Corrigé
Corrected

CR 2022/2

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2022

Public sitting

held on Wednesday 23 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 mercredi 23 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

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

H.E. Mr. Dawda Jallow, Attorney General and Minister of Justice, Republic of The Gambia,

as Agent;

Mr. Hussein Thomasi, Solicitor General, Ministry of Justice, Republic of The Gambia,

as Co-Agent;

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

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

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

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

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

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

as Counsel and Advocates;

Ms Bafou Jeng, Ministry of Justice, Republic of The Gambia,

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,

Mr. Yuri Parkhomenko, Attorney at Law, Foley Hoag LLP,

Ms Diem Ho, Attorney at Law, Foley Hoag LLP,

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

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

as Counsel;

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

as Adviser;

Ms Nancy Lopez, Washington, DC,

Ms Rachel Tepper, Washington, DC,

Le Gouvernement de la République de Gambie est représenté par :

S. Exc. M. Dawda Jallow, *Attorney General* et ministre de la justice de la République de Gambie,

comme agent ;

M. Hussein Thomasi, *Solicitor General*, ministère de la justice de la République de Gambie,

comme coagent ;

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

M. Philippe Sands, QC, professeur de droit international au University College London, avocat, Matrix Chambers (Londres),

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

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

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

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

comme conseils et avocats ;

Mme Bafou Jeng, ministère de la justice de la République de Gambie,

Mme Fatou L. Njie, ministère de la justice de la République de Gambie,

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

M. Yuri Parkhomenko, avocat au cabinet Foley Hoag LLP,

Mme Diem Ho, avocate au cabinet Foley Hoag LLP,

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

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

comme conseils ;

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

comme conseiller ;

Mme Nancy Lopez (Washington),

Mme Rachel Tepper (Washington),

Ms Amina Chaudary, Washington, DC,

as Assistants.

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

H.E. Mr. Ko Ko Hlaing, Union Minister for International Cooperation of the Republic of the Union of Myanmar,

as Agent;

H.E. Ms Thi Da Oo, Union Minister of Legal Affairs and Attorney General of the Union of Myanmar,

as Alternate Agent;

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

as Lead Counsel and Advocate;

Mr. Robert Kolb, Professor of Public International Law, University of Geneva,

Mr. Stefan Talmon, Professor of International Law, University of Bonn, Barrister, Twenty Essex Chambers, London,

as Counsel and Advocates;

H.E. Mr. Soe Lynn Han, Ambassador of the Republic of the Union of Myanmar to the Kingdom of Belgium, the Kingdom of the Netherlands, the Grand Duchy of Luxembourg, the Republic of Croatia and the European Union,

Ms Khin Oo Hlaing, member of the Advisory Board to the Chairman of the State Administration Council,

Mr. Myo Win Aung, Deputy Judge Advocate General, Office of the Judge Advocate General,

Mr. Kyaw Thu Nyein, Deputy Director General, International Organizations and Economic Department, Ministry of Foreign Affairs,

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,

Mr. Swe Sett, Deputy Director, Ministry of Foreign Affairs,

Ms Khin Myo Myat Soe, Counsellor, Embassy of Myanmar in Brussels,

Mr. Thu Rein Saw Htut Naing, Deputy Director, Ministry of Foreign Affairs,

Mr. Ye Maung Thein, Deputy Director, Ministry of Foreign Affairs,

Mme Amina Chaudary (Washington),

comme assistantes.

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

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

comme agent ;

S. Exc. Mme Thi Da Oo, ministre des affaires juridiques et *Attorney General* de l'Union du Myanmar,

comme agente suppléante ;

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

comme conseil principal et avocat ;

M. Robert Kolb, professeur de droit international public à l'Université de Genève,

M. Stefan Talmon, professeur de droit international à l'Université de Bonn, *barrister* au cabinet Twenty Essex Chambers (Londres),

comme conseils et avocats ;

S. Exc. M. Soe Lynn Han, ambassadeur de la République de l'Union du Myanmar auprès du Royaume de Belgique, du Royaume des Pays-Bas, du Grand-Duché de Luxembourg, de la République de Croatie et de l'Union européenne,

Mme Khin Oo Hlaing, membre du comité consultatif auprès du président du conseil d'administration de l'Etat,

M. Myo Win Aung, juge-avocat général adjoint, bureau du juge-avocat général,

M. Kyaw Thu Nyein, directeur général adjoint, service des organisations internationales et de l'économie, ministère des affaires étrangères,

Mme Myo Pa Pa Htun, ministre conseillère, ambassade du Myanmar à Bruxelles,

M. Kyaw Thu Hein, directeur, ministère des affaires juridiques,

M. Thwin Htet Lin, directeur, ministère des affaires étrangères,

M. Ngwe Zaw Aung, directeur, ministère des affaires juridiques,

M. Swe Sett, directeur adjoint, ministère des affaires étrangères,

Mme Khin Myo Myat Soe, conseillère, ambassade du Myanmar à Bruxelles,

M. Thu Rein Saw Htut Naing, directeur adjoint, ministère des affaires étrangères,

M. Ye Maung Thein, directeur adjoint, ministère des affaires étrangères,

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,

M. Thurein Naing, juge-avocat, bureau du juge-avocat général,

Mme Ei Thazin Maung, sous-directrice, ministère des affaires étrangères,

Mme May Myat Noe Naing, première secrétaire, ambassade du Myanmar à Bruxelles,

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

Mme M Ja Dim, sous-directrice, ministère des affaires juridiques,

M. Zin Myat Thu, chef de service (1), ministère des affaires étrangères,

M. Wunna Kyaw, chef de service (2), ministère des affaires étrangères,

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. I would like to note that, today, the following judges are present with me in the Great Hall of Justice: Vice-President Gevorgian, and Judges Tomka, Abraham, Yusuf, Sebutinde, Iwasawa, Nolte and Charlesworth, and Judges *ad hoc* Pillay and Kress; while Judges Bennouna, Xue, Bhandari, Robinson and Salam are participating by video link. The Court meets today to hear the first round of oral argument of The Gambia.

I shall now give the floor to the Agent of The Gambia, H.E. Mr. Dawda Jallow. You have the floor, Your Excellency.

Mr. JALLOW:

I. AGENT'S SPEECH

1. Madam President, honourable judges. It is an honour to address you today as the Agent of the Republic of The Gambia in our dispute with the Republic of the Union of Myanmar.

2. Over two years ago, The Gambia filed its Application with this Court, exercising its right as a party to the Genocide Convention to hold Myanmar to account for its ruthless acts of genocide against the Rohingya group in Myanmar. My esteemed predecessor said that he stood before you then, as I do now, "to awaken the conscience of the world, and to arouse the voice of the international community".

3. The Court rose to that challenge and unanimously ordered provisional measures against Myanmar that have, to this very day, helped to protect the Rohingya group from a repeat of the violent acts of genocide that Myanmar's military, the Tatmadaw, had inflicted upon them. We must never forget the Tatmadaw's mass murder; its co-ordinated use of rape and sexual violence as a weapon of genocide; its burning of villages with people locked in their homes; its targeted killing of children and the elderly; its murder of people as they fled these so-called "clearance operations"; and its order to kill all that its soldiers could hear and see.

4. Justice and accountability for those acts of genocide, and for Myanmar's ongoing acts of genocide, is not just possible — it is necessary, a solemn obligation shared by The Gambia, every State party to the Genocide Convention and the international community as a whole. It is why the international community drafted and adopted the 1948 Genocide Convention. It is why The Gambia filed its Application against Myanmar over two years ago. It is why the United Nations, the

Organisation of Islamic Cooperation and the States around the world have welcomed and supported The Gambia's case, and it is why the Netherlands and Canada have publicly announced their intention to intervene under Article 63 of the Court's Statute. It is why this Court must reject Myanmar's meritless preliminary objections and proceed to adjudicate the merits of this dispute.

5. Madam President, honourable judges, The Gambia may be a geographically small State, but we stand tall in the international community of States and take pride in promoting and protecting human rights, and international accountability for atrocity crimes like genocide. We work bilaterally with other States and through multilateral institutions in our sovereign capacity for these and other national goals. It is a testament to The Gambia's diplomacy that the 57 Member States of the OIC formally endorsed and supported our action before this Court, not to mention the many others who have subsequently done the same.

6. We are no one's proxy. As my predecessor told you at the outset of this case:

> "this is very much a dispute between The Gambia and Myanmar. We seek to protect not only the rights of the Rohingya, but our own rights as a State party to the Genocide Convention by holding Myanmar to its *erga omnes partes* obligations not to commit genocide, not to incite genocide, and to prevent and punish genocide."[1]

These violations of the Genocide Convention are a "stain on our collective conscience" and it would be "irresponsible" to "pretend that it is not our business". We made it "our business when we, as civilized nations, committed ourselves to a pact under the 1948 Genocide Convention"[2].

7. At the last oral hearings, Myanmar raised the very same objections that are before the Court now. The Court rightly rejected them in its Order on provisional measures. Nothing has changed that would warrant the Court to depart from its previous unanimous decision, and we call on the Court to swiftly reaffirm its previous rejection of these groundless objections.

8. Now, even more than before, justice within Myanmar is impossible. And now, as before, only this Court can hold Myanmar to account for its acts of genocide.

9. Madam President, honourable judges, justice delayed is indeed justice denied. The Rohingya and all people of Myanmar deserve justice and accountability. The Gambia is grateful that the Court has scheduled these hearings so that this case may proceed without further delay.

---

[1] CR 2019/18, p. 19, para. 15 (Tambadou).

[2] *Ibid.*, p. 17, para. 5 (Tambadou).

10. As a State party to the Genocide Convention, The Gambia fully expects that the Court will uphold its right to have this case heard on the merits. The Gambia urges the Court to proceed as expeditiously as your careful deliberations allow. The Rohingya deserve no less.

11. The Gambia is proud to be represented by a diverse team of international advocates who will address all of Myanmar's preliminary objections in turn.

12. Mr. Paul Reichler will speak first to update the Court on the developments in this dispute since 2019.

13. Mr. Andrew Loewenstein will then demonstrate what should be the obvious point — that The Gambia is the applicant State, and not acting as a "proxy" for any other entity.

14. Professor Pierre d'Argent will establish The Gambia's standing to bring this case as a State party to the Genocide Convention.

15. Next, Ms Tafadzwa Pasipanodya will show that Myanmar's reservation to Article VIII does not deprive the Court of its jurisdiction, which is explicitly provided for under Article IX of the Convention.

16. Mr. Arsalan Suleman will confirm that a dispute existed between The Gambia and Myanmar over its violations of the Genocide Convention as of the time the Application in this case was filed.

17. And finally, Professor Philippe Sands will provide concluding remarks for The Gambia's first round of arguments.

18. Madam President, honourable judges. It remains for me to thank you for your courtesy, for your keen attention to this case and for allowing me to address you. With your permission, I would ask that you call upon Mr. Reichler to address you virtually. Thank you very much.

The PRESIDENT: I thank the Agent of The Gambia for his statement. And I now invite Mr. Paul Reichler to take the floor. You have the floor, Mr. Reichler.

Mr. REICHLER:

II. THE CIRCUMSTANCES IN WHICH THESE HEARINGS ARE TAKING PLACE: AN UPDATE ON CRITICAL EVENTS SINCE DECEMBER 2019

1. Madam President, Members of the Court, good afternoon. It is, as always, an honour for me to appear before you. It is a special privilege to do so in this case, on behalf of The Gambia, and to speak in support of its efforts to protect the Rohingya people in Myanmar from destruction as a group by the respondent State, and to prevent further State-initiated acts of genocide against them, by holding Myanmar accountable under the Convention on the Prevention and Punishment of the Crime of Genocide.

2. Madam President, a lot has happened since the Parties last appeared in this Court in December 2019. Two major events stand out above the rest. First, in January 2020, the Court indicated provisional measures. Second, one year later, in February 2021, Myanmar's armed forces, the Tatmadaw, overthrew the elected civilian government. They then filled top governmental positions, including Prime Minister and Deputy Prime Minister, with the same senior army generals whom United Nations bodies have accused of responsibility for the acts of genocide that, according to their findings, were committed against the Rohingya people between 2016 and 2018[3].

3. These two overarching events, and their consequences, set the context in which these hearings on Myanmar's preliminary objections are taking place. My remarks today will be addressed to them, and the implications they have for the remainder of the proceedings in this case, including Myanmar's effort, by means of its preliminary objections, to escape the Court's jurisdiction.

4. Madam President, there is good news and bad. The good news is that the provisional measures indicated by the Court in January 2020 are having an effect. To be sure, they are not as effective as they might be, and in no sense is Myanmar fully complying with them, as The Gambia has made clear in its observations on Myanmar's periodic reports. But the Court's measures have helped to prevent the worst from happening. In particular, there has been no resumption of the "clearance operations" that the Tatmadaw carried out against the Rohingya population with such devastating brutality and effect in prior years. There have been no new mass killings of Rohingya,

[3] See United Nations, Human Rights Council (hereinafter "UN HRC"), *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2, 17 Sept. 2018, p. 1 (summary), para. 1555, MG, Vol. II, Ann. 40.

no new mass rapes or gang rapes of Rohingya women and girls, and no new burning of populated Rohingya homes and villages, with families locked inside.

5. The Gambia attributes the absence of such overtly genocidal acts to the existence of the Court's provisional measures, and its ongoing exercise of jurisdiction and oversight. Myanmar's military junta has been impervious to pleas of restraint from around the world, including from members of the United Nations Security Council, other UN bodies and agencies, and neighbouring States. None appear to have had any influence on its behaviour. Except for the Court. Even after the coup of 1 February 2021, the military government has continued to submit reports on its alleged compliance with the Court's provisional measures Order; it has appointed a new Agent; it has retained new counsel; and it has appeared at these hearings to plead its case on preliminary objections. Plainly, by its actions, it has shown that, as a Party to these proceedings, it will not, or dares not, disregard the Court.

6. In these circumstances, maintaining the existing provisional measures in effect is essential for the protection, and survival, of the estimated 600,000 Rohingya who remain in Myanmar today. The Court's measures are the last, and only remaining, constraint on the military government's policies and practices toward this extremely vulnerable and existentially threatened group. Even under elected civilian rule, prior to February 2021, the Tatmadaw was a law unto itself, especially in regard to its treatment of the Rohingya. As Myanmar's then Agent, who is now imprisoned and incommunicado, explained in December 2019: "Under its 2008 Constitution, Myanmar has a military justice system. Criminal cases against soldiers or officers for possible war crimes committed in Rakhine must be investigated and prosecuted by that system."[4]

7. If there was no accountability in Myanmar for acts of genocide committed by military personnel then, there is certainly none now. This is because the individual authors and perpetrators of the genocide against the Rohingya — the very same military leaders most responsible for planning it and carrying it out — are now openly in charge of the government. Any restraints on their behaviour that an elected civilian government, or the image of democratic legitimacy, might have

[4] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures*, CR 2019/19, p. 16, para. 17 (Aung San Suu Kyi).

provided have been cast aside. The Tatmadaw now exercise all State power nakedly and directly. That is the bad news.

8. And it is still worse. The devils are in the details. The main architect of the military coup, Senior General Min Aung Hlaing, was the principal architect of the Rohingya genocide, according to the United Nations Fact-Finding Mission, whose 2018 and 2019 reports formed part of the factual basis for The Gambia's provisional measures request. After the coup, Senior General Hlaing appointed himself Prime Minister. Serving immediately under him, as Deputy Prime Minister, is Vice Senior General Soe Win. The United Nations Fact-Finding Mission found him responsible, as Commander-in-Chief of the Tatmadaw, for directing the "clearance operations" against the Rohingya, including the deployment of combat divisions to Rakhine State for the purpose of eradicating them[5]. Other Tatmadaw officers head key government ministries and agencies.

9. This includes the Acting President, Lieutenant General Myint Swe. As Chair of the Investigation Commission for Maungdaw, he found that there were absolutely "no cases of genocide and religious persecution in the region"[6]. This demonstrated, in the views of the United Nations Special Rapporteur on the situation of human rights in Myanmar and the Special Advisor on the Prevention of Genocide, a complete lack of independence[7]. Not surprisingly, despite a plethora of so-called investigation commissions, as described in The Gambia's Memorial, no one, not a single military officer or enlisted person, has ever been accused, let alone convicted, of genocide either under the military régime, or during the prior civilian government.

10. Madam President, there is presently no national or international body or institution of any kind to which Myanmar's current leaders have acknowledged accountability in any way, except, as

---

[5] See UN HRC, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2, 17 Sept. 2018, p. 1 (summary), para. 1555; MG, Vol. II, Ann. 40.

[6] *Ibid.*, para. 1606.

[7] See UN OHCHR, *Statement by Ms Yanghee Lee, Special Rapporteur on the Situation of Human Rights in Myanmar at the 34th session of the Human Rights Council,* 13 Mar. 2017:

> "[F]or investigations to be truly independent – members should be independent of any institution or agency that may be the subject of the inquiry. However, the Maungdaw Investigation Commission, whose members I was able to meet during my January visit, includes former members of the military and the currently serving Chief of the Myanmar Police Force." MG, Vol. III, Annex 68;

United Nations, Press Release: *Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide following OHCHR's report on the situation in northern Rakhine State, Myanmar,* 6 Feb. 2017: "The existing Commission is not a credible option to undertake the new investigation. I urge that any investigation be conducted by a truly independent and impartial body that includes international observers."; MG, Vol. III, Ann. 61.

they continue to demonstrate, for this Court. That explains why they persist in pursuing their preliminary objections — the very same ones that the Court already rejected, on a prima facie basis, in its Order of January 2020: if they can escape the Court's jurisdiction, they will be accountable to no one, and there will be no constraints on their persecution and ultimate destruction of the Rohingya.

11. The evidence gathered by United Nations bodies since the February 2021 military takeover demonstrates that this is still the Tatmadaw's objective. According to the United Nations Special Rapporteur, in a report dated 2 September 2021, at tab 2 of our judges' folders,

> "[t]he estimated 600,000 largely stateless Rohingya in Rakhine State *continue to face existential threats* and remain discriminated against in accessing citizenship, freedom of movement, and other fundamental rights. Since the coup, the junta has demonstrated that it intends to ensure that the Rohingya remain disenfranchised and segregated."[8]

In particular, the Special Rapporteur stated — also at tab 2 of our folders, as are the rest of the materials I will be displaying:

> "Since the coup, the junta has continued to deny the existence of the Rohingya while keeping them disenfranchised through their unresolved legal status, institutional discrimination, human rights abuses, restrictions on their movement and limited access to livelihoods and essential services."[9]

12. Among other forms of discriminatory treatment that threaten to destroy the Rohingya as a group, "[t]he junta continues to force or coerce Rohingya to accept the . . . National Verification Card (NVC)". "The NVC process continues to require Rohingya to self-identify as foreigners and, as such, remains an administrative tool to erase Rohingya ethnic-identity."[10]

13. In an official public statement, issued last month, on 7 January 2022, Myanmar's Ministry of Foreign Affairs criticized the International Organization for Migration for its use of the term "Rohingya": "Myanmar steadfastly rejects the term 'Rohingya' which has never existed in legal and historical records of the country and the people of Myanmar do not recognize it."[11]

---

[8] United Nations, General Assembly (hereinafter "UNGA"), *Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews*, UN doc. A/76/314, 2 Sept. 2021; Ann. 1 — Additional Human Rights Concerns Observed by the Special Rapporteur, para. 16, available at https://www.ohchr.org/Documents/Countries/MM/GA76report-annex-SR-Myanmar.pdf, emphasis added.

[9] *Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews*, UN doc. A/76/314, 2 Sept. 2021 (hereinafter "UN Special Rapporteur September 2021 Report"), para. 68, available at https://undocs.org/A/76/314.

[10] UN Special Rapporteur September 2021 Report, Ann. 1, para. 18.

[11] Republic of the Union of Myanmar, Ministry of Foreign Affairs, Press Release, 7 Jan. 2022, available at https://www.mofa.gov.mm/press-release-11/.

14. The military government continues to block citizenship for Rohingya in innumerable ways, and to deny them the fundamental rights that only citizens can enjoy, including those rights regarding birth and marriage:

> "Rohingya people continue to face discriminatory laws and policies blocking their access to citizenship, documentation and civil registration. Despite legislative commitments to universal birth registration under the 2019 Child Rights Law, the birth of Rohingya children continue to not be systematically registered. Updating civil registration records, including birth and marriages, through the household list remains a challenge, negatively affecting access to legal documentation, basic services, and freedom of movement."[12]

15. The statelessness, internment and movement restrictions maintained by the junta deny the Rohingya access to the basic necessities of life, and leave them especially vulnerable to destruction by the State.

> "There are an estimated 130,000 stateless Rohingya who remain confined in internment camps in Rakhine State, and those in villages throughout the state face increased movement restrictions and are continually impeded from accessing citizenship, services, and livelihoods. As a result, *the Rohingya remain at grave risk of mass atrocity crimes*."[13]

As a result, the Rohingya remain at grave risk of mass atrocity crimes.

16. Madam President, the Special Rapporteur here recalls what human experience has long taught us: that it is just a short step from dehumanizing a people to killing them en masse. In the words of Simone Weil, on the eve of the Holocaust that would soon unfold, "once a certain class of people has been placed by the temporal and spiritual authorities outside the ranks of those whose life has value, then nothing comes more naturally to men than murder"[14].

17. The Tatmadaw have shown, both historically and since they have assumed direct power in Myanmar, that Rohingya lives have no value to them. This is especially true of Rohingya women and girls, who continue to be victims of singularly destructive policies and practices. The United Nations Special Rapporteur, in his latest report, called particular attention to the "detention and forced labour among women and girls living in [internment] camps", and he cited reports that Rohingya "women and girls are trafficked [regularly] from internment camps in Rakhine State"[15].

---

[12] UN Special Rapporteur September 2021 Report, Ann. 1, para. 17.

[13] *Ibid.*, para. 20, emphasis added.

[14] Simone Weil, *Selected Essays: 1934-1943*, Wipf & Stock Publishers 2015, p. 174.

[15] UN Special Rapporteur September 2021 Report, Ann. 1, paras. 24-26.

18. The Gambia quoted extensively from the Special Rapporteur's latest report in its Observations on Myanmar's Fourth Compliance Report, filed with the Court on 7 December. It calls out here, in these proceedings before the one institution to which the Myanmar authorities purport to remain accountable, Myanmar's ongoing policies and practices that threaten the survival of the Rohingya people. The Gambia does so in hopes that, out of respect for the Court, those authorities will feel compelled to untighten the noose they have placed around the Rohingya's necks.

19. Two days ago in these proceedings, the Agent for Myanmar extolled his government's approach to the repatriation of hundreds of thousands of Rohingya refugees, who fled the country during the "clearance operations" to avoid destruction at the Tatmadaw's hands. Here is what the Special Rapporteur said about this subject, just two months ago in a statement issued on 19 December 2021:

> "The relentless assault by the Myanmar military junta's attacks against its own people, as well as the systematic land clearance in Rakhine State, and the ongoing system of discrimination against the Rohingya in law and practice continue at this time. This means that the conditions for the safe, sustainable, dignified return of the Rohingya to their homeland currently do not exist. It will take considerable time and significant effort to create such conditions in Myanmar."[16]

20. Madam President, my colleagues who follow me today will demonstrate, one by one, why each of Myanmar's four preliminary objections has no merit whatsoever. The Court was correct in rejecting them on a prima facie basis two years ago; and Myanmar has failed to make them any more meritorious in the time since then — not in its written pleading of 20 January 2021, and certainly not in its oral presentations on 21 February 2022.

21. Notwithstanding their lack of substance, Myanmar has already benefitted from filing them. It has stopped the clock on the merits phase of the case for over a year, since the objections were filed in January 2021. In so doing, it managed to obtain a lengthy delay in the filing of its Counter-Memorial, which may not be due until sometime next year. Meanwhile, the agony of the Rohingya is extended further.

22. Human Rights Watch, in its latest report on Myanmar, issued on 7 December 2021, had this to say about the delay in these proceedings: "The court will next hold hearings on the preliminary

---

[16] UN OHCHR, *Mission to Bangladesh 13-19 December 2021, End of Mission Statement by the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews*, UN doc. A/76/314, 19 Dec. 2021, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28001&LangID=E.

objections Myanmar filed 10 days before the coup. There is no quick route to justice in Myanmar, but never has the call for it been louder."[17]

23. The Gambia trusts that the Court will hear this call for justice — again — just as it did at the provisional measures phase. In the circumstances, we hope for a prompt judgment from the Court. We have no doubt that the judgment will be based on the facts and the law, and that it will be rendered in an objective and impartial manner. We pray that the case will then move forward as expeditiously as possible through the merits phase to its just conclusion.

24. Madam President, Members of the Court, I thank you for your kind courtesy and patient attention, and I ask that you call upon my colleague, Mr. Andrew Loewenstein, to address Myanmar's first preliminary objection.

The PRESIDENT: I thank Mr. Reichler. I now invite Mr. Andrew Loewenstein to address the Court. You have the floor.

Mr. LOEWENSTEIN:

III. THE GAMBIA IS THE APPLICANT STATE AND THE FIRST PRELIMINARY OBJECTION MUST BE REJECTED

1. Madam President, Members of the Court, good afternoon. It is an honour to appear before you and to do so on behalf of The Gambia. I will address Myanmar's first preliminary objection. This objection, in effect, asks the Court to erase The Gambia's name from its Application and to replace it with the Organisation of Islamic Cooperation, on the asserted ground that the OIC — and not The Gambia — is somehow the "real" applicant. On the basis of this substitution, Myanmar argues that the Court lacks jurisdiction because only States — and not international organizations — may be parties to disputes before the Court, or alternatively, that the Application is inadmissible for the same reason. The objection lacks any basis in law or fact.

2. I begin with the law. The relevant requirements for the Court to exercise jurisdiction *rationae personae* are clear and straightforward. They are rooted in Article 92 of the United Nations

[17] Human Rights Watch, "Decades of Impunity Paved Way for Myanmar's Coup: Justice, Solidarity Crucial to Confront Abuses Past and Present", 7 Dec. 2021, available at https://www.hrw.org/news/2021/12/07/decades-impunity-paved-way-myanmars-coup.

Charter, which provides that the Court "shall function in accordance with" its Statute[18]. The pertinent provisions of the Statute are located in Articles 34 and 35. Paragraph 1 of Article 34 provides that "[o]nly States may be parties in cases before the Court"[19]. Paragraph 1 of Article 35 then provides that "[t]he Court *shall* be open to the States parties to the present Statute"[20]. Tellingly, Myanmar did not mention Article 35 on Monday. That is, perhaps, not surprising; the provision is fatal to its argument.

3. Article 35's use of unqualified, mandatory language — "shall be open" — permits no exception to the requirement that the parties to the Statute are entitled to have access to the Court. Since Article 93, paragraph 1, of the Charter stipulates that "[a]ll Members of the United Nations are *ipso facto* parties to the Statute"[21], The Gambia, by virtue of its United Nations membership, is *ipso facto* a party to the Statute as well. Accordingly, by operation of paragraph 1 of Article 35 of its Statute, the Court "shall be open" to The Gambia.

4. Since both The Gambia and Myanmar are parties to the Statute of the Court, and also parties to the Genocide Convention, The Gambia is entitled to invoke the Court's jurisdiction in accordance with Article IX of the Genocide Convention. This, Madam President, should be the end of the matter.

5. So, how does Myanmar try to fashion its objection? As you heard on Monday, it advances the novel argument that the Court can disregard the fact that The Gambia is the Applicant and decide that some *other* entity is the "real" applicant. As you will have noticed, Myanmar could not cite a single instance in which this Court or its predecessor, or indeed any international court or tribunal, has ever suggested, let alone denied, that the applicant State is the "real" applicant. Nor, as far as The Gambia is aware, has any respondent State ever before asked an international court or tribunal to do so. Indeed, Myanmar could not even cite a single commentator — anyone — who supports this unprecedented theory.

6. The reason is plain: under Article 35, paragraph 1, States that are Members of the United Nations are entitled to seise the Court in accordance with an applicable basis for jurisdiction, such as

---

[18] Charter of the United Nations, Art. 92.

[19] Statute of the International Court of Justice, Art. 34 (1).

[20] *Ibid*., Art. 35 (1), emphasis added.

[21] Charter of the United Nations, Art. 93 (1).

Article IX of the Genocide Convention. As Professor Rosenne has observed: "Every State which is a party to the Statute has the right to . . . invoke the jurisdiction of the Court in accordance with the general conditions for the exercise of that jurisdiction."[22] It was precisely this "right" that The Gambia "invoked" when The Gambia commenced the present proceedings. Myanmar had nothing to say on Monday about Professor Rosenne's commentary on jurisdiction.

7. Myanmar nonetheless asks you to ignore the Application and attempt to discern *why*, or on whose alleged *behalf*, The Gambia commenced these proceedings. Now, putting aside the fact that The Gambia brought the case because it has a dispute with Myanmar regarding its violations of the Genocide Convention — a matter to which I will return — the question of what motivated The Gambia to commence the case is wholly irrelevant as a matter of law. As the Court held in paragraph 52 of its Judgment on jurisdiction and admissibility in *Nicaragua* v. *Honduras*, the Court "cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement"[23].

8. The Court's case law has thus been clear that it does not matter whether The Gambia's motivation for bringing the case was its outrage over Myanmar's genocidal acts, the urging of other members of the international community, a proposal by the OIC or any other reason. As the Court held, none of this has any relevance for the exercise of its jurisdiction.

9. There is good reason for this. As Professor Tomuschat has observed, the Court's holding that "any possible 'political motivation' of an application is irrelevant for the discharge of its judicial function" would "seem to be" the Court's "final word . . . on the issue"[24]. That is because, Professor Tomuschat further observed, the Court would "emasculate itself if it refrained from agreeing to clarify the legal position in disputes of great importance" for "peace and security"[25]. Myanmar did not address Professor Tomuschat's commentary either.

---

[22] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, Martinus Nijhoff Publishers, 2006, pp. 601-602; WOG, Ann. 19.

[23] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52.

[24] Christian Tomuschat, "Competence of the Court, Article 36", in Zimmermann, Tams, Oellers-Frahm, Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary*, 3rd edition, Oxford University Press, 2019, p. 725; WOG, Ann. 22.

[25] *Ibid*.

10. So, how does Myanmar make its argument? On Monday, while conceding that the applicant's motivation is irrelevant to the exercise of jurisdiction[26], Myanmar argued that its objection is not based on The Gambia's motivation but rather on whether The Gambia is the "real" Applicant. This artificial formulation provides Myanmar no help at all. Myanmar's thesis for *why* The Gambia is not the "real" Applicant depends on proving that The Gambia commenced the case at the OIC's behest rather than for its own reasons. That is inevitably a question of motive, the very definition of which is a "[c]ause or reason that moves the will and induces action"[27]. As the Court has ruled, such factors are irrelevant to the exercise of its jurisdiction or the admissibility of an application.

11. Nor is Myanmar helped by arguing, as it also did on Monday, that whether The Gambia is the Applicant is a question of substance that calls for objective determination. Even if that were correct, all the Court would need to determine objectively is whether The Gambia is a party to the Statute of the Court. The Charter of the United Nations specifies how this is done. Parties to the Charter are *ipso facto* also parties to the Statute. So, to the extent there is anything to be objectively determined, it is accomplished by verifying that The Gambia is, in fact, a Member of the United Nations. As The Gambia indisputably meets that qualification, the requirements for jurisdiction *ratione personae* are satisfied. For the Court to decide otherwise would be truly extraordinary.

12. Turning now to the facts, The Gambia is, by any measure, the "real" Applicant. On Monday, Myanmar tried to cast doubt on that reality by referencing an eclectic variety of websites, articles, tweets and press releases. But Myanmar deliberately glided over the evidence that matters. And, in making this argument, it was surprising to hear its counsel contend that The Gambia has said "nothing" about the events leading to the case[28]. That is simply not true. So, let's begin with what The Gambia has, in fact, said about the case.

13. Madam President, the then Agent and Attorney General of The Gambia, Mr. Abubacarr Marie Tambadou, himself a former war crimes prosecutor at the International Criminal Tribunal for

---

[26] See CR 2022/1, p. 24, para. 47 (Staker).

[27] "Motive", *Black's Law Dictionary*, 6th ed.

[28] See CR 2022/1, p. 20, para. 27 (Staker).

Rwanda, told the Court *why* The Gambia brought the case — and *how* it came about — when he addressed you at the opening of the provisional measures hearing.

14. He explained this in very direct terms. He recounted how he had "visited the refugee camps in Bangladesh" as part of an OIC delegation and how, as he "listened to the stories of the refugees", he "could smell the stench of genocide from across the border in Myanmar"[29]. And he explained how he heard stories of "helplessness in the face of mass killings, of mass rape, and mass torture, and of children being burnt alive in the sanctuary of their homes and places of worship"[30]. The stories of these victims, The Gambia's Agent told you, were "all too familiar to me from a decade and a half of interaction with surviving victims" of the Rwandan genocide[31].

15. He further explained why the plight of the Rohingya had particular resonance for The Gambia and why The Gambia was motivated to act. He told you: "Twenty-two years of a brutal dictatorship in my own country has taught us that we must use our moral voice in condemnation of the oppression of others wherever it occurs around the world so that others will not suffer our pain and our fate."[32]

16. And so, The Gambia assumed a leadership role in mobilizing international action against the genocide of the Rohingya. The Gambia's efforts involved, among other things, working with the OIC and its Member States to establish, and then chair, the OIC's Ad Hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingya. This does not in any way suggest, as Myanmar tries to argue, that The Gambia's actions, including those done in co-ordination with, or through, the OIC and/or its Ad Hoc Committee, are not The Gambia's own.

17. Indeed, The Gambia's public statements regarding its efforts to promote accountability for Myanmar's crimes demonstrate that The Gambia *itself* was taking these actions, and that The Gambia was imploring the international organizations to which it belonged, including especially the United Nations and the OIC, to further that objective. For example, on 25 September 2018, that is, over a year before filing the case, the President of The Gambia reported on these efforts to the

---

[29] CR 2019/18, p. 17, para. 6 (Tambadou).

[30] *Ibid.*

[31] *Ibid.*, pp. 17-18, para. 6 (Tambadou).

[32] *Ibid.*, p. 19, para. 14 (Tambadou).

United Nations General Assembly. He stated: "As the upcoming Chair of the next OIC Summit, *The Gambia* has undertaken, through a Resolution, to champion an accountability mechanism that would ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book."[33] As you can see, the President of The Gambia was apprising the General Assembly of The Gambia's use of the OIC to seek protection for the Rohingya and accountability for the perpetrators of the crimes committed against them. With respect to its interactions with both the United Nations and the OIC, The Gambia was acting in its own right and for its own purposes.

18. Moreover, it was *The Gambia* itself that informed Myanmar by Note Verbale on 11 October 2019 that a dispute exists between the two States regarding Myanmar's violations of the Genocide Convention. You can find it at tab 3 of the judges' folder.

19. The Gambia's Note Verbale is crystal clear that *The Gambia* is the party to that dispute. The Gambia stated: "*The Republic of The Gambia* is deeply troubled by the findings" of the United Nations Fact-Finding Mission regarding "the ongoing genocide against the Rohingya people"[34]. This had been the case for more than a year, as the record indisputably shows.

20. The Gambia's Note Verbale further stated that "*The Gambia* considers those findings well-supported by the evidence and highly credible" and is "disturbed by Myanmar's absolute denial of those findings" and "refusal to acknowledge and remedy its responsibility"[35].

21. The Gambia's Note Verbale also informed Myanmar that "*The Gambia* insists that Myanmar take all necessary actions to comply with these obligations"[36].

22. There can be no confusing The Gambia with the OIC. The same Note Verbale distinguished between the two when it informed Myanmar that "The Gambia fully endorse[d]" a resolution of the OIC calling upon Myanmar to "take all measures to immediately halt all vestiges and manifestations of the practice of genocide against" the Rohingya[37].

---

[33] UNGA, 73rd Session, 7th Plenary Meeting, "Address by Mr. Adama Barrow, President of the Republic of The Gambia", doc. A/73/PV.7, 25 Sept. 2018, p. 6, emphasis added, MG, Vol. III, Ann. 41.

[34] Note Verbale from Permanent Mission of the Republic of The Gambia to the United Nations to Permanent Mission of the Republic of the Union of Myanmar to the United Nations, 11 Oct. 2019, emphasis added; Observations of The Gambia 2 Dec. 2019 (OG 2019), Ann. 1.

[35] *Ibid.*

[36] *Ibid.*

[37] *Ibid.*

23. Myanmar tries to argue that The Gambia acted on instructions from the OIC. The record shows otherwise. To begin with, it was The Gambia that conceived the idea of bringing a case against Myanmar under the Genocide Convention. As a sovereign State, The Gambia did not need anyone else's instructions or permission to pursue it.

24. The fact that The Gambia sought and received the OIC's support and encouragement is both understandable and immaterial for purposes of this case. It is understandable because for a small State like The Gambia gaining the political support of the 57 Member States of the OIC manifestly increased the influence within the international community that could be brought to bear on Myanmar. It is immaterial because it has no bearing whatsoever on the identity of the Applicant in these proceedings. It certainly does not make the OIC the Applicant. As the Court held in its provisional measures Order, "the fact that The Gambia may have sought and obtained the support of other States or international organizations in its endeavour to seise the Court does not preclude the existence between the Parties of a dispute relating to the Genocide Convention"[38]. As my colleague, Mr. Suleman, will explain, there is undoubtedly such a dispute.

25. Accordingly, independently of whether the OIC supported, encouraged, endorsed, proposed, requested, tasked, or whatever else may be Myanmar's preferred word to describe the OIC's relationship to The Gambia's decision to bring the case, the bottom line is this: The Gambia's decision to invoke the Court's jurisdiction under Article IX was The Gambia's decision. No one else's.

26. That decision was undertaken at the highest levels of the Gambian Government. In July 2019, a session of The Gambia's Cabinet, presided over by His Excellency President Adama Barrow, "discussed and approved" the proposal for "The Gambia's leading legal action against Myanmar at the International Court of Justice"[39].

27. In particular, the official statement of the Office of The Gambia's President records that the "Attorney General and Minister of Justice presented a paper on the OIC proposal for The Gambia to lead the international legal action against Myanmar"[40]. The statement then memorializes that the

---

[38] Provisional measures Order, p. 12, para. 25.

[39] The Gambia, Office of the President, press release, "Cabinet approves transformation of GTTI into University of Science, Technology and Engineering", 6 July 2019; POM, Vol. IV, Ann. 120.

[40] *Ibid.*

Cabinet "approved the proposal" and "also approved" the Attorney General's "appointment" to "represent The Gambia throughout the proceedings"[41].

28. To these facts, on Monday, Myanmar could only respond that when the Gambian Cabinet decided to bring the case, its announcement of this decision stated that The Gambia would "*lead*" the legal action[42]. According to Myanmar, "lead" is insufficient to establish that The Gambia is the real Applicant. So, Myanmar's argument comes down to this: the Court cannot exercise jurisdiction over a claim under the Genocide Convention because, in Myanmar's estimation, the Cabinet of a sovereign State, when taking a sovereign decision for that State to initiate judicial proceedings, used the wrong verb. But even then, to "lead" the case is not to serve as anyone's puppet or proxy.

29. The fact that the OIC has assisted in organizing political and financial support does not transform the OIC into the Applicant or otherwise wrest the case away from The Gambia. The OIC itself has made clear that the case is not the organization's but The Gambia's. The September 2019 report of the meeting of the OIC's Ad Hoc Ministerial Committee, when discussing the OIC's support for The Gambia, "acknowledged The Gambia's prerogative to select a legal firm to pursue the case in the ICJ and took note of The Gambia's choice of the legal firm"[43].

30. On Monday, Myanmar asked: "does this not suggest that this prerogative was *conferred* by the OIC?" No, it does not. Here, it is Myanmar that uses the wrong verb. "Conferred" implies that something was given; "acknowledged", which is the word used by the Ad Hoc Committee, constitutes affirmation of a fact or situation that already exists. In this case, it was The Gambia's prerogative, as the applicant State, to select its own counsel. The Court need only consider another part of the same report, which Myanmar elected *not* to show you. This describes the litigation as the "case *undertaken by The Gambia*"[44]. And, to this I would add that counsel for The Gambia receive and accept instructions exclusively from The Gambia's Agent. No one else. That has remained the case at all times, including in the preparation of The Gambia's Application, its Memorial, its Written

---

[41] The Gambia, Office of the President, press release, "Cabinet approves transformation of GTTI into University of Science, Technology and Engineering", 6 July 2019; POM, Vol. IV, Ann. 120.

[42] CR 2022/1, p. 17, para. 14 (Staker).

[43] Organisation of Islamic Cooperation, "Report of the Ad Hoc Ministerial Committee on Human Rights Violations Against the Rohingya", OIC doc. OIC/acm/ad-hocaccountability/report2019/final, 25 Sept. 2019, para. 12 (emphasis added); POM, Vol. IV, Annex 97.

[44] *Ibid.*

Observations on Myanmar's preliminary objections and all of The Gambia's observations on Myanmar's reports under the provisional measures Order.

31. Madam President, nothing is changed by the fact that it has sometimes been said that The Gambia brought the case on behalf of the OIC, a description that does not describe a legal relationship, but reflects the fact that The Gambia enjoys the support of the OIC's 56 other Member States, who, not surprisingly, are also outraged by Myanmar's crimes against their fellow Muslims. In its September 2019 report, the UN Fact-Finding Mission, after concluding that Myanmar was responsible for genocide, welcomed The Gambia's efforts to pursue in this Court a case against Myanmar under the Genocide Convention. It recommended that the United Nations and the international community encourage and support such a case[45]. Does this mean that The Gambia brought the case on behalf of the United Nations, or that the United Nations or its Fact-Finding Mission is the *real* Applicant?

32. Madam President, it could be said — and, in fact, is often said — that The Gambia brings this case *on behalf of the Rohingya*. In a sense, it did, because it brought the case to save their very existence. But, just as this does not mean that the victims of Myanmar's genocide are the "real" Applicants, neither do the references to the OIC, or the United Nations, negate the reality that The Gambia, in law and fact, is the applicant State. The Court's jurisdiction *ratione personae* is therefore fully established.

33. Madam President, I turn now to Myanmar's alternative argument that the Court should decline to exercise jurisdiction on grounds of admissibility. Here, I can be brief. There are no grounds whatsoever for declining to exercise jurisdiction. There is no indispensable third party. The case does not concern a matter in which The Gambia lacks a legal interest. And, as Mr. Reichler showed, far from being moot or hypothetical, the case, and the provisional measures Order, continue to provide the Rohingya who remain in Myanmar with the Court's protection at a time of acute vulnerability.

34. Myanmar knows this, so it argues the case is an abuse of process. An abuse of process? Myanmar argued on Monday that this is because The Gambia has supposedly brought the case for

[45] See UN HRC, "Detailed findings of the Independent International Fact-Finding Mission on Myanmar", doc. A/HRC/42/CRP.5, 16 Sept. 2019, paras. 40, 702; MG, Vol. III, Annex 49.

"aims alien to those for which the procedural rights have been granted"[46]. But Myanmar did not dare remind you of the actual aims of the procedural rights set out in Article IX. They are, of course, to allow States parties judicial recourse to prevent and punish the crime of genocide. Those are precisely the objectives of this case.

35. This was recognized by the Secretary-General of the United Nations, who welcomed the Court's Order on provisional measures[47]. The Secretary-General also cited the case as an example of the appropriate use of peaceful means for the settlement of international disputes. That view is shared by the United Nations General Assembly, which also welcomed the Court's action[48]. And, it is shared as well by the Office of the United Nations High Commissioner for Human Rights, which described the "proceedings before the Court" as being "vitally important"[49].

36. Madam President, these facts lead to only one conclusion: The Gambia is the Applicant ***State***. There is no basis to strip it of that role, or to deny its right to bring this case as a sovereign State that is a party both to the Statute of the Court and the Genocide Convention. There is no merit whatsoever to Myanmar's first preliminary objection and it must be rejected, as it was in the Court's January 2020 Order.

37. Madam President, Members of the Court, this concludes my presentation. Thank you very much for your kind attention. I ask~~ed~~ that you invite Professor d'Argent to the podium to address Myanmar's second preliminary objection.

The PRESIDENT: I thank Mr. Loewenstein. And I now invite Professor Pierre d'Argent to address the Court. You have the floor, Professor.

---

[46] See CR 2022/1, p. 25, para. 53 (Staker).

[47] See United Nations, press release, "Secretary-General Welcomes International Court of Justice Order on *The Gambia* v. *Myanmar* Genocide Convention Case", 23 Jan. 2020 (emphasis added); WOG, Annex 3.

[48] UNGA, "Resolution adopted on 31 December 2020 on Situation of human rights of Rohingya Muslims and other minorities in Myanmar", doc. A/RES/75/238, 4 Jan. 2021, available at https://undocs.org/en/A/RES/75/238.

[49] Spokesperson for the United Nations High Commissioner for Human Rights, "Press briefing note on Myanmar", 24 Jan. 2020, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25497&LangID=E.

M. D'ARGENT : Merci, Madame la présidente.

IV. LA GAMBIE A QUALITÉ POUR AGIR ET LA DEUXIÈME EXCEPTION PRÉLIMINAIRE DU MYANMAR DOIT ÊTRE REJETÉE

1. Madame la présidente, Mesdames et Messieurs les juges, c'est toujours un honneur de prendre la parole devant vous et de le faire, aujourd'hui encore, au soutien de la Gambie.

2. Selon la deuxième exception préliminaire du Myanmar, la requête gambienne serait irrecevable faute, pour la Gambie, d'avoir qualité pour agir en l'espèce. Comme les trois autres exceptions préliminaires du Myanmar, cette deuxième exception avait déjà été soulevée lors du stade conservatoire. En revanche, ce qui est nouveau depuis les audiences de lundi, c'est la raison avancée par le Myanmar au soutien de cette exception.

3. Je voudrais m'y arrêter dans la première partie de mon exposé. J'aborderai ensuite la question de l'«intérêt commun» qui caractérise les obligations *erga omnes (partes)*, et sa signification en lien avec cette affaire. Dans un troisième temps, je reviendrai sur la question de la qualité pour agir à proprement parler. Je terminerai, dans un quatrième temps, par un bref examen de l'article IX de la convention compte tenu de ce que le Myanmar en a dit dans ses écritures au sujet de la qualité de la Gambie pour agir.

1. La nouvelle approche du Myanmar : nationalité des réclamations et invocation de la responsabilité internationale

4. Madame la présidente, lors des audiences de décembre 2019, le Myanmar ne contestait pas le droit de la Gambie d'invoquer sa responsabilité internationale. Votre ordonnance de janvier 2020 le relevait expressément : «[l]e Myanmar admet que, en raison du caractère *erga omnes partes* de certaines obligations imposées par la convention sur le génocide, la Gambie a un intérêt à ce qu'il s'acquitte de ces obligations»[50]. Le Myanmar admettait donc que la Gambie pouvait invoquer sa responsabilité internationale. En revanche, le Myanmar contestait la qualité de la Gambie pour agir devant la Cour, c'est-à-dire pour vous soumettre le différend né de cette invocation.

[50] *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. 16, par. 39 (ci-après l'«ordonnance de mesures conservatoires»).

5. Cela débouchait sur l'impasse un peu absurde selon laquelle ce différend pouvait naître et exister à la suite de l'invocation de la responsabilité du Myanmar, mais qu'il n'était pas susceptible d'être soumis à la Cour pour jugement. Quoi qu'il en soit, lors du stade conservatoire, et aussi dans ses écritures à l'appui de ses exceptions préliminaires, le Myanmar soutenait que la Gambie n'avait pas qualité pour agir devant la Cour car l'article IX de la convention exclurait toute *actio popularis*. Comme je l'ai annoncé, j'y reviendrai dans la dernière partie de ma plaidoirie.

6. Mais depuis, ayant changé de gouvernement et de conseils, le Myanmar a modifié son argumentation juridique. Il soutient désormais que la Gambie n'aurait même pas qualité pour invoquer la responsabilité internationale du Myanmar. Pourquoi ? Parce que les Rohingya persécutés et tués par le Myanmar n'avaient pas la nationalité gambienne.

7. Oui, Mesdames et Messieurs de la Cour, vous m'avez bien entendu : la Gambie ne pourrait pas invoquer la responsabilité du Myanmar, et dès lors n'aurait pas qualité pour porter le présent différend devant vous, car les victimes des «clearance operations» des Tatmadaw n'avaient pas la nationalité gambienne.

8. Si ce n'était tragique, je pourrais ironiser et rappeler au professeur Talmon que les Rohingya — qu'il refuse obstinément de nommer par leur nom — n'avaient pas non plus la nationalité birmane puisqu'ils en ont été privés par la loi de 1982[51], mais je préfère reprendre mot pour mot ce qu'il vous a dit lundi. Je le cite :

> «[t]he 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 *erga omnes* obligation … 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.»[52]

9. Madame la présidente, il ne faut pas réfléchir très longtemps pour apercevoir le caractère absurde, voire abject, de cette thèse juridique appliquée à la convention sur le génocide. A suivre le Myanmar, aucun Etat partie à la convention ne serait en droit d'invoquer la responsabilité d'un autre Etat partie aussi longtemps que ce dernier exécute méticuleusement son projet génocidaire en s'en prenant exclusivement à ses propres nationaux. On sait bien pourtant que les génocides commencent généralement à l'intérieur des pays et qu'ils sont le plus souvent dirigés contre des ressortissants de

[51] Voir mémoire de la Gambie (MG), vol. I, par. 6.13-6.21.

[52] CR 2022/1, p. 35, par. 45-46 (Talmon).

l'Etat génocidaire formant un groupe national, ethnique, racial ou religieux. Souvent aussi, comme c'est le cas pour les Rohingya, les membres du groupe qui est l'objet du projet génocidaire sont identifiables car ils sont privés de la nationalité de l'Etat où ils vivent et qui les persécute tandis qu'ils ne sont ressortissants d'aucun autre pays. Peut-on sérieusement soutenir, Mesdames et Messieurs les juges, qu'il est conforme à l'objet et au but de la convention de refuser dans ces cas à tout autre Etat partie la qualité pour invoquer la responsabilité de l'Etat auteur des violences génocidaires ?

10. Je souligne que la thèse du professeur Talmon a pour conséquence non seulement de mettre à l'abri de toute invocation de responsabilité l'Etat qui commet un génocide à l'encontre des membres d'un groupe ayant sa nationalité, mais également de protéger contre toute semblable invocation l'Etat génocidaire ciblant les membres d'un groupe ayant la nationalité d'un ou plusieurs Etats tiers à la convention. En effet, dans un tel cas, aucun Etat partie ne pourrait non plus agir, à défaut pour les victimes d'avoir la nationalité de l'un d'entre eux.

11. Madame la présidente, Mesdames et Messieurs les juges, la thèse que le Myanmar vous a présentée lundi est non seulement absurde, abjecte et profondément contraire à l'objet et au but de la convention, mais elle est aussi erronée au regard des principes juridiques sur lesquels elle est prétendument fondée.

12. Que dit en effet l'article 44 *a)* des Articles sur la responsabilité internationale des Etats sur lequel le Myanmar fait fond ? Il dit ceci : «[l]a responsabilité de l'Etat ne peut pas être invoquée si … [l]a demande n'est pas présentée conformément aux règles applicables en matière de nationalité des réclamations»[53]. Cette disposition ne dit donc pas qu'il existerait une «nationality of claims rule»[54] qui serait applicable de manière générale et à toute réclamation interétatique. ***Non, ce n'est pas cela qu'elle dit cette règle.*** Cette disposition rappelle seulement que lorsque les règles en matière de nationalité des réclamations sont applicables, l'invocation de la responsabilité d'un Etat par un autre Etat y est subordonnée. Paraphrasant l'article 44, le commentaire de la Commission du droit international auquel le professeur Talmon s'est pourtant référé explique que la «règle de la nationalité des réclamations … est une condition générale de l'invocation de la responsabilité *dans les cas où*

[53] Assemblée générale des Nations Unies, *Responsabilité de l'Etat pour fait internationalement illicite*, Nations Unies, doc. A/RES/56/83 du 28 janvier 2002, art. 44.

[54] CR 2022/1, p. 35, par. 43 (Talmon).

elle est applicable»[55]. La Gambie soutient que, dans le cas de la convention sur le génocide, une telle règle n'est à l'évidence pas applicable.

13. La règle de la nationalité des réclamations n'est en effet pas applicable car rien dans le texte de la convention ne donne à penser qu'elle le serait et surtout, comme je viens de le montrer, parce qu'il serait contraire à l'objet et au but de la convention d'y subordonner les réclamations entre Etats parties. Faut-il rappeler que le génocide est, selon la résolution 96 (I) de l'Assemblée générale, contraire «à l'esprit et aux fins des Nations Unies» et qu'il «bouleverse la conscience humaine» en «inflige[ant] de grandes pertes à l'humanité»[56] par la destruction totale ou partielle d'un groupe national, ethnique, racial ou religieux, quelle que soit la nationalité ou l'absence de nationalité des membres de ce groupe ? Que deviendrait cette *ratio legis* essentielle et universelle que votre ordonnance en indication de mesures conservatoires a rappelée[57], si l'argument du Myanmar devait être retenu ?

14. Le Myanmar n'a fait aucune référence à l'objet et au but de la convention lorsqu'il a soutenu que la règle de la nationalité des réclamations lui était applicable. Ce silence est éloquent et la volte-face du Myanmar au sujet de la prétendue impossibilité pour la Gambie d'invoquer sa responsabilité internationale est non seulement malencontreuse mais aussi très mal fondée. En réalité, comme le Myanmar l'admettait en décembre 2019, mais ne paraît plus l'admettre, la Gambie a bien ~~***un***~~ intérêt à ce qu'il s'acquitte des obligations de la convention et cet intérêt existe en raison du caractère *erga omnes partes* de ces obligations[58].

2. Intérêt commun et obligations *erga omnes (partes)*

15. Madame la présidente, Mesdames et Messieurs les juges, le Myanmar ne conteste pas le caractère *erga omnes partes* des obligations de la convention qui sont au cœur du présent différend. Sans confronter votre jurisprudence — qui est bien établie, bien fixée à cet égard, et que vous avez rappelée dans l'ordonnance de janvier 2020 —, le Myanmar en minimise toutefois la portée et il

---

[55] Commission du droit international, Projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite, commentaire de l'article 44, *Annuaire de la Commission du droit international*, 2001, vol. II, deuxième partie, p. 129, par. 2 (les italiques sont de nous). Voir aussi CR 2022/1, p. 35, par. 44 (Talmon).

[56] Assemblée générale des Nations Unies, *Le crime de génocide*, Nations Unies doc. A/RES/96(I) du 11 décembre 1946. MG, vol. II, annexe 4.

[57] Voir ordonnance de mesures conservatoires, p. 26, par. 69.

[58] Voir *ibid*., p. 16, par. 39.

soutient que l'existence d'un «intérêt commun» au respect de la convention ne saurait constituer un intérêt juridique individuel («an individual legal interest»[59] — pour reprendre les mots du professeur Talmon) susceptible d'être revendiqué devant la Cour, ce que votre jurisprudence, selon le Myanmar, n'aurait jamais admis comme tel[60] et qu'elle aurait en réalité, selon le Myanmar encore, mis en doute à l'occasion de l'affaire *Bosnie c. Serbie*[61].

16. Pourtant, depuis l'avis consultatif de 1951, votre jurisprudence enseigne que, dans une convention comme celle sur le génocide, «les Etats contractants n'ont *pas* d'intérêts propres»[62]. Le Myanmar cherche donc dans votre jurisprudence quelque chose que la Cour a exclu il y a plus de soixante-dix ans : lorsqu'il est question de la convention sur le génocide, il ne saurait être question d'intérêt juridique individuel et, comme l'avis consultatif l'indiquait déjà, «l'intérêt commun» des Etats contractants leur appartient à «tous *et chacun*»[63]. Cela ne signifie nullement que chaque Etat partie serait dépourvu d'un intérêt au respect de la convention ; bien au contraire, l'Etat partie invoquant la responsabilité d'un autre Etat lié par la convention possède bien un intérêt pour ce faire ; toutefois, son intérêt n'a rien de particulier à cet Etat lui-même. Cet intérêt, partagé par tous les autres Etats parties, est de voir l'intérêt commun à assurer la prévention et la répression du génocide pleinement protégé. Comme vous l'avez souligné dans votre ordonnance de janvier 2020, «[c]et intérêt commun implique que les obligations en question s'imposent à tout Etat partie à la convention à l'égard de tous les autres Etats parties»[64], c'est-à-dire à l'égard de chacun d'entre eux. Vous en avez déduit, au paragraphe 41 de votre ordonnance,

> «que tout Etat partie à la convention sur le génocide, et non pas seulement un Etat spécialement affecté, peut invoquer la responsabilité d'un autre Etat partie en vue de faire constater le manquement allégué de celui-ci à ses obligations *erga omnes partes* et de mettre fin à ce manquement»[65].

---

[59] CR 2022/1, p. 31, par. 26 (Talmon).

[60] Voir *ibid*., p. 29-30, par. 17 (Talmon).

[61] Voir *ibid*., p. 30, par. 19, et p. 33, par. 34 (Talmon).

[62] *Réserves à la convention pour la prévention et la répression du crime de génocide, avis consultatif, C.I.J. Recueil 1951*, p. 23 (les italiques sont de nous).

[63] *Ibid.* (les italiques sont de nous).

[64] Ordonnance de mesures conservatoires, p. 17, par. 41.

[65] *Ibid.*

17. Le professeur Talmon a mis en doute votre prononcé et il vous a invité à le reconsidérer. Selon lui, «a careful rethink»[66] serait nécessaire car vous n'auriez pas eu le bénéfice d'un débat contradictoire, la Cour s'étant prononcée au stade conservatoire. Alors, il est vrai que le professeur Talmon n'était pas conseil du Myanmar à l'époque et que les arguments nouveaux qu'il a développés n'avaient pas été formulés par le Myanmar, mais je tiens toutefois à le rassurer : le principe du contradictoire est assuré à tous les stades de la procédure devant la Cour et il le fut bien entendu en décembre 2019.

18. Par ailleurs, il est erroné de soutenir que le paragraphe 41 de votre ordonnance ne concerne que le droit d'invoquer la responsabilité et non la qualité pour agir[67]. En effet, ce paragraphe clôt la deuxième partie de l'ordonnance, dont le titre porte précisément sur la «question de la qualité pour agir de la Gambie»[68].

19. Le professeur Talmon ajoute que le paragraphe 41 de l'ordonnance ne tient pas compte des exigences de la règle relative à la nationalité des réclamations, mais j'ai déjà souligné combien cette règle n'était pas applicable aux réclamations entre Etats parties à la convention sur le génocide.

20. Le paragraphe 91 de l'arrêt de la *Barcelona Traction* invoqué par le professeur Talmon[69] ne vient pas remettre en cause cette conclusion car la Cour y compare les instruments universels des droits de l'homme protégeant contre le déni de justice à la convention européenne des droits de l'homme ; il n'est nullement question dans ce paragraphe de la convention sur le génocide.

21. Le Myanmar soutient encore que l'arrêt *Belgique c. Sénégal* ne serait d'aucune aide à la Gambie car la Cour n'aurait pas eu besoin d'examiner lors de cette affaire si la règle de la nationalité des réclamations limitait la qualité pour agir de la Belgique, l'Etat demandeur s'étant limité à invoquer la responsabilité du Sénégal pour violation d'obligations de nature répressive[70]. Pourtant, l'arrêt de 2012 souligne clairement, au sujet des obligations *erga omnes partes* que «[s]i un intérêt particulier était requis» afin de pouvoir «demander qu'un autre Etat partie, qui aurait manqué auxdites obligations, mette fin à ces manquements», alors «aucun Etat ne serait, dans bien des cas,

---

[66] CR 2022/1, p. 36, par. 51 (Talmon).

[67] Voir *ibid.*, p. 36-37, par. 52 (Talmon).

[68] Ordonnance de mesures conservatoires, p. 16.

[69] Voir CR 2022/1, p. 36-37, par. 52 (Talmon).

[70] Voir *ibid*., p. 36, par. 49, et p. 37, par. 53 (Talmon).

en mesure de présenter une telle demande»[71]. Le Myanmar recherche précisément ce que la Cour a voulu éviter par l'arrêt de 2012.

22. Le Myanmar convoque aussi l'arrêt de 2007 dans l'affaire *Bosnie c. Serbie* au soutien de sa thèse relative à la nationalité des réclamations[72]. Mais qu'a décidé la Cour à ce sujet dans cette affaire ? Qu'elle n'avait pas à trancher la question de savoir si la règle de la nationalité des réclamations limitait le droit de la Bosnie de formuler des demandes au sujet d'actes infligés à des non-Bosniaques hors de son territoire, faute de preuves à cet égard[73]. Pour le reste, la Cour a dit ceci :

> «Dans la mesure où cette demande viserait des victimes non bosniaques, elle pourrait soulever certaines interrogations quant à l'intérêt juridique ou à la qualité pour agir du demandeur à l'égard de telles questions et quant au caractère de *jus cogens* qui s'attache aux normes pertinentes et au caractère *erga omnes* que revêtent les obligations pertinentes.»[74]

Que faut-il retenir de cette phrase ? Que l'intérêt juridique et la qualité pour agir sont mis sur le même pied et que l'un et l'autre dépendent nécessairement du caractère *erga omnes* des obligations de la convention et du caractère impératif de ses normes. La Gambie ne dit rien d'autre et la Cour a rappelé dans l'ordonnance de janvier 2020 que les obligations de la convention sont, en effet, *erga omnes partes*.

3. La qualité pour agir

23. Madame la présidente, Mesdames et Messieurs les juges, la Gambie a bien qualité pour invoquer la responsabilité du Myanmar et elle a aussi qualité pour agir en l'espèce. La Gambie reconnaît que cette dernière question se pose quelle que soit la base de compétence utilisée et la Gambie admet aussi qu'il s'agit d'une exigence générale applicable au contentieux devant la Cour[75].

24. Mais qu'est-ce que la qualité pour agir ? Depuis l'affaire du *Wimbledon*[76], la qualité pour agir n'est rien d'autre que l'intérêt pour le respect des règles qui sont au cœur du différend,

---

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

[72] Voir CR 2022/1, p. 30, par. 19, et p. 33, par. 34 (Talmon).

[73] Voir *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. 120, par. 185, et p. 193-194, par. 368-369.

[74] *Ibid*., p. 120, par. 185.

[75] Voir G. Gaja, «Standing: International Court of Justice (ICJ)», *Max Planck Encyclopedia of International Procedural Law*, June 2018, OUP.

[76] Voir *Vapeur* Wimbledon, *arrêts, 1923, C.P.J.I. série A n° 1*, p. 20. Voir aussi G. Gaja, «Standing: International Court of Justice (ICJ)», *Max Planck Encyclopedia of International Procedural Law*, June 2018, OUP.

c'est-à-dire l'intérêt qu'une partie à un différend a à voir ce différend résolu par application de ces règles[77]. Si cet intérêt existe, la qualité pour agir est établie.

25. En cas d'obligation bilatérale, la qualité pour agir dérive de l'intérêt concret et particulier poursuivi par l'action en justice. Mais lorsque les obligations qu'il faut appliquer pour résoudre le différend sont *erga omnes partes*, c'est l'inverse : c'est alors la qualité de partie à l'instrument portant ces obligations qui «établit l'intérêt pour agir»[78]. Cet intérêt est le même pour tous les Etats parties à la convention car ils ont chacun, pour reprendre vos mots, «un intérêt commun à assurer la prévention des actes de génocide et, si de tels actes sont commis, à veiller à ce que leurs auteurs ne bénéficient pas de l'impunité»[79].

26. Comme la Cour l'a déjà souligné, le propre des obligations *erga omnes partes* tient au fait que «quelle que soit l'affaire, chaque Etat partie a un intérêt à ce qu'elles soient respectées»[80]. Ces mots («quelle que soit l'affaire») s'opposent à «dans un cas déterminé»[81] et ces mots sont la traduction de «in any given case». Le professeur, puis juge, Giorgio Gaja insista sur cette particularité des obligations *erga omnes* dans son rapport à l'Institut de droit international[82]. C'est parce que les circonstances propres à chaque affaire n'ont aucune incidence sur l'intérêt de chaque Etat à voir les obligations en cause respectées que celles-ci ont un caractère *erga omnes (partes)*.

27. Dès lors, chaque Etat non directement lésé a l'intérêt requis pour invoquer la responsabilité de l'Etat auteur de la violation de telles obligations. Lorsque cette invocation débouche sur un différend, comme c'est le cas en l'espèce, l'article IX de la convention ouvre le prétoire de la Cour à l'une quelconque des parties à ce différend. Si la saisine de la Cour est le fait d'un Etat non lésé

---

[77] Voir G. Gaja, «Standing: International Court of Justice (ICJ)», *Max Planck Encyclopedia of International Procedural Law*, June 2018, OUP ; M. Longobardo, «The Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: Lessons Learned and Future Implications in Light of The Gambia *v.* Myanmar and Beyond», *International Community Law Review*, 2021, p. 9-11 ; 21-24.

[78] C. Santulli, *Droit du contentieux international*, 2e éd., LGDJ, 2015, par. 412-418.

[79] Ordonnance de mesures conservatoires, p. 17, par. 41.

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

[81] *Barcelona Traction, Light and Power Company, Limited (nouvelle requête : 1962) (Belgique c. Espagne), deuxième phase, arrêt, C.I.J. Recueil 1970*, p. 32, par. 35.

[82] En ce sens, voir G. Gaja, «Obligations and Rights Erga Omnes in International Law», First Report, *Annuaire de l'Institut de droit international*, session de Cracovie (2005), vol. 71, no 1, p. 121.

partie au différend, sa qualité pour agir tient à l'intérêt qu'il a, en commun avec les autres Etats parties à la convention, à la voir respectée.

4. La compétence de la Cour au titre de l'article IX de la convention s'étend aux différends soumis par des Etats non directement lésés

28. J'en arrive à la dernière partie de ma plaidoirie, Madame la présidente, Mesdames et Messieurs les juges. L'article IX de la convention est une clause compromissoire particulièrement claire et non ambigüe. Ainsi que l'ordonnance de janvier 2020 l'a rappelé, l'article IX régit deux choses : votre compétence et votre saisine[83]. Vous connaissez bien l'article IX, aussi je n'en donnerai pas lecture, me contentant pour rappel, ~~***vous le voyez,***~~ de le projeter à votre écran[84]. Selon l'article IX, votre compétence s'étend aux différends nés entre parties à la convention au sujet des obligations de celle-ci, sans aucune condition procédurale préalable et sans aucune limitation tenant aux Etats parties à ces différends, si ce n'est le fait qu'ils doivent, bien entendu, être liés par la convention. Par ailleurs, l'article IX indique que de tels différends peuvent être soumis à la Cour pour règlement par l'une des parties au différend — et non, donc, par une partie à la convention qui ne serait pas partie au différend. Comme je le disais, tout cela est limpide.

29. Pourtant, dans ses écritures au soutien de ses exceptions préliminaires, le Myanmar prétend à titre principal que «[t]he Gambia lacks standing»[85] parce que l'article IX de la convention exclurait toute *actio popularis*. Sous couvert d'un prétendu défaut de qualité pour agir, le Myanmar soulève ainsi en réalité une exception d'incompétence[86] puisqu'il soutient que l'article IX de la convention ne permettrait pas à la Cour de statuer sur la demande soumise par un Etat partie lorsque ce dernier n'est pas directement et personnellement préjudicié par les actes qu'il dénonce. Selon le Myanmar, l'*actio popularis* serait matériellement exclue de l'article IX, de telle manière que le consentement donné par cet article à votre compétence ne couvrirait pas ce type d'action.

30. Au soutien de cette thèse, le Myanmar brode dans ses écritures des arguments spécieux autour de mots qui sont absents de l'article IX ou de différences entre les articles VIII et IX alors que

---

[83] Voir ordonnance de mesures conservatoires, p. 10, par. 20, et p. 15, par. 35.

[84] Voir convention pour la prévention et la répression du crime de génocide, Nations Unies, *Recueil des traités (RTNU)*, vol. 78, p. 283, art. IX. MG, vol. II, annexe 1.

[85] EPM, p. 65.

[86] Voir Y. Shany, «The taxonomical challenge», *Questions of Jurisdiction and Admissibility before International Courts*, CUP, 2015, p. 129-147.

ces dispositions ont des objets différents. Un point central de l'argument du Myanmar, que je ne répéterai pas intégralement, tient au fait que l'article IX ne concernerait pas «tout différend» («all disputes» ou «any disputes»), mais seulement «[l]es différends» («Disputes»)[87]. Vous n'avez pratiquement rien entendu à ce sujet lundi, seul le professeur Kolb faisant vaguement référence à cet argument lorsqu'il a contrasté l'article IX avec l'article 24 de la convention européenne des droits de l'homme[88].

31. Même si le Myanmar a donc probablement perçu la faiblesse de ses arguments écrits puisqu'il les a, sur ce point, largement abandonnés, je tiens néanmoins à rappeler que l'article IX commence par les mots «[l]es différends» («Disputes» en anglais), au pluriel, de manière indéterminée et donc inclusive. La disposition exige que les différends en question existent entre des parties contractantes et qu'ils soient «relatifs à l'interprétation, l'application ou l'exécution de la présente Convention», ce qui englobe les différends «relatifs à la responsabilité d'un Etat en matière de génocide ou de l'un quelconque des autres actes énumérés à l'article III»[89]. Il suffit qu'un tel différend existe pour qu'une partie à celui-ci puisse le soumettre à la Cour, pourvu bien sûr que les deux parties à ce différend soient liées par l'article IX. Le sens ordinaire des termes utilisés dans l'article IX ne laisse aucun doute : aucune différence n'y est faite entre les possibles différends relatifs aux obligations de la convention ni entre les Etats contractants parties à ces différends, selon qu'ils soient ou non directement lésés.

32. L'interprétation de l'article IX proposée par le Myanmar est donc non seulement contraire au sens ordinaire des mots qui y sont utilisés et à leur contexte, mais elle heurte aussi, à nouveau, l'objet et le but de la convention.

33. Malgré la clarté du texte de l'article IX, le Myanmar soutient encore dans ses écritures que l'interprétation tortueuse qu'il en propose serait prétendument confirmée par les travaux préparatoires de la convention[90]. Nos écritures ont amplement répondu à la lecture partielle des

---

[87] EPM, par. 262-266.

[88] CR 2022/1, p. 46, par. 36 (Kolb).

[89] Convention pour la prévention et la répression du crime de génocide, *RTNU*, vol. 78, p. 283, art. IX. MG, vol. II, annexe 1.

[90] Voir EPM, par. 277-295.

travaux développée par le Myanmar et je me permets de vous y référer, d'autant que le Myanmar n'en a rien dit lors de l'audience de lundi[91].

34. Enfin, afin d'être complet au sujet de l'article IX, j'ajouterai que vous avez été saisis par la Gambie du différend qui l'oppose au Myanmar ; cette saisine n'est pas le fait d'un autre Etat lié par la convention qui ne serait pas partie au différend. Les élémentaires conditions de l'article IX sont donc toutes remplies.

35. Madame la présidente, Mesdames et Messieurs de la Cour : pour les raisons que je viens d'exposer, mais également celles développées dans nos écritures, la deuxième exception préliminaire du Myanmar doit être rejetée.

36. Je vous remercie de votre attention. Puis-je vous demander, Madame la présidente, de bien vouloir inviter M[e] Pasipanodya à prendre la parole, mais peut-être souhaiterez-vous le faire après la pause ?

The PRESIDENT: I thank Prof. d'Argent. 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 p.m. to 3.15 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now give the floor to Ms Tafadzwa Pasipanodya. You have the floor, Madam.

Ms PASIPANODYA:

V. ARTICLE VIII DOES NOT GOVERN THE SEISIN OF THE COURT AND MYANMAR'S THIRD PRELIMINARY OBJECTION MUST BE REJECTED

1. Madam President, Members of the Court, it is a privilege to appear before you again on behalf of The Gambia in its efforts to hold Myanmar to account for the genocide of the Rohingya people.

2. In Myanmar's third objection, it argues that The Gambia's Application is inadmissible because "The Gambia, as a non-injured Contracting Party to the Genocide Convention, may not seise

[91] Voir EPM, par. 3.31-3.41.

the Court with a case arising under that Convention since Myanmar, when acceding to the Convention, has entered a reservation to its Article VIII"[92].

3. Struggling for a way to extend its reservation to Article VIII of the Convention to Article IX — an Article to which it has no reservation — Myanmar argues that The Gambia's ability to seise the Court to resolve its dispute with Myanmar under Article IX is somehow governed by Article VIII[93]. Article VIII, however, is irrelevant to the seisin of the Court.

4. The Court made this clear in its Order of 23 January 2020, when it rejected Myanmar's objection on a prima facie basis[94]. It ruled that Article VIII and Article IX have "distinct areas of application" and that "[i]t is only Article IX of the Convention which is relevant to the seisin of the Court in the present case"[95]. There have been no changes to Article VIII or Article IX since the Court issued its Order a little over two years ago. There are no new facts that could cause the Court to reach a different interpretation of these Articles.

5. Myanmar itself offers nothing new. Instead, it asks the Court to reverse its determination on the basis of a purportedly "in-depth analysis"[96]. But Myanmar has not been able to present a single authority, of any sort, to support its peculiar view that Article VIII governs the seisin of the Court to hear a dispute between Contracting Parties under Article IX. As explained in The Gambia's Written Observations, and as I will recall briefly today, the terms of Article VIII, its object and purpose, as well as the preparatory works of the Convention, demonstrate that Article VIII governs appeals to United Nations organs at a political level — it has no bearing on the seisin of the Court to resolve a legal dispute between State parties.

6. I begin with the ordinary meaning of the terms of Article VIII.

---

[92] POM, para. 28.

[93] See e.g. *ibid.*, para. 352: "This is due to the fact that a valid seisin of the Court is a mandatory precondition before a case may be brought before the Court under Article IX of the Genocide Convention. This seisin of the Court is governed, as confirmed by its wording, its drafting history, as well by its very object and purpose by Article VIII of the Convention."

[94] Provisional measures Order.

[95] *Ibid.*, para. 35. *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. 109, para. 159, holding that Article VIII "may be seen as completing the system [of the Genocide Convention] by supporting both prevention and suppression, *in this case at the political level rather than as a matter of legal responsibility*", emphasis added.

[96] POM, para. 456.

1. The ordinary meaning of the terms of Article VIII

7. Madam President, as you can see in the screen before you, Article VIII provides:

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."[97]

8. Upon Myanmar's accession to the Genocide Convention, it entered a reservation to Article VIII, stating: "With reference to Article VIII, the Union of Burma makes the reservation that the said Article shall not apply to the Union."[98]

9. Myanmar argues again, as it did at the hearing on the provisional measures, that the wording of Article VIII indicates that it is Article VIII, rather than Article IX, that enables a "non-injured" Contracting Party to the Convention to seise the Court to resolve a dispute with another Contracting Party[99]. The primary basis of Myanmar's argument is that the Court is one of the "competent organs of the United Nations"[100]. But, as the Court explained in its Order of 23 January 2020, "although the terms 'competent organs of the United Nations' under Article VIII are broad and may be interpreted as encompassing the Court within their . . . application, *other terms used in Article VIII suggest a different interpretation*"[101].

10. In particular, the Court noted that Article VIII "only addresses in general terms the possibility for any Contracting Party to 'call upon' the competent organs of the United Nations to take 'action' which is 'appropriate' for the prevention and suppression . . . of genocide"[102]. As the Court continued, Article VIII "does not refer to the submission of disputes between Contracting Parties to the Genocide Convention to the Court for adjudication"[103], which is a "matter specifically addressed in Article IX of the Convention"[104].

---

[97] Genocide Convention, Art. VIII.

[98] United Nations, "Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide: Ratification with Reservations by Burma", doc. C.N.25, 1956 Treaties, 29 Mar. 1956 (MG, Vol. II, Ann. 5).

[99] POM, paras. 390 and 399.

[100] *Ibid.*, paras. 374-380.

[101] Provisional measures Order, para. 35, emphasis added.

[102] *Ibid.*

[103] *Ibid.*

[104] *Ibid.*

11. Indeed, as The Gambia explained in its Written Observations, the Court, as a judicial institution, does not take "actions" under the Charter of the United Nations[105]. Rather, in exercising jurisdiction in contentious cases, the Court renders legal judgments in accordance with Article 38 (1) of the Statute[106]. Nor are the judgments based on what it considers "appropriate", as Article VIII requires: such judgments are rendered solely on the basis of international law[107]. The Court may only "decide a case *ex aequo et bono*, if the parties agree thereto"[108].

12. The conclusion that Article VIII does not address the seisin of the Court is further confirmed by its use of the words "call upon" to describe the Contracting Parties' engagement with the "competent organs of the United Nations". These words are employed in connection with appeals to the exercise of discretion[109]. The *Oxford English Dictionary* defines "call upon" as meaning "[t]o appeal to (a person, organization, etc.) to do something; to require, urge, or demand that (a person, organization, etc.) do something"[110]. "Call upon" is not a formulation that ordinarily describes the initiation of judicial proceedings, and even Myanmar does not attempt to suggest otherwise.

13. Instead, Myanmar invites the Tribunal to consider the French and Spanish versions of the Genocide Convention, which use "saisir" and "recurrir", respectively, for the term "call upon"[111]. The argument fares no better in these languages. Both terms are also commonly used to refer to appeals to political and security authorities, as reflected in the definitions of the terms that Myanmar itself submitted before the Court[112].

14. Madam President, the ordinary meaning of the terms of Article VIII simply do not permit the reading that the Article seeks to govern the seisin of the Court in a dispute between two Contracting Parties.

---

[105] WOG, paras. 4.10-4.16.

[106] Statute of the International Court of Justice, Art. 38 (1).

[107] *Ibid.*

[108] *Ibid.*, Art. 38 (2).

[109] WOG, paras. 4.17 and 4.18.

[110] *Oxford English Dictionary*, "to call upon" (last accessed 13 Apr. 2021) (WOG, Ann. 23, p. 73).

[111] POM, paras. 384-385.

[112] *Dictionnaire de l'Académie française*: "saisir" (POM, Ann. 31); Real Academia Española, *Diccionario de la lengua española*: "recurrir" (POM, Ann. 32).

2. Object and purpose of Article VIII

15. Neither do the object nor purpose of Article VIII offer assistance to Myanmar[113]. Myanmar contends that Article VIII "must be understood as regulating the right of a non-injured Contracting Party to bring a case" to the Court, otherwise Article VIII "would be devoid . . . of any meaningful object and purpose"[114]. But, as Judge Gaja explained in his commentary: "Article VIII could be construed as implying that all the contracting states accept that a matter referred to under Article VIII of the Convention does not pertain to domestic jurisdiction, and therefore as removing the barrier raised by Article 2 (7) of the UN Charter" to United Nations Security Council engagement[115].

16. In fact, Myanmar's parliamentary discussions upon ratifying the Genocide Convention demonstrate that its Article VIII reservation was motivated precisely by a concern about this sort of interference with its domestic jurisdiction. Myanmar explained that it entered reservations to Article VIII and Article VII (which preserves the rights of domestic courts to hear cases of genocide) because of its belief that "what happens internally in a country concerns the people of that country and . . . outside interference is undesirable for what happens internally in a state party"[116]. Significantly, at that time, Myanmar confirmed that except for Article VIII and Article VII of the Convention, it "supported all the other ones"[117]. The words "all the other ones" encompass Article IX.

3. *Travaux préparatoires*

17. I come to the third and final point of my submission, Madam President. The Genocide Convention's preparatory works confirm that Article VIII is unrelated to the seisin of the Court under Article IX. You heard Professor Kolb inform you on Monday that the *travaux préparatoires* of the Genocide Convention "confirm" that Article VIII governs all principal United Nations organs,

---

[113] POM, Sec. III.C.2.d.

[114] *Ibid.*, para. 438.

[115] Giorgio Gaja, "The Role of the United Nations in Preventing and Suppressing Genocide" in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary*, Oxford, Oxford University Press, 2008, p. 400 (WOG, Ann. 20); Charter of the United Nations, Art. 2 (7).

[116] Myanmar, Pyithu Hluttaw, Motion for the Union Government to ratify, with two reservations, the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations in 1948, 2 Sept. 1955 (original and unofficial translation) (POM, Ann. 127, p. 873).

[117] *Ibid.*

including the Court[118]. He omitted, however, discussion of any of this preparatory work because doing so would show quite the opposite: Article VIII was only intended to govern the political organs of the United Nations, and not the Court, which was addressed in Article IX.

18. Right from the outset of the drafting procedure, Article VIII and Article IX were envisioned as addressing distinct matters. In the 1947 draft text of the Convention prepared by the United Nations Secretariat, engagement of the United Nations organs was addressed in draft Article XII, the forerunner of what would become Article VIII, which was entitled "Action by the United Nations to Prevent or Stop Genocide"[119]. Significantly, the drafters elected to locate the compromissory clause in a different part of the Convention, then Article XIV, which bore the title "Settlement of Disputes on Interpretation or Application of the Convention"[120].

19. The Report of the Ad Hoc Committee records that draft Article VIII was "discussed at length when the Committee considered questions of principle" and "again when the Articles of the Convention were being drafted"[121]. Yet, there is no evidence that any of the participants ever suggested that Article VIII should govern the seisin of the Court. As Professor Kolb himself recognized on Monday, it would normally be "absurd" to consider that a compromissory clause such as Article IX would govern the competence of the Court but not its seisin[122]. Surely, then, the drafters' decision to adopt the "absurd" approach of placing the seisin of the Court in a separate article from that containing the compromissory clause would have warranted some discussion during the drafting negotiations. But none is evident. Nor is there any indication that the participants intended to establish different obligations for Contracting Parties to seise the Court depending on the extent to

---

[118] CR 2022/1, p. 41, para. 9 (Kolb).

[119] United Nations, Economic and Social Council (ECOSOC), *Draft Convention on the Crime of Genocide*, E/447, 26 June 1947, Art. XII, reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires*, Martinus Nijhoff, 2008, p. 218 (WOG, Ann. 5):

> "Irrespective of any provisions in the foregoing articles, should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes. In such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations."

[120] *Ibid.*, p. 219, providing "Disputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice".

[121] ECOSOC, Ad hoc Committee on Genocide, *Report of the Committee and Draft Convention drawn up by the Committee*, E/794 (24 May 1948), Art. VIII, reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1141 (WOG, Ann. 8).

[122] CR 2022/1, p. 45, para. 32 (Kolb).

which they were "injured" by genocidal acts. The text of Article VIII made no distinction between the ability of "injured" and "non-injured" Contracting Parties to appeal to the United Nations' organs, and evidently, the drafters saw no reason to consider, let alone adopt, such a distinction.

20. Instead, the debate on Article VIII centred on whether the article should refer specifically to the Security Council or instead not mention any specific political United Nations' organ. Those advocating the latter view argued that,

> "although the Security Council appeared to be the organ to which governments would most frequently wish to apply, it was undesirabl[e] to rule out the General Assembly, the Economic and Social Council or the Trusteeship Council. In some cases it would be of advantage to call on the General Assembly because it directly expressed the opinion of all Members of the United Nations, and because its decisions were taken by a majority vote with no risk of the right of veto preventing a decision."[123]

21. As is clear, the drafters only addressed political organs in their consideration of the scope of Article VIII: the General Assembly, the Economic and Social Council and the Trusteeship Council[124]. There was no mention whatsoever of the Court.

22. The preparatory works show that, later in the drafting process, the Sixth Committee decided to delete Article VIII by a small majority, on the basis of a joint amendment by Belgium and the United Kingdom suggesting that the article did not expand the powers of the United Nations' organs[125]. It was pursuant to an Australian amendment to Article IX, that Article VIII was reinstated at a subsequent meeting. The reasoning for the Australian amendment confirms that Article VIII was intended to address appeals to the political organs of the United Nations, rather than the Court, because recourse to the Court had already been established in Article IX (then numbered X). As recorded in the Sixth Committee: "The Australian delegation considered that a clause should be inserted in article X concerning organs of the United Nations *other than the International Court of Justice*, which could take useful action in suppressing genocide."[126]

---

[123] ECOSOC, Ad hoc Committee on Genocide, *Report of the Committee and Draft Convention drawn up by the Committee*, E/794 (24 May 1948), Art. VIII, reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 1142 (WOG, Ann. 8).

[124] See also Giorgio Gaja, 'The Role of the United Nations in Preventing and Suppressing Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford, OUP 2008), p. 401, observing that Article VIII is "meant to include" the Security Council as well as "the Trusteeship Council, the Economic and Social Council and the Secretariat" (WOG, Ann. 20).

[125] *Ibid.*, p. 400.

[126] UNGA, Sixth Committee, Third Session, 103rd Meeting, A/C.6/SR.103, 12 Nov. 1948, reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires*, Martinus Nijhoff 2008, p. 1760 (Mr. Dignam) (WOG, Ann. 10), emphasis added.

23. The purpose of reinserting Article VIII in the draft Convention was therefore precisely to allow recourse to the political organs of the United Nations, as distinguished from the Court. The United Kingdom's explanation for voting for the adoption of Article VIII, after having initially proposed its removal, further confirms that the article was intended to ensure recourse to the United Nations' political organs. The United Kingdom's delegate explained that "although his delegation considered it unnecessary to include in the convention provisions conferring on the organs of the United Nations powers which they already possessed under the terms of the Charter", it had voted in favour of the Australian amendment reinstating Article VIII "in order that it might be clear, beyond any doubt", that his prior amendment proposing the deletion of Article VIII "did not imply that recourse might be had only to the International Court of Justice, to the exclusion of the other competent organs of the United Nations"[127].

24. The drafting history of the Convention is thus clear about the allocation of respective functions of Articles VIII and IX: the former concerns access to the United Nations' political organs; the latter to the Court. This is consistent with the Court's holding in its 2007 Judgment in the *Bosnian Genocide* case that Article VIII "may be seen as completing the system [of the Genocide Convention] by supporting both prevention and suppression, *in this case at the political level rather than as a matter of legal responsibility*"[128].

25. Commentators on Article VIII have also concluded that Article VIII refers only to the United Nations' political organs. Dr. Schiffbauer, for example, explains in his commentary on Article VIII that,

> "[i]n contrast with the initiation of strictly judicial proceedings before the ICJ which is governed by the ICJ's Statute, referral to UN organs is a much more amorphous concept. *Referral under Article VIII can be seen as a more political procedure, which serves as an alternative weapon in achieving the prevention and punishment of the crime of genocide*"[129].

---

[127] UN General Assembly, Sixth Committee, Third Session, 105th Meeting, A/C.6/SR.105 (13 November 1948), reproduced in Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires*, Martinus Nijhoff 2008, p. 1797 (Mr. Fiztmaurice) (WOG, Ann. 12).

[128] *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. 109, para. 159, emphasis added.

[129] B. Schiffbauer, "Article VIII", in C. Tams *et al.* (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), para. 11 (POM, Ann. 28), emphasis added.

26. We refer to Dr. Schiffbauer's commentary, in particular, because Myanmar, in its written pleading, expressly relies on that commentary for the proposition that Article VIII must not be deprived of its meaningful object and purpose. But Myanmar neglected to mention that Dr. Schiffbauer wrote that "[r]eferral under Article VIII can be seen as a more political procedure", and that it stood "[i]n contrast with the initiation of strictly judicial proceedings before the ICJ"[130], which is covered by Article IX.

27. Nor does Myanmar mention Dr. Schiffbauer's conclusion that contradicts Myanmar's foundational argument that Article VIII governs the seisin of the Court in disputes concerning Contracting Parties. Consistent with the ordinary meaning of the terms of Article VIII, interpreted in context and in light of its object and purpose, Dr. Schiffbauer concludes: "Article VIII does not add to (nor diminish from) the Court's competences as defined by Article IX. *For the scope of the Court's competences, it is irrelevant*."[131]

28. Dr. Schiffbauer is not alone. Professor Kolb himself wrote in 2009 that seisin of the Court by a party to a dispute under the Convention is governed by Article IX, not Article VIII. In striking contrast with his insistence before you on Monday that Article VIII governs the seisin of the Court and is therefore "indispensable" for the Court's seisin in the present dispute[132], in his commentary on the Genocide Convention, before he was retained by Myanmar, Professor Kolb was unequivocal that *"Article IX allows a unilateral seizing of the ICJ by any party to a dispute"*[133]. Professor Kolb continued:

> "Moreover, it must be noticed that the compromissory clause in Article IX of the Genocide Convention contains no further limitations, e.g. as to previous negotiations. Such restrictive conditions may prompt delicate problems — all of which are avoided in the Genocide Convention. Article IX of the Convention is in this respect a model of clarity and simplicity, *opening the seizing of the Court as largely as possible*."[134]

---

[130] B. Schiffbauer, "Article VIII", in C. Tams *et al.* (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), para. 11 (POM, Ann. 28).

[131] *Ibid.*, para. 34.

[132] CR 2022/1, p. 44, paras. 23-25, 30, and 33-34 (Kolb).

[133] Robert Kolb, 'The Compromissory Clause of the Convention' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford, OUP 2009), p. 420, WOG, Ann. 21, emphasis added.

[134] *Ibid.*

29. Madam President, Members of the Court, for all of these reasons and those set out in The Gambia's Written Observations, the Court should once again reject Myanmar's third preliminary objection.

30. I thank you for your courteous attention and ask that you call my colleague, Mr. Arsalan Suleman, to address Myanmar's fourth preliminary objection.

The PRESIDENT: I thank Ms Pasipanodya. I now invite Mr. Arsalan Suleman to address the Court. You have the floor.

Mr. SULEMAN:

VI. A DISPUTE BETWEEN THE PARTIES EXISTED PRIOR TO THE APPLICATION AND MYANMAR'S FOURTH PRELIMINARY OBJECTION MUST BE REJECTED

1. Madam President, Members of the Court, it is an honour to address the Court and especially to do so again today as counsel for The Gambia.

2. In its fourth preliminary objection, Myanmar argues that the Court lacks jurisdiction, or alternatively, that the Application is inadmissible, because there was no dispute between The Gambia and Myanmar at the time of the filing of the Application.

3. This objection, like the others, is entirely without merit.

4. My presentation is organized in three parts. First, I briefly recall the Court's standards for determining the existence of a dispute. Second, I recount the clear factual bases that establish the existence of a dispute between The Gambia and Myanmar prior to the filing of the Application. And third, I identify the various ways in which Myanmar's new standards for determining the existence of a dispute would not only run contrary to the Court's jurisprudence, but would also functionally give respondent States a veto over the Court's exercise of jurisdiction and graft onto the Genocide Convention a new negotiations requirement.

1. The Court's standard for finding that a dispute exists

5. The Court's standards for establishing the existence of a dispute are well known. Indeed, the Court set them out in its Order of 23 January 2020 on provisional measures, so I need not dwell long on them.

6. The Court has made clear that "[a] dispute between States exists where they hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations"[135]. Also, a "dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant"[136].

7. The "disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other" can be established expressly or by inference[137]. The Court's use of the disjunctive "or" in this recitation of the pertinent standards makes clear that any one of those showings would establish the existence of a dispute. And a dispute can also be inferred from the respondent's failure to respond in circumstances where a response is called for[138].

8. The Court takes into account exchanges between the Parties in bilateral and multilateral settings[139]. The exchanges should refer to the subject-matter of the dispute with sufficient clarity[140].

9. These are the proper standards to be applied when the Court determines the existence of a dispute, and they are amply met by the facts in this case. On Monday, Mr. Staker outlined four requirements that Myanmar asserts are necessary to establish a dispute[141], but as discussed further below, these do not track with the Court's settled jurisprudence.

2. The facts that establish a dispute between The Gambia and Myanmar

10. Madam President, both the Parties' exchanges at the United Nations and The Gambia's Note Verbale of 11 October 2019 clearly demonstrate the existence of a dispute between The Gambia and Myanmar.

---

[135] Provisional measures Order, p. 10, para. 20.

[136] *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. 41.

[137] Provisional measures Order, p. 13, para. 27 (quoting *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89).

[138] *Ibid.*, para. 28.

[139] *Ibid.*, p. 12, para. 26.

[140] *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*, p. 85, para. 30.

[141] CR 2022/1, pp. 50-52, paras. 10-21 (Staker).

A. The Parties' exchanges at the United Nations demonstrate that a dispute exists

11. The manifestations of the Parties' dispute began in 2018. In May of that year, The Gambia led an effort at an OIC ministerial meeting in Dhaka to hold Myanmar accountable for its brutal violence against the Rohingya group. Myanmar reacted to this development with a statement from its Ministry of Foreign Affairs that "categorically reject[ed]" the allegations against Myanmar in the declaration issued at the end of that OIC ministerial meeting[142].

12. Four months later, on 12 September 2018, the United Nations Independent International Fact-Finding Mission on Myanmar ("UN Fact-Finding Mission" or "UN Mission") issued its landmark report finding that Myanmar's crimes in Rakhine State were "similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts"[143]. The UN Fact-Finding Mission delivered its report to Myanmar on 16 August and gave it seven days — till 23 August — to provide any comments or reactions. Myanmar provided none.

13. On 25 September, just two weeks after the release of the UN Mission's 2018 report, His Excellency Adama Barrow, President of The Gambia, delivered remarks at the United Nations General Assembly. He stated that "The Gambia has undertaken, through a Resolution, to champion an accountability mechanism that would ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book"[144].

14. Three days later, speaking at the same United Nations General Assembly forum, Myanmar's former Co-Agent in these proceedings, U Kyaw Tint Swe, dismissed the UN Mission's findings as "based on narratives and not on hard evidence"[145].

15. The Parties' exchanges continued into 2019, further demonstrating the clearly opposed views of The Gambia and Myanmar. First, OIC resolutions from March 2019, promoted by The Gambia, continued to condemn Myanmar's crimes, including genocide, against the Rohingya,

---

[142] Republic of the Union of Myanmar, Ministry of Foreign Affairs, "#Myanmar rebuts Dhaka Declaration's reference on situation in Rakhine State and calls for Bangladesh's sincere cooperation to start early repatriation", Twitter, 9 May 2018; MG, Vol. VI, Ann. 158.

[143] UN HRC, "Report of the independent international fact-finding mission on Myanmar", doc. A/HRC/39/64, 12 Sept. 2018, para. 85; MG, Vol. II, Ann. 39.

[144] UNGA, 73rd Session, 7th Plenary Meeting, "Address by Mr. Adama Barrow, President of the Republic of The Gambia", doc. A/73/PV.7, 25 Sept. 2018, p. 6; MG, Vol. III, Ann. 41.

[145] Republic of the Union of Myanmar, State Counsellor Office, "Statement by H.E. U Kyaw Tint Swe, Union Minister for the Office of the State Counsellor and Chairman of the Delegation of the Union of Myanmar at the General Debate of the 73rd Session of the United Nations General Assembly", 28 Sept. 2018, p. 4; WOG, Ann. 4.

and called for accountability. Myanmar, again, officially reacted to these resolutions, demonstrating its awareness of the opposing positions of the Parties.

16. Then in May 2019, in a statement at the conclusion of an OIC Summit Conference, the Member States of the OIC "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"[146].

17. The UN Fact-Finding Mission took notice of The Gambia's efforts and the OIC Summit statement regarding a potential claim before this Court. In its report of 8 August 2019, the UN Mission affirmed its conclusion "that Myanmar incurs State responsibility under the prohibition against genocide", and it "welcome[d] the efforts of . . . the Gambia . . . to encourage and pursue a case against Myanmar before the International Court of Justice under the [Genocide] Convention"[147]. Myanmar received a copy of this report for comment eight days in advance of its publication. It chose not to respond.

18. The UN Mission's detailed report of 16 September 2019 was also provided to Myanmar five days in advance. Again, Myanmar chose not to respond. The detailed report found that Myanmar "continues to harbour genocidal intent" and that "the Rohingya remain under serious risk of genocide"[148]. It also welcomed The Gambia's efforts to "pursue a case against Myanmar before the International Court of Justice (ICJ) under the Genocide Convention"[149].

19. These UN Fact-Finding Mission reports demonstrate both the existence and international recognition of the opposing views of The Gambia and Myanmar in regard to Myanmar's responsibility for genocide, and they provide the context for further statements by officials of The Gambia and Myanmar at the United Nations General Assembly meeting in September 2019.

---

[146] Organisation of Islamic Cooperation, "Final Communiqué of the 14th Islamic Summit Conference", doc. OIC/sum-14/2019/fc/final, 31 May 2019, para. 47; MG, Vol. VII, Ann. 205.

[147] UN HRC, "Report of the independent international fact-finding mission on Myanmar", doc. A/HRC/42/50, 8 Aug. 2019, paras. 18, 107; MG, Vol. III, Ann. 47.

[148] UN HRC, "Detailed findings of the Independent International Fact-Finding Mission on Myanmar", doc. A/HRC/42/CRP.5, 16 Sept. 2019, para. 140; MG, Vol. III, Ann. 49.

[149] *Ibid.*, para. 40.

20. At that General Assembly meeting, on 26 September 2019, Her Excellency Mrs Isatou Touray, Vice-President of The Gambia, announced The Gambia's intention "to lead concerted efforts to take the Rohingya issue to the International Court of Justice" under the Genocide Convention[150].

21. Two days later, Myanmar's former Co-Agent, U Kyaw Tint Swe, again dismissed the UN Mission's reports as "biased and flawed, based not on facts but on narratives" and he noted in particular that the "latest reports are even worse"[151].

22. As the Court concluded in its Order of January 2020, "these statements made by the Parties before the United Nations General Assembly suggest the existence of a divergence of views concerning the events which allegedly took place in Rakhine State in relation to the Rohingya"[152].

23. Indeed, that is certainly the case. The Gambia's actions and statements in 2018 and 2019 indicate that it agreed with the UN Fact-Finding Mission that genocidal acts were committed by Myanmar against the Rohingya, in violation of its obligations under the Genocide Convention, and that The Gambia would bring a case under the Convention to this Court to hold Myanmar accountable under the Convention. It was equally evident from Myanmar's statements and actions that it rejected such findings — which it had described as "biased and flawed" — regarding its treatment of the Rohingya.

24. In sum, taken as a whole, the Parties' exchanges at the United Nations demonstrate that they held clearly opposite views concerning Myanmar's fulfilment of its obligations under the Genocide Convention, and that they disagreed about the facts and legal implications of Myanmar's anti-Rohingya "clearance operations" in Rakhine state.

B. The Gambia's Note Verbale confirms the existence of a dispute

25. Madam President, by then there was no doubt about Myanmar's awareness of a dispute with The Gambia over compliance with its obligations under the Genocide Convention. The Gambia's Note Verbale of 11 October 2019 offers further confirmation.

---

[150] UNGA, 74th Session, 8th Plenary Meeting, "Address by Mrs Isatou Touray, Vice President of the Republic of The Gambia", doc. A/74/PV.8, 26 Sept. 2019, p. 31; MG, Vol. III, Ann. 51.

[151] UNGA, 74th Session, 12th Plenary Meeting, "Address by Mr. Kyaw Tint Swe, Union Minister for the Office of the State Counsellor of Myanmar", doc. A/74/PV.12, 28 Sept. 2019, p. 24; MG, Vol. III, Ann. 52.

[152] Provisional measures Order, p. 13, para. 27.

26. Mr. Staker asked the Court "to look at this two-page document"[153]. I agree; please do, as you deliberate over Myanmar's fourth preliminary objection. It is located in your judges' folder at tab 3.

27. Mr. Staker asked: "What facts does it refer to?" His answer was: "None at all."[154] That is an astonishing statement.

28. In clear terms, the Note Verbale invoked the findings of the UN Fact-Finding Mission regarding the ongoing Rohingya genocide and "in particular its findings regarding the ongoing genocide against the Rohingya people of [Myanmar] in violation of Myanmar's obligations under the [Genocide] Convention".

29. Mr. Staker asserts that there was "no suggestion that The Gambia had access to, or could itself evaluate, the FFM's evidence"[155]. Perhaps he forgets that the UN Fact-Finding Mission reports are public and contain literally hundreds of pages of findings of fact based on direct witness testimony from over 600 victims, satellite imagery and stakeholder consultations, among other sources of evidence[156], all of which support its conclusions that Myanmar committed acts of genocide against the Rohingya. Is it Mr. Staker's argument that unless The Gambia had compiled all of this evidence on its own, it could not rely on the UN Mission's evidence to assert facts that Myanmar disputed?

30. As regards the existence of a dispute on the law, Mr. Staker says "there is not even any positive allegation of The Gambia's own that Myanmar is in breach of international law"[157]. Yet again, the text of the Note Verbale, like the speech of The Gambia's Vice-President before the United Nations General Assembly, shows otherwise.

31. The Note, referring to the UN Fact-Finding Mission's findings, declared The Gambia's positive opposition to Myanmar's "absolute denial of those findings and its refusal to acknowledge

---

[153] CR 2022/1, p. 56, para. 42 (Staker).

[154] *Ibid.*, para. 43.

[155] *Ibid.*, para. 44.

[156] AG, paras. 11-13.

[157] CR 2022/1, p. 57, para. 48 (Staker).

and remedy its responsibility for the ongoing genocide against the Rohingya population of Myanmar, as required under the Genocide Convention and customary international law"[158].

32. In the Note, The Gambia rejected in explicit terms "Myanmar's denial of its responsibility for the ongoing genocide against Myanmar's Rohingya population, and its refusal to fulfil its obligations under the Genocide Convention and customary international law". The Note even refers back to and specifically incorporates the contents of the OIC resolutions of March 2019, including the language calling on Myanmar to honour its obligations under international law to cease all genocidal acts against the Rohingya.

33. And after noting its view that Myanmar was committing further breaches of the obligations under the Genocide Convention, The Gambia insisted that Myanmar take all necessary steps to comply with those legal obligations, including through making reparations to the victims and providing guarantees and assurances of non-repetition.

34. In summary, the Note Verbale explicitly articulated the Parties' clearly opposed views regarding Myanmar's fulfilment of its obligations under the Genocide Convention and customary international law as it relates to Myanmar's genocidal acts against the Rohingya. Myanmar does not deny having received the Note: in this way, it was absolutely aware of the dispute as articulated therein.

C. Myanmar's lack of response further confirms the existence of the dispute

35. Madam President, Myanmar's lack of response to the Note Verbale, in the face of grave allegations that merit a response, provides further indication that a dispute existed between the Parties. Thirty days passed from the time Myanmar received The Gambia's Note without a response, or any indication that one would be forthcoming. On the thirty-first day, with the existence of a dispute indisputably established, The Gambia filed its Application with the Court.

36. In reference to the Note Verbale, Mr. Staker also asked on Monday: "should Myanmar at the time have understood it as making a specific legal claim calling for a response?"[159] For this

---

[158] Note Verbale from Permanent Mission of the Republic of The Gambia to the United Nations to Permanent Mission of the Republic of the Union of Myanmar to the United Nations, No. GPM/NV241/Vol. 1(LY), 11 Oct. 2019; OG (2 Dec. 2019), Annex 1.

[159] CR 2022/1, p. 58, para. 61 (Staker).

question, we can rely on Myanmar's own representations to supply the answer. Its government spokesperson stated on 16 November 2019 that Myanmar "had expected over a month before that Myanmar could face a suit at [the] ICJ"[160]. Given this clear and unequivocal admission by the respondent State, its contention that it was unaware that a dispute existed at the time that The Gambia's Application was filed is entirely lacking in credibility, as is Mr. Staker's argument.

3. Myanmar's new legal standards depart from the Court's jurisprudence

37. Madam President, in the face of this incontrovertible evidence of the existence of a dispute between the Parties, under the Court's well-established standards, Myanmar now seeks to apply new, heightened standards for determining the existence of a dispute. These are contrary to the Court's jurisprudence, reflect bad policy and must be rejected.

38. First, in its written pleadings, Myanmar argues that as a general matter, or at least as regards cases such as this one, the Court's alternative grounds for establishing the existence of a dispute must be *cumulatively* established.

39. Myanmar offers no legal support for its proposal because none exists. There is no case law from the Court that would support this position. In fact, this view directly contradicts the Court's jurisprudence, which shows that the different ways of establishing a dispute are disjunctive and not cumulative. The Court's use of the disjunctive "or" in listing the various ways of proving the existence of a dispute in *Cameroon* v. *Nigeria* directly proves this point[161]. Mr Staker did not present this argument on Monday, so perhaps it is now abandoned.

40. Second, Myanmar seeks to revisit the Court's decision in the *Nuclear Arms and Disarmament* cases. In addition to the Court's holding that a respondent's awareness of the applicant's clearly opposed views would suffice to establish a dispute, Myanmar adds that the applicant must then provide evidence that it was made aware of the respondent's specific opposition to the applicant's claims. No such requirement can be found in any of the Court's jurisprudence.

---

[160] Min Naing Soe, "Myanmar to respond to Gambia lawsuit at ICJ in line with international laws", *Eleven News*, 16 Nov. 2019, MG, Vol. IX, Annex 316.

[161] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.

41. Myanmar's imposition of an additional hurdle for the filing of an application would require the applicant State to show that it received an express indication from the respondent State of its opposition to the applicant's claims before it could bring its claims to the Court. This, of course, would conveniently allow a potential respondent State to defeat the Court's jurisdiction by remaining silent, even when faced with statements by the applicant in regard to a dispute between the two parties that call for a response. Article IX of the Genocide Convention imposes no such impediment to the exercise of the Court's jurisdiction and there is no reason for the Court to invent one.

42. Myanmar's proposal, which would effectively give a respondent the power to exercise a silent veto over the Court's jurisdiction, is particularly unattractive in the context of a claim of genocide. If accepted by the Court, it would become an instruction manual for how to avoid accountability for breach of the obligations imposed by the Convention, including, as is the case here, ***for*** the commission of genocide itself.

43. In this context, Mr. Staker explained that this new standard would require "both parties to articulate their legal positions to each other before a case is brought"[162]. This is to allow, he says, "friendly settlement of disputes between the parties"[163]. Here, Myanmar has articulated a new negotiations requirement, where the applicant would have to give the respondent a chance to articulate its legal views before the possibility of filing an application. Article IX of the Genocide Convention contains no such negotiation requirement and neither does the Court's jurisprudence on the existence of a dispute.

44. Third, Myanmar asserts that a potential respondent State must be aware of *all* the facts related to *all* the legal claims that an applicant raises, as well as the provisions of international law said to have been breached.

45. Myanmar's demand for such "particularity" about the potential claims, the facts underlying them and the legal provisions at issue is tantamount to a requirement that the applicant share a draft of the application before it is filed.

46. There is no basis for such a demand. The Court's jurisprudence only requires that the exchanges between the parties refer to the subject-matter of the dispute with sufficient clarity.

---

[162] CR 2022/1, p. 52, para. 20 (Staker).

[163] *Ibid.*

47. Plainly, that was the case here. Both the exchanges at the United Nations and the text of The Gambia's Note Verbale make the subject-matter in dispute clear and obvious. Moreover, the Note even specified the primary factual bases for the dispute, in other words, the evidence gathered and conclusions reached by the UN Fact-Finding Mission, as well as the legal instruments and principles at issue, namely the Genocide Convention and related customary international law obligations.

48. Finally, Myanmar also seeks to create a new standard providing respondents with an undefined amount of time to react to an applicant's potential claims to show an acceptance or rejection of its claims. As applied to this case, they say that Myanmar was not given sufficient time to respond to the Note Verbale and that its lack of response by 11 November 2019 did not indicate its positive opposition to the Note.

49. But Myanmar's opposition to The Gambia's claims was manifest even before the Note Verbale itself. Indeed, the Note documented that opposition. Myanmar consistently denied allegations of genocide, rejected the reports of the UN Fact-Finding Mission and rejected the OIC resolutions invoked in the Note Verbale. Myanmar had 30 days to respond to it before the Application was filed, which was ample time to do so, especially in light of its admission, on 16 November, that it had anticipated the filing of the Application for over a month, that is, since its receipt of the Note Verbale.

50. Madam President, in the grave circumstance of acts that amount to a genocide, 30 days was more than sufficient time for Myanmar to react to the Note Verbale and deny the existence of a dispute if that were the case. There was nothing new in The Gambia's Note that had not already been alleged in The Gambia's statements at the United Nations, which Myanmar had emphatically rejected.

51. Madam President, Members of the Court: for the reasons I have just given, and also those set out in our written observations, Myanmar's fourth preliminary objection must be rejected.

52. I thank you for your usual kind attention. May I ask you, Madam President, to kindly call Professor Philippe Sands to the microphone to provide The Gambia's final pleading in this round.

The PRESIDENT: I thank Mr. Suleman. I now invite Professor Philippe Sands to take the floor.

Mr. SANDS:

VII. CONCLUSIONS

1. Madam President, Members of the Court, it is a privilege and a responsibility to address you today on behalf of The Gambia in a case of singular importance: for the Court, for the rule of law and for the international community as a whole. My task is to conclude the first round of The Gambia's submissions in response to Myanmar's preliminary objections. We invite you to reject each and every one of Myanmar's four preliminary objections, for the reasons set out in detail in the submissions put to you by my distinguished colleagues.

2. Those submissions have set out with crystal clarity why none of Myanmar's preliminary objections pass legal scrutiny. None provides any conceivable basis for this Court to refuse jurisdiction or to find that The Gambia's Application is inadmissible.

3. Indeed, in brief summary of the points made to you by my colleagues demonstrating the lack of substance of Myanmar's objections.

4. First, the real and only Applicant in this case is The Gambia, as Mr. Loewenstein has set out, and as The Gambia's Agent has compellingly confirmed. Myanmar's argument that another entity should be viewed as the Applicant is novel, it is unprecedented, unsupported by any facts, and it is unbecoming. The Gambia is a sovereign nation, just like any other. It is not anyone's "proxy", and the fact that it is a member of, and has worked with, an international organization, is wholly irrelevant.

5. Second, The Gambia has standing to bring this case against Myanmar: as Professor d'Argent has explained, Article IX of the Convention does not preclude this case, whether as an *actio popularis* or for any other reason. Indeed, the arguments Myanmar advanced on this preliminary objection are particularly tenuous. Professor Talmon suggested, rather optimistically if I may say, that the fact that no non-injured State has brough an application in the seven-decade history of the Convention may be taken as "indicative" of agreement by States that they would not have had standing to do so. But no such conclusion can be drawn from that fact. As the Court will have noted, the United Nations General Assembly *welcomed* the Court's provisional measures Order, which tends to confirm that the body and its Member States *do* consider The Gambia's standing to be established. Yet even that

was not the most surprising or the weakest of Myanmar's arguments: how astonishing it was to hear Professor Talmon argue that an application under the Genocide Convention cannot be brought except by a State whose nationals are the victims of genocide! The argument drives a coach and horses through the entire rationale of the Convention, reflecting as it does an attempt to address the horrors of the events that occurred between 1933 and 1945. Mr. Talmon's argument would allow States to treat their nationals entirely as they wish, ***~~removing~~ it would remove*** all protections of the Genocide Convention when a State turns on its own people. Under this approach, a State would be free to annihilate an entire religious, racial or ethnic group without legal challenge under the Convention so long as the victims were its own nationals. The argument is ahistorical; it is absurd, and it is totally unsupported by the text or negotiating history of the Convention, as he well knows. We trust the Court will consign this argument to the heap in which it belongs.

6. Third, the idea that Myanmar should be able to invoke the reservation it has entered under Article VIII of the Convention to argue for a *de facto* reservation under Article IX is entirely fanciful, as Ms Pasipanodya has explained: as the Court made clear in its Order of January 2020, Articles VIII and IX of the Convention have "distinct areas of application", and "[i]t is only Article IX of the Convention which is relevant to the seisin of the Court in the present case"[164]. The preliminary objections phase of a case is not an appeal mechanism from a ruling made in a provisional measures phase, particularly when there has been no change in, or understanding of, the law to be applied.

7. Fourth, there is plainly a dispute between The Gambia and Myanmar, as Mr. Suleman has explained: the Court's criteria for determining the existence of a dispute are clear, and the evidentiary record before the Court plainly establishes that those criteria were met by the time The Gambia's Application was filed. Myanmar's approach to the elucidation of different criteria or standards disregards the Court's jurisprudence. It would give a respondent State — in effect — a veto over the Court's exercise of jurisdiction.

8. The legal position in respect of these preliminary objections is, we submit, clear and obvious. To say that the arguments of Myanmar are tantamount to clutching at straws would be generous. It would require you to redefine both the act of clutching and the nature of straw. As my

[164] Provisional measures Order, p. 3, para. 35.

colleagues have demonstrated, The Gambia has brought an Application fully in accordance with the rules of the Court and subject to the provisions of the Convention, and in so doing, The Gambia has carefully followed the practice of the Court over its 75-year history. Article 36 of the Statute of the Court, in combination with Article IX of the Genocide Convention, confers the necessary jurisdiction. So, too, does the Convention confer standing on The Gambia; it is the Applicant in this matter and its Application to the Court is admissible.

9. These, then, are the technical requirements for the case to proceed, and they are all satisfied in the circumstances of this case.

10. But there is a broader point to make, by way of closing. As Myanmar itself observes in its written preliminary objections, the Genocide Convention is a treaty of singular importance in the history of modern international law, one of the most fundamental multilateral treaties of our time. To have invoked the 1948 Convention is a matter of utmost gravity: it is not something to be done lightly, and I hope you will be able to see that it was not done lightly in this case. The Gambia proceeded very carefully in deciding how to proceed: it took account of reports of United Nations investigators, and the inquiries of other third parties; it consulted with other States and with international organizations; it sent its Attorney General — a former prosecutor at the International Criminal Tribunal for Rwanda, who knows a genocide when he sees one — to the camps in Bangladesh to see for himself what was going on, to listen to personal accounts of what was being reported; and The Gambia took independent advice on whether the conditions met the definition of a genocide. On this basis, after reflection and the passage of some time, it decided to act.

11. ***And t***his is exactly the conduct that the Convention demands of its parties, and exactly the purpose for which the Convention was adopted. The Court itself has previously observed ~~***that***~~

> "[t]he Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality."[165]

12. This Court bears a responsibility in upholding the object of the Convention: as The Gambia observed at the last hearing on this Application, this Court — the International Court of Justice — is

---

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

the ultimate guardian of the Genocide Convention, and the world's eyes are once again turned to this Court. The Gambia is acutely aware of the responsibility that it invokes of you, the Court and the Judges, and at the same time of its own responsibilities, shared by all parties to the Convention, to promote and secure the Convention's aims.

13. It is with that responsibility in mind that The Gambia has brought this Application before the Court, abiding by the Court's own exhortation to "*carefully ascertain that all the requisite conditions for the jurisdiction of the Court have been met at the time proceedings are instituted*"[166].

14. Conversely, Myanmar's preliminary objections are, frankly, in direct conflict with the aims which the Genocide Convention pursues. If they succeeded, in whole or in part, they would seriously undermine the value of the Convention and its protections. On Monday, Myanmar evoked the prospect of an "*unmanageable proliferation*", as they put it, of disputes if the Court were to find that it had jurisdiction, and that The Gambia has standing. Really? Did the floodgates open after your unanimous ruling on prima facie jurisdiction in the provisional measures phase? No, they did not. Will they open if the Court, as it surely must, recognizes jurisdiction in this phase? No, they will not. Because it is fundamental to the Convention — and to any functioning legal order — that its parties be equipped to hold each other to account by the institution of proceedings before this Court whenever there has been an apparent breach. Without that — and if, for example, Myanmar were right that only the *most* affected party would have standing to bring an application, or, now as it argues, only the party whose *own* nationals were the victims — the efficacy of the Convention would be so attenuated by the inability to enforce it that it would quickly become a dead letter; and this Court would be toothless. An argument that would produce such a result cannot be allowed to prevail.

15. If I may be permitted, it might be helpful to share a brief anecdote to illustrate the significance of the 1948 Convention and this case. In November 2019, shortly before the oral hearings were held in the provisional measures phase, I was in Washington DC, participating at an academic event. I shared the panel with a distinguished former judge of this Court, the International Court of Justice, a man who had, as a small boy, been imprisoned at the Auschwitz concentration camp, under the care of a doctor, one Joseph Mengele. Can you imagine — my fellow panellist at

---

[166] *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*, p. 438, para. 80, emphasis added.

that academic event said — if, back then, in the 1940s, there had been a treaty like the 1948 Convention and a faraway country had invoked it before an international court to argue that the inhumane treatment of those held at such a place was not permitted under international law?

16. That is the stark significance of the 1948 Convention, and of the existence of this international Court, and of the unanimous ruling this Court handed down in January 2020. No, this Court ruled, this kind of behaviour is not permissible under international law. And yes, this Court added, we are entitled to decide at this provisional measures stage at the instance of a third State. There was no question of the "law of nationality" then — Myanmar did not even advance the argument it has concocted — and there is no proper place for such a concept to be introduced now.

17. Indeed, two years on, Myanmar seems to wish to roll ***the clock back***, to an earlier era. It wants you to rule that the Genocide Convention, and the protections it seeks to afford to vulnerable groups across the globe, should be turned into nothing. We trust this Court will not do that. We trust that this Court will rule that the 1948 Convention, so carefully elaborated, has real meaning and effect, that it goes to the very heart of human existence, that it seeks to achieve something profound and fundamental in the international legal order by ensuring the right of groups to exist and to hold to account those who threaten such existence, and by recognizing the right of a third State which is a party to that Convention to invoke the rights and obligations it proclaims here in the Great Hall of Justice.

18. Madam President, this is not the first genocide case heard by the Court. In the previous cases in which this Court has heard well-grounded applications alleging breach of the Genocide Convention, it has always resisted the invitation, made on each occasion, to refuse jurisdiction. It has charted a course that ensures that "*its basic judicial functions [are] safeguarded*"[167]. It ***has*** held that it is free to show some "*realism and flexibility*", where necessary[168], to find that jurisdiction exists, although no such "realism and flexibility" is needed in this case, where the law is clear and the facts are deplorable.

---

[167] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 260, para. 23, emphasis added.

[168] *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*, p. 438, para. 80, emphasis added.

19. But the Court's overture to realism reflects an understanding of the importance of its role, and an unwillingness to permit concocted technicalities to interfere with its exercise of its proper judicial function. The "*exercise of its jurisdiction over the merits . . . shall not be frustrated*", the Court has ruled[169]. We ask the Court to consider the ramifications if it did refuse jurisdiction in this case. Such an outcome would be seriously damaging to the operation of the Convention, and to the international legal order. But alongside that, and more urgently, it would be especially damaging to the Rohingya group. As the Court found in its provisional measures Order, unanimously, there is a prima facie case of genocide and, in so far as the provisional measures serve a protective function, that is because there is a continuing risk of genocide against the Rohingya.

20. You have heard in the submissions from Mr. Reichler about the worrisome developments and conflict that have arisen in Myanmar since the provisional measures Order. That turmoil can only increase the risk that exists, and the threat which the remaining Rohingya face. It makes it ever more critical that the Court proceed expeditiously to the merits stage of these proceedings, and that in the meantime it continues to enforce the protective provisional measures Order.

21. Indeed, the change of régime in Myanmar, while concerning on a political level, does nothing to alter the basic legal position with which the Court is confronted, either at this stage or subsequently. In respect of the issues with which the Court is concerned at this hearing, the jurisdiction and admissibility requirements remain satisfied. There is a clear and compelling case for this Application to progress to consideration of the merits.

Madam President, Members of the Court, this brings to a conclusion the first round of arguments by The Gambia. I thank you for your kind attention.

The PRESIDENT: I thank Professor Sands, whose statement brings to an end the first round of oral argument. The Court will reconvene on Friday 25 February 2022 at 3 p.m., to hear Myanmar's second round of oral pleadings. At the end of that sitting, Myanmar will present its final submissions. The Gambia will present its second round of oral argument on Monday 28 February 2022 at 3 p.m. At the end of that sitting, The Gambia will also present its final submissions. Each Party will have a maximum of one hour and a half to present its arguments for the second round.

---

[169] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253, para. 23, emphasis added.

As the Parties and their counsel turn to their preparation for the second round of these oral proceedings, I take this opportunity to remind them of Article 60, paragraph 1, of the Rules of Court, pursuant to which the oral statements are to be as succinct as possible. The Court has emphasized this requirement in Practice Direction VI. The Parties should not use the second round to repeat statements that they have previously made. The second round is an opportunity to respond to points that were made earlier in these oral proceedings, Moreover, the Parties are not obliged to use all the time allotted to them.

The sitting is adjourned.

The Court rose at 4.20 p.m.

_____