts necessary to satisfy the fundamental jurisdictional requirements of the kind imposed in *every* case by the very terms of the Court's Statute. It is well established that it is the applicant who must prove that there was a dispute at the time of institution of proceedings. The identity of the real applicant is the same kind of fact[64].

37. However, even if *(quod non)* the burden of proof was not on The Gambia, the Court would still have to determine the relevant facts on the basis of such material as is before it.

38. The Gambia has not disputed the authenticity of any of this material, nor denied nor sought to explain any of the specific statements made in it, nor has it submitted any contrary evidence. Unparticularized assertions made by The Gambia, unsupported by evidence, cannot be treated by the Court as facts[65].

39. The Court has before it official statements by the supreme organ of the OIC and the Government of The Gambia that the latter has been tasked by the former to bring this case on behalf

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[61] WOG, paras. 2.4, 2.17, 2.21, 2.23 and 2.24.

[62] POM, paras. 39-42, 54 and 161.

[63] POM, para. 54.

[64] POM, paras. 37-41.

[65] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 874, para. 138, quoting *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

of the OIC. This is reflected in numerous other documents. There is no contrary evidence. Matters must proceed on that basis[66].

The question of law

40. Madam President, Members of the Court, I turn, then, to the question of law.

41. It is of course fundamental that the Court's contentious jurisdiction is limited.

42. One limitation is that only States may be parties in cases before it. An international organization cannot. Nor can a non-governmental organization, or a commercial corporation, or other entity. The question that arises directly in this case is whether an entity that is not a State can circumvent this limitation on the Court's jurisdiction by appointing or tasking a State to bring a case on its behalf.

43. A second limitation is that the Court can only exercise jurisdiction in contentious cases with the consent of both parties, expressed for instance through their mutual participation in a treaty with a compromissory clause. A related question is whether this limitation can be circumvented in the same way. For instance, suppose that State A is not a party to the Genocide Convention but that State B and State C are both parties without reservation. Could State A, the non-party, bring a case against State B under the Genocide Convention by appointing or tasking State C to bring the case on State A's behalf?

44. This second question is of some pertinence to this case, because 20 of the 57 Member States of the OIC are either not parties to the Genocide Convention or have made reservations to its Article IX[67]. Two of those are Bangladesh and Malaysia, who appear to be members of the OIC Committee[68], and who appear together to have contributed half of the funds financing this case, as at December 2020[69]. At least one press article also suggests that Bangladesh was active in persuading the OIC to bring these proceedings[70].

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[66] POM, paras. 46-49.

[67] POM, para. 68.

[68] POM, para. 72.

[69] POM, para. 137.

[70] POM, para. 151.

45. These questions are not confined to cases under the Genocide Convention. They could arise in cases brought under other treaties, especially if an applicant contends that a treaty creates rights *erga omnes* or *erga omnes partes*. These same questions might thus arise in cases brought under treaties concerning any number of areas of law, including environmental, energy or trade law, law of the sea or nuclear weapons.

46. In addressing these questions, I refer to the third party on whose behalf proceedings are brought as the "real applicant" and to the State bringing proceedings on its behalf as the "proxy" State.

47. Now, it might be argued that a proxy State would surely not go to the trouble of bringing proceedings for another unless it also had an interest of its own in the case. But that cannot be assumed. A proxy State might in theory have any number of motivations. It might, for instance, be doing a political favour to the real applicant, in return for a wholly unrelated reciprocal favour. The real applicant might simply pay a proxy State to bring a case. In any event, as The Gambia acknowledges, motivations are irrelevant to matters of jurisdiction[71].

48. Regardless of motivations, the position must surely be as follows. If a third party cannot itself bring a case before the Court, for instance because it is not a State, or because it has no reciprocal acceptance of jurisdiction with the respondent, then it cannot circumvent this restriction on the Court's jurisdiction by using a proxy State to bring proceedings on its behalf.

49. General international law principles of effectiveness and good faith necessitate this conclusion. The Court's jurisdiction is determined by its Statute, which is a treaty. Treaty law has well-established principles of effectiveness[72] and good faith[73], and these are an entrenched part of international law more generally[74]. If provisions of the Statute limiting the Court's jurisdiction could be avoided through the use of proxy States, the effectiveness of those provisions would be defeated.

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[71] WOG, para. 2.11.

[72] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 455, para. 52; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51.

[73] Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, *Treaty Series (UNTS)*, Vol. 1155, p. 331, Article 31, para. 1; POM, Ann. 4, reflecting pre-existing customary international law (*Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 29, para. 63).

[74] E.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 126, para. 246 (effectiveness); *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 67, para. 145 (good faith).

50. In the example I gave earlier, no case could be brought against State A under the Genocide Convention because it is not a party to it, yet State A itself could bring a case under that Convention against State B by using State C as a proxy. This would be antithetical to the principle of reciprocity. Any good faith interpretation of the provisions governing the Court's jurisdiction, in the light of their object and purpose[75], could not permit of such a practice.

51. Furthermore, the question whether the applicant State acts as proxy for another must be a question of fact, a question of substance, not merely a question of form or procedure. If an applicant is in *fact* acting as proxy for another, it is immaterial whether or not there is a legally binding relationship between the proxy State and the real applicant, such as an agency agreement under international or domestic law, or whether or not the real applicant has legal power to compel the proxy to act[76]. Whether or not such circumstances exist, the effect of the principles I have referred to would be the same. Nevertheless, in the present case there are reasons to conclude that The Gambia acts as an organ or agent of the OIC[77].

52. Furthermore, if an applicant is in *fact* acting as proxy for another, the fact that the real applicant has given the proxy some independent discretions as to how the proceedings are conducted would not alter that fact.

53. The bringing of proceedings as proxy State for a third party that could not itself bring proceedings can also be characterized as an abuse of process[78]. If a State uses its right to bring a case before the Court in order to give access to the Court to a third party that is not entitled to it, how can it be said that this is not a use of proceedings for aims alien to those for which the procedural rights have been granted[79]? Nevertheless, whether or not this is characterized as an abuse of process, principles of effectiveness, good faith and reciprocity must prohibit such a practice in any event.

54. Madam President, Members of the Court, what, then, does The Gambia say about the legal question?

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[75] Vienna Convention on the Law of Treaties, 23 May 1969, *UNTS*, Vol. 1155, p. 331, Article 31, para. 1; POM, Ann. 4, reflecting pre-existing customary international law (*Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 29, para. 63).

[76] POM, paras. 39-43 and 162-168. Compare WOG, para. 2.25.

[77] POM, paras. 169-184.

[78] POM, paras. 189-206.

[79] Cf. WOG, para. 2.29.

55. Again, it simply does not engage with it.

56. It just says that it is the named Applicant in the Application instituting proceedings, and that all jurisdictional requirements are met in relation to it[80]. It says that these considerations alone "foreclose" Myanmar's first preliminary objection[81]. No explanation is given of why this is so. Implicitly, The Gambia may suggest that it is always permissible for any entity not entitled to bring a case to use a proxy State to do so. If so, it presents no arguments to support that contention, nor to counter Myanmar's contrary arguments.

57. The Gambia then says that its Application states that the Agent acts in the name of, and on behalf of, The Gambia[82]. However, even if the Agent acts for The Gambia, that does not address the question whether The Gambia itself is acting on behalf of the OIC[83].

58. The Gambia then refers to the principle that a State's motivation for bringing a case is irrelevant to matters of jurisdiction[84]. But of course, previous cases applying that principle did not address the question with which we are presently concerned. We are concerned with identifying who is to be treated as the real applicant for purposes of determining jurisdiction and admissibility. We are not concerned with the motivation of whoever that may be, or of whoever acts on their behalf.

59. The Gambia then says that a dispute existed between it and Myanmar at the time the proceedings were instituted. That is denied by Myanmar in its fourth preliminary objection. But in any event, once it is established that the applicant brings proceedings as proxy for a third party, the effect of principles of effectiveness, good faith and reciprocity will still be the same, whether or not the proxy also has its own dispute with the respondent in relation to the same issue.

Conclusion

60. Madam President, Members of the Court, that concludes my arguments on the first preliminary objection. Myanmar contends that the relevant facts are clear. As to the law, it cannot be possible for an international organization to bring a case before the Court by using a State as proxy

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[80] WOG, paras. 2.5, 2.7-2.10 and 2.26.

[81] WOG, para. 2.10.

[82] WOG, paras. 2.12-2.13.

[83] POM, para. 176.

[84] WOG, para. 2.11.

applicant. The Gambia has provided no substantive response to that contention. This may be the first case in which this issue has arisen, but depending on what the Court decides, it may be far from the last. This case will set an important precedent.

61. I thank the Court for your careful attention. Madam President, may I now please ask you to call on Professor Talmon to address the second preliminary objection.

The PRESIDENT: I thank Mr. Staker and I now invite Mr. Stefan Talmon to take the floor. You have the floor, Sir.

Mr. TALMON:

SECOND PRELIMINARY OBJECTION

1. Madam President, Mr. Vice-President, distinguished Members of the Court, it is an honour to appear before you.

2. My task today is to present Myanmar's second preliminary objection.

3. Let me start by saying that this case is unlike any other case ever brought before this Court under the Genocide Convention: The Gambia alleges genocide committed outside its own territory against persons who are not its nationals. There is no link whatsoever between The Gambia and the facts of this case.

4. This raises questions of The Gambia's standing in this case.

The requirement of standing in international legal proceedings

5. Under customary international law, a fundamental condition for the admissibility of claims is that the State espousing a claim must have standing to do so. Standing refers to the right to present a claim to the Court. It requires the showing of individual prejudice or an individual legal interest in the subject-matter of the claim. Such individual interest must be distinguished from a mere general interest that could be invoked by any State.

6. International law does not know of an "*actio popularis*" giving each and every State standing to challenge any alleged internationally wrongful act before a court[85]. The Gambia accepts that.

7. There is no question that an injured State, as the State adversely affected by an internationally wrongful act, has standing to present a claim to the Court. The Gambia, however, is not an injured State nor does it claim to be.

8. As a non-injured State, The Gambia must therefore establish its standing before the Court by demonstrating an individual legal interest in the subject-matter of its claims. This, The Gambia has failed to do.

9. The subject-matter of a claim is determined by the submissions. In essence, The Gambia requests the Court to declare that Myanmar is responsible for violations of the Genocide Convention because it allegedly committed acts of genocide against members of the affected community in Myanmar's northern Rakhine State.

10. A non-injured State can have standing only if, upon a proper construction of the Genocide Convention, it can be concluded:

— First, that a non-injured State is intended to have individually a legal interest in the observance by every other Contracting Party of the obligations under the Convention, even where a breach of these obligations does not affect its material interests, either directly or through its nationals; and

— Second, that, in view of the said legal interest, it is entitled not only to call upon the competent organs of the United Nations under Article VIII of the Convention, but also to institute with regard thereto contentious judicial proceedings before this Court.

11. Humanitarian considerations cannot in themselves generate a legal interest. As the Court once noted, "[i] is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form"[86].

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[85] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 47, para. 88.

[86] *Ibid.*, p. 34, para. 49.

12. The question which the Court must thus decide is whether the Genocide Convention vests a legal, and not just political or humanitarian, interest in the observance of the Convention in The Gambia individually, and in its own right, entitling it to request the Court to declare that Myanmar is responsible for violations of the Convention by allegedly committing genocidal acts against members of the affected community in Myanmar's northern Rakhine State.

13. If The Gambia does not possess such a legal interest, it does not have standing to seek the requested declarations, even if the various allegations were assumed to be meritorious.

No individual legal interest on the part of The Gambia

14. Madam President, Members of the Court, Myanmar submits that the Genocide Convention does not vest an individual legal right or legal interest in the Contracting Parties with regard to alleged acts of genocide committed against non-nationals outside their own territory. There is no indication in the Convention that the Court was ever intended to act as a general judicial supervisory authority at the instance of every Contracting Party.

Common and individual legal interest distinguished

15. Let me observe at the outset that the Court has never found that each contracting State has an individual "legal interest" in the observance by every other contracting State of the obligations under the Genocide Convention in all circumstances. In its Advisory Opinion on *Reservations to the Genocide Convention*, the Court stated: "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a *common interest*, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention."[87]

16. And in its Provisional Measures Order in the present case, the Court held that "all . . . 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"[88].

17. A "common interest" in the accomplishment of the high purposes of the Convention is not the same as an individual legal interest intended to be enforceable before this Court. In fact, in its

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[87] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23; emphasis added.

[88] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 17, para. 41; emphasis added.

Advisory Opinion, the Court expressly distinguished between the "common interest" of all contracting States and the "legal interest of a signatory State in objecting to a reservation" to the Genocide Convention[89].

18. The limited meaning of the term "common interest" in the prevention and punishment of genocide is also shown by Articles VI and VII of the Convention. These do not confer any entitlement on the Contracting Parties to try alleged perpetrators of genocide for acts committed outside their territory, or to request their extradition in respect of such acts.

19. In the *Bosnian Genocide* case, the Court expressly observed that claims in respect of alleged genocide committed outside the applicant's territory against non-nationals "could raise questions about the legal interest or standing of the Applicant"[90]. This shows that the question of "legal interest" or standing has by no means been settled by the finding of a "common interest".

20. Common interest may imply, as the Court found in its Provisional Measures Order, that "the obligations in question are owed by any State party to all the other States parties to the Convention", but this says nothing about whether each and every State party has an individual legal interest that can be pursued in judicial proceedings.

21. For example, under Article V of the Genocide Convention all parties are obligated to enact the necessary legislation to give effect to the provisions of the Convention and, in particular, provide effective penalties for persons guilty of genocide.

22. Madam President, Members of the Court, can it really be said, for example, that Liechtenstein has an individual legal interest entitling it to bring a case before this Court alleging that, say, Tonga violates the Genocide Convention because it considers the penalties for genocide prescribed by Tonga to be ineffective — the answer must surely be "No"!

23. Let us assume that each Contracting Party of the Genocide Convention had in fact such a judicially enforceable legal interest. This would mean that each of the 136 Contracting Parties that have not made a reservation to the Court's jurisdiction could at any time bring a case before the Court against any one of the other 135 such Contracting Parties, alleging that the latter violated their

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[89] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 29.

[90] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 120, para. 185.

obligations under the Convention. As Myanmar has shown in its written pleadings, due to the inapplicability of *res judicata,* the other 134 Contracting Parties would not be bound by any ruling of the Court in such a case, so that these other Contracting Parties could successively litigate the same claims against the same respondent over and over again[91].

24. In the 71 years since the Genocide Convention entered into force, no State has ever tried to bring a claim before the Court concerning a violation of the Convention that did not affect its own interests as a State or those of its nationals — and there were many such alleged genocides throughout the world. This fact may not be conclusive in itself but it is indicative that parties do not generally consider themselves to have standing to request the Court to declare that another contracting State is responsible for violations of the Convention in the absence of any individual prejudice to themselves.

No individual legal interest can be derived from the jurisdictional clause in Article IX

25. Madam President, Members of the Court, The Gambia argues that Article IX of the Genocide Convention supports its view that it has standing to seise the Court in the present case, despite the fact that it is not specifically or directly injured[92]. Article IX, however, deals with jurisdiction, not with admissibility. In particular, it does not deal with the question of standing. It is Myanmar's argument that standing requires an individual legal interest to present the claims to the Court.

26. No such individual legal interest can be derived from the jurisdictional clause in Article IX. As the Court has noted, "jurisdictional clauses are adjectival not substantive in their nature and effect"[93]. The capacity to invoke a jurisdictional clause does not settle the question of whether a State also has standing. As the Court itself has pointed out, even the wide language found in optional clause declarations under Article 36, paragraph 2, of the Court's Statute — encompassing "all disputes" — does not absolve the State invoking these clauses from establishing an individual legal interest in the subject-matter of the claim[94].

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[91] POM, pp. 99-100, 105-106.

[92] MG, Vol. I, p. 40, para. 2.23, and p. 42, para. 2.26; WOG, p. 27, paras. 3.17-3.18.

[93] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 39, para. 64.

[94] *Ibid.*, p. 42, para. 73.

27. In its Written Observations, The Gambia attempted at great length to demonstrate that under Article IX the Court has jurisdiction; what it has not done is to prove that it has an individual legal interest, that it has standing.

No individual legal interest follows from the* erga omnes partes *character of the obligations under the Genocide Convention

28. Madam President, Members of the Court, The Gambia also argues that it has standing to seise the Court because the obligations under the Genocide Convention are obligations *erga omnes partes*, which entitle any contracting State party to invoke the responsibility of another party and seek reparation without having to prove a special interest[95].

29. However, the fact that a treaty establishes obligations *erga omnes partes* does not automatically grant every contracting party standing before the Court. An obligation's substantive character is distinct from the procedural requirements of jurisdiction and admissibility.

30. The Court itself has observed that "'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things' . . . and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute"[96]. It is submitted that the same reasoning applies to the relationship between obligations *erga omnes partes* and standing.

31. The *erga omnes partes* character of an obligation as such cannot form the basis for the admissibility of a claim. As pointed out by Judge Xue in *Belgium* v. *Senegal*, "there is no general standing resident with each and every State to bring a case in the Court for the vindication of a communal interest"[97].

32. Even more pertinent to the present proceedings is the *Barcelona Traction* case where the Court held that obligations *erga omnes* derive, *inter alia*, from the outlawing of acts of genocide and from the principles and rules concerning the basic rights of the human person[98]. However, this

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[95] MG, Vol. I, p. 40, para. 2.23, and p. 42, para. 2.26; WOG, pp. 23-27.

[96] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64.

[97] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, dissenting opinion of Judge Xue, p. 575, para. 15.

[98] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 34.

characterization of the obligations did not settle the question of the admissibility of claims. The Court observed that even instruments which embody human rights do not confer on contracting States the capacity to protect the victims of infringements, "irrespective of their nationality"[99]. In this connection, it may be recalled that Judge Shahabuddeen observed that it was not unreasonable to describe the Genocide Convention as "the first human rights instrument adopted by the United Nations"[100].

33. And let me add what Judge Ammoun said in the *Barcelona Traction* case: "a State which acts *proprio motu* for the defence of . . . a collective interest[] must nevertheless prove the existence of a lawful interest which is legally protected"[101].

34. In the more recent *Bosnian Genocide* case, the applicant sought, *inter alia*, a declaration of violations of the Genocide Convention with regard to alleged genocide committed outside its territory against non-nationals. The Court observed:

> "Insofar as that request might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the *jus cogens* character of the relevant norms, and the *erga omnes* character of the relevant obligations."[102]

35. The Court did not need to address these questions in that case, but the quoted passage clearly shows that the *erga omnes partes* character of the obligations under the Genocide Convention does not automatically establish standing.

Invocation of responsibility and admissibility of claims distinguished

36. Madam President, Members of the Court, The Gambia bases its standing also on the argument that, as a party to the Genocide Convention, it is entitled to invoke the responsibility of

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[99] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 47, para. 91.

[100] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, separate opinion of Judge Shahabuddeen, p. 637.

[101] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, separate opinion of Judge Ammoun, p. 326.

[102] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (II)*, p. 120, para. 185.

another State for a breach of obligations *erga omnes partes* without having to prove a special interest[103]. This argument calls for two observations.

37. First, the invocation of responsibility belongs to the law on State responsibility. According to the International Law Commission (the "ILC"), invocation should be understood as taking measures of a relatively formal character: for example, the commencement of proceedings before an international court or tribunal[104].

38. The ILC, however, noted in its commentary on the Articles on State Responsibility that the "present articles are not concerned . . . with the conditions for the *admissibility* of cases brought before [international] courts or tribunals. Rather, they define the conditions for . . . the invocation of that responsibility by another State or States"[105].

39. Thus, no conclusions from the law of State responsibility can be drawn for the admissibility of claims and the question of standing. In particular, a right to invoke responsibility does not automatically mean that a State has an individual legal interest entitling it to bring a claim before an international court or tribunal.

40. Second, the invocation of responsibility may very well require proof of a special legal interest, particularly where the alleged violation of international law is committed against individuals as in the present case.

41. The Genocide Convention belongs to the group of treaties concerning the protection of human rights[106] where — in the words of the ILC — "the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights"[107].

42. In this context, subparagraph *(a)* of Article 44 of the Articles on State Responsibility is of particular relevance. The provision, which reflects customary international law[108], states: "The

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[103] MG, Vol. I, p. 40, para. 2.23, and p. 42, para. 2.26; WOG, p. 40, para. 3.45.

[104] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, commentary on Article 42, *ILC Yearbook (YILC) 2001*, Vol. II, Part Two, p. 117, para. 2; MG, Vol. II, Ann. 15.

[105] *Ibid.*, commentary on Article 44, pp. 120-121, para. 1; emphasis added.

[106] Genocide Convention; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, declaration of Judge Oda, p. 626, para. 4, and separate opinion of Judge Weeramantry, pp. 645-646 and 650.

[107] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, commentary on Article 33, *YILC 2001*, Vol. II, Part Two, p. 95, para. 3.

[108] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12.

responsibility of a State may not be invoked if: *(a)* the claim is not brought in accordance with any applicable rule relating to the nationality of claims".

43. According to the nationality of claims rule, a State may protect individuals or groups of individuals, when injured by acts contrary to international law committed by another State, only if they are its nationals. States are not entitled to protect non-nationals. It is the bond of nationality that establishes the special legal interest on the part of the State of nationality which entitles it to invoke the international responsibility of the wrongdoing State.

44. The ILC stated with regard to the nationality of claims rule:

> "[C]ertain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place.
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> . . . . . .
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> Subparagraph (a) . . . makes it clear that the nationality of claims rule is not only relevant to questions of . . . the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable."[109]

45. The nationality of claims rule applies to the invocation of responsibility by both injured and non-injured States and irrespective of whether the obligation breached is an *erga omnes partes* or an *erga omnes* obligation. This is clearly shown by Article 42, subparagraph *(b)*, and Article 48, paragraphs (1) and (3), of the Articles on State Responsibility.

46. The Gambia argues that if a State has the right "to invoke the responsibility of another State . . . then that State necessarily has standing"[110]. However — as just shown — under the law of State responsibility, The Gambia cannot invoke the responsibility of Myanmar for violations of the Genocide Convention with regard to individuals who are not its nationals.

47. If that is so, then — according to The Gambia's own logic — it also does not have standing.

Distinction of the present case from the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*

48. Madam President, Members of the Court, The Gambia invokes the responsibility of Myanmar with regard to an alleged genocide committed outside its own territory against

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[109] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, commentary on Article 33, *YILC 2001*, Vol. II, Part Two, p. 121, paras. 1 and 2; POM, Vol. III, Ann. 69, p. 562.

[110] WOG, p. 24, para. 3.10.

non-nationals. These facts distinguish the present case from all other cases referred to by The Gambia.

49. In particular, the *Obligation to Prosecute or Extradite* case between Belgium and Senegal, on which The Gambia so heavily relies, did not address the question of nationality of claims. Belgium did not claim that Senegal had violated the Convention against Torture by subjecting individuals to acts of torture. Belgium rather claimed that Senegal had violated its obligations owed to Belgium to conduct a preliminary enquiry and to submit the case of an alleged offender present in its territory to its competent authorities for prosecution. In that context, the Court found that Belgium could invoke Senegal's responsibility for alleged breaches of these obligations because they constituted "'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case"[111]. Each State party to the Convention, including Belgium, could thus invoke the responsibility as an injured State, individually, without having to prove that it had been specifically affected by the breach of the obligation[112].

50. Based on *Belgium* v. *Senegal*, the Court concluded in its provisional measures Order that "any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end"[113].

51. Now, this statement calls for several observations. First, it was included in the provisional measures Order without the Court having had the benefit of legal argument by the Parties; or, in other words, it has not been subjected to the *principe de contradictoire*. It is submitted that in view of its far-reaching consequences for the invocation of the responsibility for breaches of obligations *erga omnes partes* in other treaties, the statement requires a careful rethink in light of Myanmar's arguments.

52. Second, the statement only refers to the invocation of responsibility, it does not deal with the conditions of standing before international courts and tribunals. Any reading of this statement,

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[111] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 449, para. 68.

[112] *Ibid.*, pp. 449-450.

[113] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 17, para. 41.

equating invocation of responsibility with standing, would be difficult to reconcile with the Court's long-standing jurisprudence on *actio popularis*, or better, its non-existence in international law[114]. In this context, Judge de Castro's statement on the Court's characterization of human rights as obligations *erga omnes* in the *Barcelona Traction* case may be recalled:

> "It seems to me that the *obiter* reasoning expressed therein should not be regarded as amounting to recognition of the *actio popularis* in international law; it should be interpreted more in conformity with the general practice accepted as law. I am unable to believe that by virtue of this dictum the Court would regard as admissible, for example, a claim by State A against State B that B was not applying 'principles and rules concerning the basic rights of the human person' with regard to the subjects of State B or even State C."[115]

Indeed, the Court expressly found that such a claim was inadmissible when it stated in the often-overlooked paragraph 91 of its *Barcelona Traction* Judgment that "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality"[116]. If universal human rights instruments do not allow the Contracting Parties to protect non-nationals, the same must be true for the Genocide Convention.

53. Third, there is no indication that the invocation of responsibility for violations of obligations *erga omnes partes* is exempt from the general conditions set out in Articles 43 to 45 of the Articles on State Responsibility and, in particular, the nationality of claims requirement. On the contrary, Article 44, subparagraph *(a)*, states in rather absolute terms that the "responsibility of a State may not be invoked if the claim is not brought in accordance with any applicable rule relating to the nationality of claims". That there was no need for the Court to deal with the nationality of claims rule in *Belgium* v. *Senegal* does not mean that it is not applicable in the present case.

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[114] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 47, para. 88; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, separate opinion of Judge Gros, p. 288; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, dissenting opinion of Judge Kreca, p. 636, para. 197; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, dissenting opinion of Judge Xue, p. 575, para. 15.

[115] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, dissenting opinion of Judge de Castro, p. 387, Sect. III, para. 2.

[116] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 47 para. 91.

Concluding observations

54. Madam President, Members of the Court, let me conclude with some general observations.

55. The Gambia may well seek to argue that the requirement of standing in international legal proceedings is undesirable in light of the Genocide Convention's high humanitarian objectives, and The Gambia might even try to frighten you again by stating that a denial of standing would cause a scandal and cast the Court into a wilderness for decades[117]. However, as the Court itself pointed out,

> "[i]f, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order to avert those consequences. This would be to engage in an essentially legislative task, in the service of political ends the promotion of which, however desirable in itself, lies outside the function of a court-of-law."[118]

56. In international law, the existence of obligations that cannot in the last resort be enforced by any legal process has always been the rule rather than the exception, and this was even more the case in 1948 than it is today.

57. The acceptance of The Gambia's claim to standing would have repercussions far beyond the present case and the Genocide Convention. Besides the obligation to prevent and punish genocide, the Court has identified, for example, the protection from racial discrimination, the right to self-determination and the prohibition of acts of aggression as *erga omnes* obligations. If this characterization automatically established standing, each State or each party to a relevant convention could, jurisdiction permitting, bring a case before the Court claiming a violation of these obligations irrespective of having suffered any material prejudice, either directly or through its nationals. This could lead to a potentially unmanageable proliferation of disputes.

58. Such a result would also raise questions of legitimacy with regard to the content of international responsibility. In its submissions, for example, The Gambia requests the Court to declare that Myanmar must perform the obligation of reparation in the interest of the victims of the alleged genocidal acts[119]. It also states: "That, failing agreement between the Parties on the amount

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[117] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, CR 2019/20, p. 30, para. 3.

[118] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 36, para. 57.

[119] MG, Vol. I, p. 507, Submissions, subparagraph (2) (B).

of compensation and any additional forms of reparation . . . the question will be decided by the Court in a subsequent phase of the proceedings."[120]

59. One may ask what mandate The Gambia has to negotiate the amount of compensation on behalf of the alleged victims, who are not its nationals. And, one may also ask what would prevent other States parties to the Genocide Convention with equal standing from instituting their own proceedings before the Court if they were dissatisfied with the amount of compensation claimed or negotiated by The Gambia.

60. Equating the concept of obligations *erga omnes partes* with standing would mean introducing the concept of *actio popularis* to international law through the back door. Such a far-reaching step cannot be based on The Gambia's flawed deduction from abstract legal principles but must be based on the consent of States and must find expression in the Genocide Convention itself.

61. For these reasons, Myanmar submits that The Gambia lacks standing in the present case, and that, accordingly, its application should be dismissed as inadmissible.

62. I thank the Court for its kind attention.

63. Madam President, it may now be a convenient time for a short break. Otherwise, may I ask you to call on Professor Kolb to present Myanmar's third preliminary objection. Thank you.

The PRESIDENT: I thank Professor Talmon. And indeed, before I give the floor to the next speaker, the Court will observe a coffee break of 10 minutes. The sitting is adjourned.

The Court adjourned from 3.10 p.m. to 3.30 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now give the floor to Mr. Robert Kolb. Please go ahead.

[120] MG, Vol. I, p. 510, Submissions, subparagraph (4).

M. KOLB :

TROISIÈME EXCEPTION PRÉLIMINAIRE

1. Madame la présidente, Mesdames et Messieurs de la Cour, j'ai la tâche de vous présenter les arguments du Gouvernement du Myanmar sur sa troisième exception préliminaire. Elle concerne la réserve que cet Etat a greffée sur l'article VIII de la convention contre le génocide. Ce texte forme le périmètre de compétence matérielle dans la présente espèce.

2. Avant d'entamer l'analyse juridique, il me paraît conseillable de dire un mot de pondération et de prudence. Nous sommes appelés ces jours à traiter d'aspects techniques. Ils sont relatifs à des exceptions préliminaires. Il faut s'y engager de manière dépassionnée.

3. La troisième exception relative à la réserve est alternative à la deuxième exception concernant la qualité pour agir. Si la Cour devait retenir la deuxième exception, elle n'aura pas besoin de considérer la présente. L'inverse est aussi vrai. Si la Cour devait admettre la présente exception, elle ne sera pas tenue de connaître de la deuxième.

4. Regardons un bref instant vers l'article VIII de la convention contre le génocide et vers la réserve ici en cause.

5. L'article VIII de la convention porte que :

> «Toute Partie contractante peut saisir les organes compétents de l'Organisation des Nations Unies afin que ceux-ci prennent, conformément à la Charte des Nations Unies, les mesures qu'ils jugent appropriées pour la prévention et la répression des actes de génocide ou de l'un quelconque des autres actes énumérés à l'article III.»

6. Dans l'original anglais, la réserve à l'article VIII se lit comme suit : «With reference to article VIII, the Union of Burma makes the reservation that the said article shall not apply to the Union.»

Portée de l'article VIII

Organes des Nations Unies

7. La première question qu'il faut agiter est de savoir si l'article VIII s'étend à tous les organes des Nations Unies. Cela veut dire : y inclus à la Cour. Cette dernière est qualifiée par l'article 7, paragraphe 1, de la Charte comme «organe[] principa[l]» de l'Organisation. L'article 92 de la Charte la désigne comme «organe judiciaire principal».

8. Ces dispositions mettent hors de doute que l'article VIII doit s'entendre comme incluant la Cour. Les textes sont clairs. Ils ne présentent aucune ambiguïté, anomalie ou anfractuosité. Ils ne suggèrent aucune restriction, aucune entrave, aucune atténuation. Jugez vous-même : «organes compétents de l'Organisation des Nations Unies». Où verrait-on ici l'ombre d'une limitation ?

9. Les travaux préparatoires confirment cette interprétation inclusive[121]. Malgré certaines propositions de restreindre l'article VIII aux seuls Conseil de sécurité et Assemblée générale, donc à des organes politiques, le texte final mentionne indistinctement les organes des Nations Unies. Le choix est clair et indiscutable.

10. L'ordonnance en mesures conservatoires dans l'affaire du *Génocide* en 1993 laisse toutefois notre question ouverte. Elle affirme : «la Cour estime que l'article VIII, à supposer même qu'il soit applicable à la Cour en tant qu'un des «organes compétents des Nations Unies»»[122]. Pourquoi ? Je vois deux raisons. Première raison : la Cour n'a pas à prendre position, sans nécessité, sur une question de droit arrivant pour la première fois devant elle, au stade pré-préliminaire des mesures conservatoires, et dépourvue du bénéfice du contradictoire. Deuxième raison : la seule question en jeu dans cette ordonnance était de savoir si l'article VIII conférait des pouvoirs supplémentaires à la Cour par rapport à son Statut. La Cour le réfute. Nul besoin d'en faire plus. En somme, ce précédent n'infirme pas l'interprétation assurée par le texte clair de l'article VIII.

11. Qu'en est-il d'autres références de votre jurisprudence ? Nos contradicteurs se font fort de deux passages[123].

12. D'abord : dans l'ordonnance au conservatoire de la présente affaire, vous avez affirmé que «l'article VIII et l'article IX peuvent … être regardés comme ayant des champs d'application distincts. Seul l'article IX de la convention est pertinent en ce qui concerne la question de la saisine de la Cour en la présente espèce.»[124] Cette affirmation n'a que la valeur d'une première

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[121] Voir les exceptions préliminaires de la République du Myanmar (EPM), par. 402 et suiv.

[122] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993*, p. 23, par. 47.

[123] Observations écrites de la Gambie sur les exceptions préliminaires du Myanmar (OEG), par. 4.9.

[124] *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar), mesures conservatoires, ordonnance du 23 janvier 2020, C.I.J. Recueil 2020*, p. 15, par. 35.

approximation dans une ordonnance[125]. Le problème de la relation entre les articles VIII et IX n'y a pas été vidé. Il mérite une étude plus approfondie. J'y reviendrai.

13. Ensuite : dans l'affaire du *Génocide* de 2007, vous avez dit que l'article VIII concerne la prévention et la répression du génocide au niveau politique et ne touche pas à la responsabilité juridique[126]. C'est compréhensible. En l'espèce, la Cour était saisie au «juridique» en vertu de l'article IX. Il n'y avait pas de réserve applicable. Dès lors, l'article VIII ne pouvait rien ajouter à la procédure judiciaire. Sa portée se réduisait aux procédures politiques que pouvaient offrir les autres organes des Nations Unies.

14. Nos contradicteurs indiquent[127] que les mots de l'article VIII «afin que ceux-ci … prennent les mesures qu'ils jugent appropriées» militent contre une inclusion de la Cour dans les organes visés par cette disposition. Ces mots renverraient à une discrétion dans l'action. La Cour ne l'aurait pas. Ainsi, votre juridiction ne saurait être incluse dans l'article VIII.

15. Peut-être. Mais rien ne force à une telle interprétation. Le texte clair de la disposition renvoie sans aucune restriction «aux organes des Nations Unies». La Cour en est. Ce n'est pas à vous d'insérer des limitations, absentes dans le texte. Ce serait réviser et non interpréter. Face à cette inclusivité sans faille et sans fissure, les mots signalés plus haut doivent être compris comme se référant spécifiquement aux nombreux organes politiques qu'il est possible de saisir. Au contraire, ces mots n'ont normalement pas vocation à s'étendre à la Cour.

16. Précisément parce que l'article VIII vise à la fois les organes politiques et l'organe judiciaire, la formulation plus large et dès lors plus englobante peut se justifier. Elle permet de couvrir les deux procédures. Elle évite de rallonger une phrase déjà imposante par des insertions lexicales supplémentaires.

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[125] Comme le montre le paragraphe 36 de l'ordonnance : «Dès lors, la réserve que l défendeur a formulée à l'article VIII de la convention sur le génocide ne paraît pas priver la Gambie de la possibilité de saisir la Cour d'un différend l'opposant au Myanmar sur la base de l'article IX de la convention.» *Ibid.*, p. 16, par 36.

[126] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 109, par. 159 :

> «La dernière disposition spécifique, à savoir l'article VIII, qui concerne l'intervention des organes compétents de l'Organisation des Nations Unies, peut être vue comme parachevant le système en appelant tant à la prévention qu'à la répression du crime de génocide, cette fois au niveau politique et non plus sous l'angle de la responsabilité juridique.»

[127] OEG, par. 4.10 et 4.11.

17. Par ailleurs, les mots «les mesures qu'ils jugent appropriées» peuvent sans difficultés s'appliquer à la Cour. Vous êtes habilités à prendre des mesures conservatoires *proprio motu*. Celles-ci sont dépendantes de votre appréciation. On peut dire que vous exercez à leur endroit une forme de discrétion.

18. On me rétorquera : pourquoi alors l'article VIII ne précise-t-il pas ce que pourra faire la Cour en cas de saisine, comme il l'établit pour les organes politiques ? Réponse : parce qu'il n'est pas nécessaire de prendre position sur ce point. La compétence de la Cour est régie par l'article IX. Nul besoin d'en dire plus dans l'article VIII. C'est une question de bonne économie du texte.

19. Nos contradicteurs font valoir dans le même filon d'argumentation[128] que le texte anglais de l'article VIII contient le terme «call upon». Il ne siérait guère à l'action de la Cour. On ne «call» pas «upon» la Cour.

20. Je donne la même réponse à cet argument qu'au précédent. Mais j'ajoute que le texte français de l'article VIII, qui fait également foi, utilise le mot «saisir». Qu'est-ce que cela démontre ? Ceci : aucun argument décisif ne peut être tiré des termes anglais mentionnés.

21. Nos contradicteurs enchérissent[129] que les vocables «organes compétents de l'Organisation des Nations Unies» ont été utilisés dans une série d'autres traités en se référant uniquement aux organes politiques.

22. Je n'en doute pas. Mais regardez les exemples qu'ils donnent. Le contexte de ces dispositions montre le plus souvent très clairement que *seuls* les organes politiques sont visés. Un exemple : la Commission des droits de l'homme a le pouvoir de demander des informations aux organes des Nations Unies s'occupant de l'administration des territoires sous tutelle ou de territoires non autonomes. Peut-on sérieusement faire un parallèle avec l'article VIII de la convention contre le génocide ? Je ne le crois pas. Son texte est sciemment inclusif ; il n'est pas exclusif. C'est une différence capitale.

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[128] OEG, par. 4.17 et 4.18.

[129] OEG, par. 4.12-4.16.

Relations entre les articles VIII et IX

23. Quelle est la relation entre les articles VIII et IX de la convention ? La saisine de la Cour est-elle gouvernée seulement par l'article IX ou l'article VIII a-t-il un rôle à jouer en la matière ? L'article VIII peut-il influer sur l'article IX ? C'est la question clé. Elle décide du sort de la troisième exception préliminaire.

24. Le Myanmar estime que l'article VIII et l'article IX ont des liens de gémellité ; que l'un et l'autre sont pertinents pour la Cour ; et que le premier concerne la saisine alors que le second touche à la compétence matérielle.

25. Il est connu que saisine et compétence sont deux notions distinctes[130]. La première est une condition procédurale. Sans elle, il n'y a pas d'instance. La deuxième est une condition pour que la Cour puisse se prononcer sur le fond d'un litige. Sans elle, l'instance ne peut pas avancer. Dans le cas d'absence de saisine, l'instance n'existe pas. Dans le cas d'absence de compétence, l'instance se trouve entravée.

26. Pourquoi l'article VIII concernerait-il la saisine ? D'abord parce que son texte le suggère. Il affirme que toute partie contractante peut «*saisir* les organes compétents» des Nations Unies. Il est vrai que contrairement au texte français, le texte anglais n'utilise pas ce terme[131]. Celui-ci est toutefois employé dans d'autres versions officielles. C'est le cas de l'espagnol. On ne saurait donc dire que l'expression «saisir» a été utilisée par hasard, par inadvertance, par irréflexion.

27. Ensuite, parce que l'économie du texte le suppose. Si cette disposition ne concernait pas la saisine, elle deviendrait superflue. Etait-il nécessaire de souligner que des organes des Nations Unies peuvent traiter de questions impliquant des génocides ? A cette fin, les dispositions contenues dans la Charte suffisaient. Vous conviendrez que la valeur ajoutée ne va dans ce cas pas au-delà d'un banal rappel. Au contraire, si la disposition concerne la saisine, on ne saurait dire qu'elle est redondante. Elle pourra alors former une *lex specialis* sur le sujet, pour ce qui est de la convention de 1948.

28. Pourquoi ne pas mentionner explicitement les conditions de saisine dans l'article VIII ? Réponse : parce que ces conditions sont différentes pour chaque organe des Nations Unies. Dès lors,

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[130] Voir les articles 34 et 35 du Statut d'un côté, et l'article 36 du même texte de l'autre.

[131] Il utilise plutôt le terme «call upon». La version russe utilise les termes «s'adresser à».

il eût été peu sage de les spécifier. C'était d'autant plus vrai que ces conditions pouvaient être amenées à évoluer dans les textes extérieurs à la convention de 1948.

29. Pourrait-on hasarder que la saisine n'est réglée ni par l'article VIII ni par l'article IX de la convention ? Qu'elle reste sous l'empire du seul Statut de la Cour et des règles générales du droit international public ? Une réserve à l'article VIII de la convention ne saurait alors barrer la saisine de la Cour. Car elle ne porterait que sur l'article VIII et non sur ces autres dispositions relatives à la saisine.

30. Une telle interprétation se heurte aux mêmes considérations d'effet utile que je viens d'esquisser. Si la Cour pouvait être saisie en vertu de ces règles situées en dehors de l'article VIII, quel serait l'effet de la réserve à cette disposition ? L'effet serait chimérique ; il serait inexistant ; il serait nul. On prend grand soin d'une voix de dire que la saisine doit être exclue, pour admettre d'une autre voix que cette saisine demeure possible. En plus que de priver la réserve de son effet utile, cette interprétation aboutit à postuler une contradiction. Pour ces raisons, il sied de la rejeter.

31. L'article IX, quant à lui, constitue une clause compromissoire de compétence. La fonction de telles clauses est de conférer la compétence sur des questions d'interprétation ou d'application de la convention dans laquelle elles sont insérées.

32. D'ordinaire, il serait absurde d'estimer que la clause compromissoire assure la compétence de la Cour mais n'en permet pas la saisine. L'utilité de telles clauses serait réduite à néant. Ainsi, ces clauses incluent normalement la faculté de saisir la Cour. Cela dispose-t-il de notre question ? Je ne le crois pas.

33. Ces autres conventions n'ont pas de dispositions équivalentes à l'article VIII. Dans ces conditions, il est naturel de rattacher à la clause compromissoire à la fois le droit de la saisine et le droit de la compétence. Mais quand une disposition spéciale sur la saisine est insérée dans le texte, il est indispensable de l'appliquer. Agir autrement serait trahir la volonté des parties et l'économie du texte. Par la présence de l'article VIII, l'article IX se trouve limité à sa fonction principale de conférer la compétence. Il est expurgé de son élément implicite de régir la saisine.

34. Pour ces raisons, l'article IX n'épuise pas l'espace dévolu aux procédures de la Cour. Il le partage avec l'article VIII. L'article IX se rapporte à la compétence, l'article VIII à la saisine.

Etats lésés et non lésés

35. Selon le Myanmar, une autre distinction est primordiale. L'article IX limitait originairement la compétence de la Cour aux différends entre Etats lésés au sens des Articles de la Commission du droit international sur la responsabilité des Etats. Au contraire, cette disposition ne consacrait pas la compétence de la Cour dans le cadre de différends avec un Etat non lésé au sens de ces mêmes articles. C'est le cas d'Etats agissant sur une base *erga omnes partes* sans avoir subi une violation de leurs propres droits et intérêts.

36. Le Myanmar en veut pour preuve la formulation de la clause compromissoire. Contrairement à l'article 24 de la convention européenne des droits de l'homme[132], adoptée à la même époque, le texte de l'article IX n'affirme pas que la Cour est compétente pour «tout» différend entre «toutes» les parties contractantes. La différence n'est pas due au hasard. A bien y regarder, la formulation dans la convention de 1948 s'inscrit dans la toile de fond du droit général de l'époque.

37. On m'objectera que l'interprétation actuelle de l'article IX est fixée. Que, de nos jours, on l'entend comme ayant étendu la compétence de la Cour à des différends *erga omnes partes*. La Cour a affirmé dans l'affaire *Belgique c. Sénégal* de 2012[133] que la convention contre la torture de 1984 et la convention contre le génocide de 1948 sont similaires. Et elle a reconnu la faculté de la Belgique de porter une affaire devant elle dans le contexte de la convention de 1984. Cela dispose-t-il de notre question ? Pas nécessairement.

38. Selon le Myanmar, la saisine dans le cadre de la convention de 1948 est régie par la *lex specialis* de l'article VIII. A quoi cela revient-il ? Dans notre espèce, il existe une réserve applicable. Son effet est d'exclure la faculté de la Gambie de saisir valablement la Cour. Que la Cour soit compétente ou qu'elle ne le soit pas sur la base de l'article IX dans son épure contemporaine, elle ne peut pas être valablement saisie à cause de la réserve à l'article VIII.

39. Le Myanmar ne fait pas valoir que sa réserve exclut toute saisine de la Cour en vertu de l'article VIII. Il estime au contraire que le texte de sa réserve porte sur des immixtions d'Etats «tiers». Interprété à la lumière de la volonté de l'Etat réservataire et du but poursuivi, il n'exclut que les

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[132] En 1950, cette disposition portait sur la compétence de la Commission européenne des droits de l'homme (CEDH). Désormais, il faut se référer à l'article 33 de la CEDH.

[133] *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012 (II)*, p. 449-450, par. 68-69.

requêtes portées devant la Cour par des Etats non lésés au sens du vocabulaire de la Commission du droit international. C'est dire que cette réserve à l'article VIII n'a pas pour effet de stériliser tout effet de l'article IX. Un Etat lésé peut saisir la Cour ; et la Cour sera compétente.

40. Les réserves sont des actes unilatéraux. Dans leur interprétation, la volonté de l'Etat réservataire doit avoir un rôle plus important que pour les actes bilatéraux ou multilatéraux. Plus même : elle doit avoir un rôle prépondérant, voire décisif.

41. Votre Cour l'a reconnu dans l'affaire de la *Compétence en matière de pêcheries (Espagne c. Canada)* en 1998. Elle affirme qu'il faut dûment tenir compte «de l'intention de l'Etat concerné [réservataire] à l'époque où ce dernier a accepté la juridiction obligatoire de la Cour»[134]. Et elle ajoute : «s'agissant d'une réserve à une déclaration faite en vertu du paragraphe 2 de l'article 36 du Statut, ce qui est exigé en tout premier lieu est qu'elle soit interprétée d'une manière compatible avec l'effet recherché par l'Etat qui en est l'auteur»[135].

42. Il n'y a aucune différence pertinente dans notre contexte entre une réserve faite en vertu du paragraphe 2 ou en vertu du paragraphe 1 de l'article 36 du Statut ; entre une réserve formulée dans le cadre d'une déclaration facultative ou d'une clause compromissoire.

43. Je ne dis pas que la volonté unilatérale soit immanquablement déterminante. Mais je ne vois aucune raison de ne pas lui accorder crédit dans la présente espèce. Et pourquoi donc ? Parce que le Myanmar ne cherche pas à étendre l'aire de sa réserve en réduisant par ricochet le domaine de la compétence de la Cour. Au contraire, il vise à contenir la projection de sa réserve en augmentant par réflexe le champ de compétence de la Cour. Je serais étonné qu'on ne s'en réjouisse pas et qu'on ne prenne pas le Myanmar au mot. Quelle serait l'alternative ? Donner un effet plus robuste à sa réserve ? Je peine à le croire.

44. M'objectera-t-on qu'en 1948 la distinction entre Etats lésés et Etats non lésés n'avait pas cours et que le Myanmar ne pouvait pas l'avoir à l'esprit lors de la formulation de sa réserve ? Or, la Birmanie a formulé sa réserve quelques années après l'avis consultatif de la Cour sur la convention contre le génocide en 1951. Le caractère spécial de ce texte lui était ainsi connu.

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[134] *Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998*, p. 454, par. 49.

[135] *Ibid.*, p. 455, par. 52.

La réserve

45. Vous me direz peut-être que je suis allé trop vite en besogne. Que j'ai supposé l'applicabilité de la réserve sans vous en dire les raisons. Pour que vous ne pensiez pas mal de moi, regardons de plus près.

46. Je rappelle que l'effet de la réserve applicable en l'espèce est d'*exclure* l'application de l'article VIII vis-à-vis du Myanmar. La réserve vise au concret à écarter la faculté de saisine unilatérale par des Etats parties non lésés de tout organe des Nations Unies en matière d'allégations de génocide. En d'autres mots, elle cherche à préserver le Myanmar contre des immixtions «tierces» sur ces questions.

47. Cette réserve est-elle valide ? Est-elle grevée de défauts subjectifs ou objectifs ? Est-elle débilitée par des ornières situées entre les parties ou par des carences de droit objectif ?

48. Le plan subjectif concerne les relations entre les parties à l'instance. Il touche principalement à l'existence ou à l'inexistence d'objections à une réserve. En l'espèce, nous ne devons pas déterminer si et dans quelle mesure d'autres Etats parties ont objecté à cette réserve. Une seule chose est décisive. La Gambie n'y a jamais objecté. A défaut d'objection, elle a accepté la validité et l'applicabilité de la réserve à son égard. En vertu de quoi il faut lui appliquer la réserve selon son texte et son but.

49. Tournons-nous vers le plan objectif. Une telle réserve est-elle permissible ? Se heurte-t-elle à des dispositions du droit des traités ou du droit international général ? La Cour a jugé dans l'affaire des *Activités armées* de 2006 qu'une réserve exclusive de compétence à l'article IX de la convention contre le génocide est permise[136]. J'en tire la conséquence qu'à plus forte raison il doit être possible de *limiter* l'accès à la Cour aux seuls Etats lésés en l'excluant pour les Etats non lésés. Qui peut le plus peut le moins.

50. Il en découle que cette réserve n'est pas contraire à l'objet et au but de la convention contre le génocide. Ce célèbre critère est énoncé par l'article 19 *c)*, de la convention de Vienne sur le droit des traités de 1969. Il reflète le droit international coutumier.

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[136] *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*, p. 32, par. 67.

51. Je note aussi que la convention de 1948 ne contient aucune disposition sur les réserves. Par conséquent, elle ne les interdit pas. Telle est la teneur de l'article 19 *a)*, de la convention de Vienne de 1969. Elle aussi mire le droit international coutumier.

52. La Cour a reconnu que des réserves peuvent être apportées à la convention de 1948 dans son célèbre avis consultatif de 1951 relatif aux *Réserves à la convention pour la prévention et la répression du crime de génocide*[137].

53. De ce qui précède, il faut conclure que la réserve du Myanmar est applicable. La Gambie n'y a pas objecté. Aucun obstacle de droit des traités ou de droit général ne s'oppose à son empire. Or, si la réserve est applicable, la saisine de la Cour en vertu de l'article VIII de la convention est exclue. La réserve obstrue en l'espèce la voie qu'ouvre cette disposition.

Conclusion

54. L'argument du Myanmar en vertu de sa troisième exception préliminaire est que la Cour n'a pas été validement saisie et que, de ce fait, elle n'a pas compétence. La réserve du Myanmar à l'article VIII de la convention de 1948 y fait obstacle.

55. Je souhaite clore ainsi ma présentation d'aujourd'hui. Je remercie la Cour de m'avoir prêté une attention patiente. Madame la présidente, puis-je vous prier d'avoir l'amabilité d'appeler à la barre M[e] Christopher Staker ?

The PRESIDENT: I thank Mr. Kolb; I now give the floor back to Mr. Staker.

Mr. STAKER:

FOURTH PRELIMINARY OBJECTION

Introduction

1. Madam President, Mr. Vice-President, Members of the Court, Myanmar's fourth preliminary objection is that the Court lacks jurisdiction, or that the Application is inadmissible, as there was no dispute between The Gambia and Myanmar when the Application instituting proceedings was submitted.

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[137] *Réserves à la convention pour la prévention et la répression du crime de génocide, avis consultatif, C.I.J. Recueil 1951*, p. 15 et suiv.

2. It is of course well established that the Court cannot exercise its contentious jurisdiction unless the dispute already existed between the parties before proceedings were instituted[138].

3. The Gambia accepts that this requirement applies in this case, like any other[139].

4. The Gambia has also not disputed that the burden is on the applicant to establish the existence of the prior dispute[140].

5. The issue for your decision is whether The Gambia has discharged that burden in this case. Myanmar says it has not.

6. In explaining why, I will first deal with the requirements that must be met for a prior dispute to exist. I will then address the circumstances of this case.

The legal requirements

7. Madam President, Members of the Court, I turn, then, first to the requirements.

8. At the outset, a point of agreement is noted. Both Parties accept that the existence of a prior dispute is a question of substance, not of form or procedure[141].

9. This means that no specific formalities need to be observed for a dispute to exist[142]. But this conversely also means that no specific formalities will necessarily suffice[143]. All will depend on the particular circumstances of the individual case, viewed objectively.

10. These circumstances must, however, satisfy four requirements.

11. The first is that the prior dispute must be the *same* dispute between the same *parties* as that submitted in the application instituting proceedings[144].

12. The second is that the prior dispute must be a *legal* dispute[145]. Obviously, the Court can only decide *legal* disputes[146]. If the prior dispute must be the *same* dispute as that contained in the

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[138] POM, paras. 487-490 and 495-503.

[139] POM, paras. 488 and 504-508; WOG, e.g. paras. 5.3-5.4 and 5.7.

[140] POM, paras. 492-493; WOG, paras. 5.34 and 5.39.

[141] POM, paras. 521 and 566-577; WOG, paras. 5.5 and 5.6.

[142] POM, paras. 567-568.

[143] POM, paras. 569-572.

[144] POM, paras. 538-546.

[145] POM, paras. 553-565.

[146] POM, paras. 510-514.

application, then it too must be a legal dispute. This means, for instance, that prior exchanges of a *political* nature would not suffice.

13. These first two requirements are the very essence of the prior dispute requirement. The Gambia has not expressly challenged their existence. It does, however, dispute the next two requirements.

14. The third requirement is that both parties must have been aware of the other's position[147].

15. It is self-evident that if two parties hold contradictory opinions, but neither knows of the other's views, there is no dispute between them. A dispute only arises when their views are made known to each other[148]. As Judge Owada has said, "it is the 'objective awareness' of the parties that transforms a disagreement into a legal dispute"[149]. In the *Right of Passage* case, the Court thus asked whether events had led the parties to "adopt clearly-defined legal positions *as against each other*"[150].

16. The Gambia claims that this third requirement would allow a respondent, simply by remaining silent, to prevent the applicant from knowing the respondent's position, thereby preventing a dispute from existing and precluding litigation before this Court[151].

17. That is not the effect of this requirement. If the applicant has made a legal claim that calls for a response, and any reasonable time to respond has passed, then the applicant may well be aware of the respondent's position from its silence[152]. However, one way or the other, each party must be aware of the opposing view of the other.

18. Contrary to what The Gambia seems to suggest[153], the Court has never said otherwise. In the *Marshall Islands* case, having found that the *respondent* was not aware of the *applicant's* position, the Court did not need to go on to decide whether the *applicant* had awareness of the

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[147] POM, paras. 515-523.

[148] POM, paras. 515-520.

[149] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, separate opinion of Judge Owada, p. 881, paras. 13-14; POM, para. 519.

[150] *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 34 (emphasis added); POM, para. 517.

[151] WOG, para. 5.34.

[152] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 850, para. 40; POM, para. 520, fn. 391 and accompanying text, and paras. 575-577.

[153] WOG, para. 5.32.

respondent's position. However, the Court said that a dispute might be inferred from the respondent's silence[154], thus affirming that the applicant does also have to be aware, from the respondent's silence or otherwise, of the latter's position.

19. If this third requirement did not exist, the effect would be this. The applicant could present a claim to the respondent in a Note Verbale and then institute proceedings an hour later. The prior dispute requirement would be met because just prior to the application, the respondent would have known of the applicant's claim and the applicant would not need to know the respondent's position.

20. If that was correct, the prior dispute requirement would be a pure formality. What purpose would it serve? It serves no purpose unless it allows both parties to articulate their legal positions to each other before a case is brought[155]. The judicial settlement of international disputes is an alternative to the direct and friendly settlement of disputes between the parties[156]. Obviously, friendly settlement is only possible once each party is aware of the other's position, and until they are, there can be no dispute in respect of which a friendly settlement could be reached. The Court would be burdened with many unnecessary cases if judicial proceedings could be brought before there is even a dispute capable of friendly settlement.

21. I move on, then, to the fourth requirement, which is this. The parties' prior legal positions must have been articulated with a minimum degree of particularity[157].

22. The need for this requirement is illustrated by this hypothetical example.

23. Suppose that State A said to State B, "you are in breach of international law". Suppose it is unclear from the statement or its context what conduct of State B is referred to, or what rule of international law is said to be breached. Suppose State B responds simply that it is unaware of any breach of international law on its part. Suppose State A then brings proceedings against State B before this Court, and its application now specifies the impugned conduct of State B and the norms of international law said to have been violated. Can it be said in this example that the prior dispute requirement is satisfied?

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[154] POM, para. 520.

[155] POM, para. 575.

[156] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 131, para. 150.

[157] POM, paras. 524-552.

24. The answer must be no. In this example, there was in *form* a prior allegation by State A of a breach of international law, which State B did not accept. But there was no prior dispute in *substance*. It cannot be shown that the prior statement of State A was referring to the same matter as that submitted to the Court in the application. Indeed, the prior statement of State A was so lacking in particularity that it could not be known what legal claim it was making, or whether it was even making a legal claim at all, rather than a political statement. If State B could not know what claim State A was making, then State B's response could hardly be a positive opposition to any claim[158].

25. Contrary to what The Gambia suggests, Myanmar does not contend that the applicant must "fully develop its factual and legal claims . . . before it seizes the Court"[159]. Rather, it is only a *minimum* degree of particularity that is required.

26. What is that minimum degree? Essentially, the positions of the parties have to be stated with enough particularity to make it possible to determine that the first three requirements I have referred to are satisfied. In cases where the dispute is said to be manifested by the respondent's silence to a claim made by the applicant, then of course it is the applicant's claim that has to be examined. Is it stated with sufficient particularity to establish that it is indeed a legal claim rather than, say, a political statement? And to establish that it has the same subject-matter as the application subsequently submitted to the Court? And to enable the respondent meaningfully to respond to it, so that it can be established whether a response is a positive opposition to the particular claim made[160]?

27. The required degree of particularity must also be a question of substance, not of form. This too may also vary according to the circumstances of the case.

28. Greater particularity may be required, for instance, if a party relies on its statements made in multilateral fora[161]. Thus, in the *Marshall Islands* cases, the Court found that no dispute could be

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[158] POM, paras. 528-533.

[159] WOG, para. 5.39.

[160] POM, paras. 538-552.

[161] POM, paras. 573-574.

inferred from a statement made by the applicant in a multilateral setting, given that statement's "very general content and the context in which it was made"[162].

29. Even greater care may be needed if reliance is placed, not on a party's statements in multilateral fora, but on its voting record on resolutions. The Court has noted that a State's vote on a resolution is not of itself indicative of its position on every proposition in the resolution, let alone of the existence of a legal dispute between it and a particular other State[163].

30. Myanmar's written pleadings thus give examples of General Assembly resolutions which state in general language that there have been "violations and abuses of human rights" in a particular State, and which call upon that State "to end immediately . . . all violations of international law"[164]. Resolutions such as these, as a matter of *form*, specifically allege violations of international law by a particular State. However, in *substance*, they are insufficiently precise to establish that a legal claim is being made by any given State voting in favour of the resolution against the State that is the subject of the resolution. The latter's silence in the face of such a resolution would not mean that there is a legal dispute between it and every State voting for the resolution.

31. Another context where greater particularity is needed is the case of statements by a State which itself is not specifically affected by breaches of international law referred to in its statement. A State that is not itself specially affected may well express a view that a State that is involved in the situation has breached norms of international law, including norms of an *erga omnes* or *erga omnes partes* character. But in the absence of a sufficiently clearly expressed intention, it cannot be assumed that the non-specially affected State is thereby asserting a specific legal claim of its own, much less assumed what that legal claim might be[165]. To demonstrate this point, the written pleadings give the

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[162] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, pp. 273-275, paras. 44-48; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (II)*, pp. 569-571, paras. 45-48; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, pp. 852-854, paras. 48-52.

[163] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 276, para. 53; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (II)*, p. 572, para. 53; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 855, para. 56.

[164] POM, paras. 556-559.

[165] POM, paras. 490-491.

further examples of a motion of the Canadian House of Commons and a statement of the Canadian Minister of Foreign Affairs[166]. Like the General Assembly resolutions I have referred to, these are political statements, not legal claims[167].

32. In short, this fourth requirement is inherently necessary, and is reflected in existing jurisprudence.

The circumstances of this case

33. Madam President, Members of the Court, I turn, then, to the circumstances of this case.

34. The focus in this case is on a Note Verbale sent by The Gambia to Myanmar on 11 October 2019 and Myanmar's lack of response thereto.

35. The Gambia also relies on various other prior resolutions, statements and silences preceding this Note Verbale, but these other matters are addressed comprehensively in the written pleadings[168], and I need deal with them only briefly today. None of these other matters, singly or collectively, could conceivably establish the existence of a dispute between The Gambia and Myanmar concerning alleged breaches of the Genocide Convention.

36. First, The Gambia relies on certain declarations and resolutions of the OIC[169]. None of these are statements by The Gambia, much less statements of the executive government of The Gambia. None of them clearly alleges that Myanmar bears State responsibility for a breach of the Genocide Convention[170]. Indeed, the last of these OIC documents, adopted by the OIC's supreme organ in May 2019, calls for a case to be brought before this Court on behalf of the OIC, yet contains no reference to genocide at all. While we now know that the OIC Committee envisaged, as early as February 2019, that this case would be brought under the Genocide Convention, this was not known to Myanmar at the time, and was not apparent from a reading of these OIC documents.

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[166] POM, paras. 560-564.

[167] POM, paras. 562-565.

[168] POM, paras. 578-585.

[169] POM, paras. 587-600, 625-638, 639-651 and 653-661.

[170] POM, paras. 581-582.

37. Secondly, The Gambia relies on reports of the United Nations Fact-Finding Mission, the "FFM"[171]. These FFM reports are not statements by The Gambia and there is nothing to suggest that the FFM was authorized to speak on behalf of The Gambia or was purporting to do so.

38. Thirdly, The Gambia relies on two statements made by The Gambia at the General Assembly[172], neither of which contains any reference to the Genocide Convention and neither of which is addressed to Myanmar.

39. Fourthly, The Gambia relies on silences by Myanmar in the face of an OIC resolution and the FFM reports[173]. Obviously, if the resolution and reports did not amount to legal claims by The Gambia vis-à-vis Myanmar, then Myanmar's silence was no positive opposition to any such claims.

40. Finally, The Gambia relies on three statements of Myanmar[174], none of which mentions the Genocide Convention.

41. None of these earlier matters establishes a dispute. We are thus left with the October 2019 Note Verbale, which is found in Volume IV of the Preliminary Objections, at Annex 121, page 850.

42. I ask the Court to look at this two-page document. Its brevity and vagueness are striking.

43. What facts does it refer to? None at all. It refers generally to "the findings of the UN [FFM]", but does not say what those findings are. It quotes an OIC resolution referring to "the practice of genocide against Rohingya Muslims", again without specifying any facts.

44. In the Note Verbale, The Gambia claims no knowledge of its own of the facts. It refers merely to the FFM reports, saying The Gambia is "deeply troubled" by these. It finds the FFM reports to be "well supported by the evidence and highly credible", but with no suggestion that The Gambia had access to, or could itself evaluate, the FFM's evidence.

45. It refers generally to "related resolutions" of the OIC without specifying which resolutions, apart from one that it quotes.

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[171] United Nations Human Rights Council, Independent International Fact-Finding Mission on Myanmar (IIFFMM or FFM). POM, paras. 610-620, 662-670 and 671-675.

[172] POM, paras. 621-624 and 676-679.

[173] POM, para. 652; WOG, para. 5.10, final sentence, and para. 5.15, final sentence.

[174] POM, paras. 601-609 and 680-685; WOG, para. 5.13.

46. It refers to Myanmar's "denial", without specifying the statements said to constitute such denials.

47. As to norms of international law, it refers generally to "the Genocide Convention and customary international law" or to "International Law and Human Rights covenants". It does not specify which conventions it refers to other than the Genocide Convention, or which norms of customary international law, or which provisions of the Genocide Convention.

48. Ultimately, there is not even any positive allegation of The Gambia's own that Myanmar is in breach of international law. Having referred to the FFM report and the OIC resolutions, the final paragraph of the Note Verbale simply says that The Gambia "understands" Myanmar to be in breach of international law. That final paragraph then ends with a hortatory call for Myanmar to comply with its obligations, reflecting a similar call in an OIC resolution that it quotes.

49. In short, the language of this document is similar to that in the General Assembly resolutions or the motion of the Canadian House of Commons and statement of the Canadian Foreign Minister, which I have given as examples of documents that are not legal claims.

50. Having considered the terms, I then ask the Court to consider the context in which this Note Verbale was sent.

51. At the time it was sent, eight months had elapsed since the OIC Committee proposed bringing this case[175].

52. At the time it was sent, seven and four months had elapsed respectively since the OIC Council of Foreign Ministers and Islamic Summit had resolved that this case should be brought on behalf of the OIC.

53. Three months had already elapsed since The Gambia agreed to be the applicant State.

54. Two weeks had elapsed since The Gambia had announced to the General Assembly that it would "lead concerted efforts" to bring this court case on behalf of the OIC.

55. And a week had already passed since The Gambia instructed its legal representatives in this case.

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[175] WOG, para. 5.12.

56. This was not a case where there was first a dispute between the parties, followed by a decision of one of them to submit the dispute to the Court. What happened here was the reverse. First, a decision was taken to bring this case before the Court. Only months later did The Gambia then take steps to generate the necessary dispute. At the time it was decided to bring this case, the purpose for doing so was not to settle a dispute, as there was at the time no dispute. The decision to bring this case was therefore not for the purpose for which the Court's contentious jurisdiction is made available to States, namely dispute settlement. For that reason alone, the Application must be inadmissible.

57. Three further points about the circumstances should be noted.

58. First, there were no prior bilateral dealings between the Parties against which this Note Verbale could be read and understood. The Gambia had been engaging for months with the OIC and its other Member States on preparations for this case, but not with Myanmar. For Myanmar, these were The Gambia's opening words on the matter[176].

59. Secondly, if the Note Verbale had wanted to make a specific legal claim on behalf of The Gambia against Myanmar, it could easily have done so. At the time it was sent, months had passed since the decision to bring this case and The Gambia's legal representatives had already been appointed. Shortly after the Note Verbale was sent, The Gambia submitted its Application instituting proceedings, which does identify specific acts and specific provisions of the Genocide Convention said to be breached. It seems it was a conscious choice to send so brief a Note Verbale.

60. Thirdly, the Note Verbale contains no reference to the intention to bring this court case. There may well be no general requirement for an applicant to give advance notice of such an intention to a respondent, but given that here the intention had existed for months, the failure to mention it is striking. This suggests, if anything, that the Note Verbale is not yet making a specific legal claim by The Gambia.

61. Given the wording and the circumstances of this document, should Myanmar at the time have understood it as making a specific legal claim calling for a response? It was a two-page note from a State not specially affected and not directly involved in events, and which had not previously

[176] POM, paras. 693 and 704.

engaged with Myanmar in relation to the matter. It specified no facts, and was vague and general about the legal norms said to be violated. It contained no reference to potential court proceedings or to The Gambia's role in the OIC initiative. It merely referred to what was stated in FFM reports and OIC resolutions, and called upon Myanmar in a general way to comply with its legal obligations.

62. No specific legal claim was made that Myanmar could meaningfully take a position on. This was not a document that called for a response. Indeed, the Note Verbale itself does not even *request* a response or imply that one was expected.

63. Furthermore, even if a response was called for, *quod non*, it cannot be said that a response was called for within a month. It had taken eight months from the OIC Committee proposal for The Gambia to send these two pages. How can Myanmar reasonably have been required to respond to such broad and unparticularized claims within one month, especially when The Gambia indicated no time frame for an expected response?

64. The inference can be drawn that The Gambia expected no response. At the time the Note Verbale was sent, The Gambia presumably already knew that it would submit its Application exactly a month later, on 11 November 2019. The intention from the outset was presumably that the Note Verbale, containing references to breaches by Myanmar of international law, and the expected lack of any response to it within a month, would in *form* establish the existence of the necessary dispute.

65. However, there was no dispute in *substance*, and that is what is required. The Note Verbale was so general and lacking in specificity that it is not possible to determine that it was making any legal claim at all or, if so, exactly what legal claim. It identified no facts and made unspecified references to human rights covenants and customary international law. It is impossible to determine whether its wording had in mind all of the matters subsequently included in the Application. It could have expressly stated that The Gambia was making a legal claim against Myanmar, but it did not[177]. It did not call for a response, but even if it did, it did not call for a response within a month. Therefore, even if it did advance a legal claim, *quod non*, no positive opposition can be inferred from Myanmar's failure to respond to it by 11 November 2019.

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[177] POM, paras. 571-572.

66. For these reasons, the requirement of a prior dispute is not met.

67. Madam President, Members of the Court, that concludes my presentation on the fourth preliminary objection and brings to an end Myanmar's first round of oral arguments. I thank you for your kind attention.

The PRESIDENT: I thank Mr. Staker, whose statement brings this sitting to a close. The oral proceedings in the case will resume on Wednesday 23 February 2022 at 1.30 p.m., when The Gambia will present its first round of argument.

The sitting is adjourned.

The Court rose at 4.40 p.m.

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