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CR 2022/3

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2022

Public sitting

held on Friday 25 February 2022, at 3 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 vendredi 25 février 2022, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

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

COMPTE RENDU

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

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

M. Gautier, greffier

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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, Judges Tomka, Yusuf, Sebutinde, Iwasawa, Nolte and Charlesworth, and Judges *ad hoc* Pillay and Kress; whereas Judges Abraham, Bennouna, Xue, Bhandari, Robinson and Salam are participating by video link.

The Court meets this afternoon to hear Myanmar's second round of oral argument.

I shall now give the floor to Mr. Christopher Staker. You have the floor, Sir.

Mr. STAKER:

FIRST AND FOURTH PRELIMINARY OBJECTIONS

Introduction

1. Madam President, Mr. Vice-President, Members of the Court, the Parties were reminded at the end of the first round that there is no need in the second round to repeat any statements already made[1].

2. In this second round, I will present arguments in respect of the first and fourth preliminary objections. Professor Talmon will then address the second preliminary objection, followed by Professor Kolb, who will deal with the third. The Agent for the Republic of the Union of Myanmar will then close Myanmar's second round.

General matters

3. However, before turning to the individual preliminary objections, I will first address three general matters arising out of The Gambia's first round of oral argument.

4. The first matter is this. The Gambia acknowledged several times during the first round that the provisional measures Order[2] considered issues of jurisdiction and admissibility only on a prima facie basis[3]. That is correct. In that Order, the Court expressly observes that at the provisional

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[1] CR 2022/2, p. 64.

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

[3] CR 2022/2, p. 16, para. 10 (Reichler), p. 18, para. 20 (Reichler), p. 40, para. 4 (Pasipanodya), p. 61, para. 14 (Sands).

measures stage, it "need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case"[4]. Issues of admissibility are dealt with in the Order on the same prima facie basis[5].

5. Thus, paragraph 85 of the provisional measures Order states unequivocally that the Order "in no way prejudges the question of the jurisdiction of the Court . . . and admissibility of the Application", and that the Order "leaves unaffected the right of . . . Myanmar to submit arguments and evidence in respect of those questions". The Court itself thereby clearly acknowledges the right of Myanmar to request that the same issues of jurisdiction and admissibility be determined on a definitive basis at a subsequent preliminary objections phase.

6. Despite this clear indication from the Court, statements were made by The Gambia in the first round suggesting that the four preliminary objections have somehow already been decided by the Court at the provisional measures stage, and that the Court's decision should not change, given that nothing has changed in the meantime[6].

7. However, if the preliminary objections have not been prejudged in any way — as paragraph 85 of the provisional measures Order makes clear — then in the present phase of the proceedings, the preliminary objections must be subject to a full *de novo* consideration, in the light of the comprehensive evidence and arguments of the Parties. Not only is the provisional measures Order not decisive — it is not even a starting-point. At this stage, it is no longer material at all to the particular issues now under consideration.

8. The second matter is this. The preliminary objections are entirely independent of the merits of the case. Despite this, during the first round, counsel for The Gambia have made various statements which pertain to The Gambia's substantive claim in the case, or pertain to claims of other events in Myanmar unrelated to the preliminary objections[7]. These statements of The Gambia obviously call for no reply at all in the context of the present hearing, which is confined to the preliminary objections, and Myanmar's failure to address these statements cannot be considered as any kind of concession.

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[4] Provisional measures Order, p. 9, para. 16.

[5] Provisional measures Order, p. 17, para. 42.

[6] CR 2022/2, p. 11, para. 7 (Jallow), p. 18, para. 20 (Reichler), p. 40, para. 4 (Pasipanodya), p. 59, para. 6 (Sands), p. 62, para. 16 (Sands).

[7] CR 2022/2, pp. 13-18, paras. 1-3 and 7-19 (Reichler).

9. The third matter is this. The preliminary objections fall to be decided in accordance with the law governing the jurisdiction of the Court and the admissibility of cases. This is so self-evident that it should not need to be stated. However, I do state it because The Gambia has made statements that possibly imply otherwise. During the first round, The Gambia made statements to the effect, for instance, that only the Court has any influence over Myanmar[8]; that if the Court does not exercise jurisdiction, Myanmar will be accountable to no one[9]; that maintaining the existing provisional measures is essential[10]; that the Court bears a responsibility for upholding the Genocide Convention[11]; and that the preliminary objections are in conflict with the aims of that Convention[12].

10. Given that the preliminary objections are independent of the merits, it is difficult to see why these statements were made by The Gambia at this stage, unless The Gambia is suggesting that the Court should modify the law of jurisdiction and admissibility in its application to this case because of these contended matters. It is apparently suggested that in the case of the Genocide Convention, preliminary objections should be regarded as "concocted technicalities"[13]. Any such suggestion, if it is being made, should not be accepted. The Court cannot in any individual case expand its jurisdiction, or expand the scope of admissibility of cases, simply because it is persuaded that it has a useful role to play in a particular situation. These statements of The Gambia are therefore not relevant to this hearing, and counsel for Myanmar need not address them.

11. The written preliminary objections acknowledge the importance of the Genocide Convention[14]. However, no matter how important it may be, it remains subject to general rules of international law governing the jurisdiction of the Court and the admissibility of cases[15], as well as for instance rules relating to reservations to treaties[16]. It is trite law that the Court does not have jurisdiction over every alleged breach of international law by every State in every situation. What

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[8] CR 2022/2, pp. 14-16, paras. 5-6 and 10 (Reichler).

[9] CR 2022/2, p. 11, para. 8 (Jallow) and p. 16, para. 10 (Reichler).

[10] CR 2022/2, p. 14, para. 6 (Reichler) and p. 27, para. 33 (Loewenstein).

[11] CR 2022/2, pp. 60-61, para. 12 (Sands).

[12] CR 2022/2, pp. 61-62, paras. 14-17 (Sands).

[13] CR 2022/2, p. 63, para. 19 (Sands).

[14] POM, para. 15.

[15] POM, para. 505.

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

the Court must determine is whether as a matter of law it has jurisdiction and whether the case is admissible, not whether it would be desirable for that to be the case.

First preliminary objection

12. Madam President, Members of the Court, with that, I turn to the first preliminary objection. As I noted in the first round, this involves a main question of fact and a main question of law.

13. As to the question of fact: in the first round, The Gambia provided no further particulars of its dealings with the OIC and other member States, and certainly no further evidence of these matters. It did, however, make certain further general statements, unsupported by evidence, such as that "The Gambia assumed a leadership role"[17] and that it was The Gambia that conceived of the idea of bringing this case[18]. These statements cannot be treated as facts or evidence.

14. The Gambia refers dismissively to the evidence before the Court as "an eclectic variety of websites, articles, tweets and press releases"[19]. However, key items of this evidence are material issued by the OIC, the United Nations, the Government of The Gambia or its representatives, and other OIC member States, as well as media reports of statements of governments[20]. It remains the case that The Gambia has not denied the specific contents of any of this material.

15. Indeed, The Gambia has now expressly confirmed that its decision to bring this case was taken by its Cabinet only in July 2019, at which time the Cabinet endorsed a proposal by the OIC[21].

16. The Gambia has also not denied and, indeed, has implicitly accepted, the evidence relating to the funding arrangements for this case[22].

17. The Gambia says that Myanmar has "glided over the evidence that matters"[23]. This "evidence that matters" is said to include the opening statement of The Gambia's Agent at the provisional measures hearing[24]. However, the Agent was not appearing as a witness, and that opening

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[17] CR 2022/2, p. 23, para. 16 (Loewenstein).

[18] CR 2022/2, p. 25, para. 23 (Loewenstein) ("it was The Gambia that conceived the idea of bringing a case against Myanmar under the Genocide Convention").

[19] CR 2022/2, p. 22, para. 12 (Loewenstein).

[20] POM, paras. 69-137.

[21] CR 2022/2, pp. 25-26, paras. 26-27 (Loewenstein).

[22] CR 2022/2, p. 26, para. 29 (Loewenstein).

[23] CR 2022/2, p. 22, para. 12 (Loewenstein).

[24] CR 2022/2, pp. 22-23, paras. 13-15 (Loewenstein).

statement cannot be treated as evidence. In any event, that opening statement gives no additional particulars of the dealings between The Gambia and the OIC and its other member States leading up to these proceedings. It merely describes a visit that the Agent made to camps in Bangladesh in early 2018 as part of an OIC delegation[25].

18. The only other "evidence that matters" identified by The Gambia are the 25 September 2018 statement of the President of The Gambia to the General Assembly and the 11 October 2019 Note Verbale[26]. The Gambia appears to argue that this evidence shows that The Gambia took actions itself, acting in its own name, and doing so voluntarily[27].

19. However, that is not to the point. In any case where a State acts on behalf of a third State as a proxy, the proxy will typically itself undertake the relevant actions in its own name and will invariably do so voluntarily. There may be any number of reasons why it agrees voluntarily to act on behalf of a third State as a proxy, but as The Gambia says, motivation is irrelevant to issues of jurisdiction. The question is therefore not whether the applicant State is voluntarily undertaking actions itself, in its own name. The question is, rather, whether the voluntary actions that it is undertaking itself in its own name are in fact being undertaken on behalf of a third State, as the third State's proxy. That is a question of fact to be decided on the evidence.

20. In short, The Gambia's first round arguments take the facts no further. The state of the evidence before the Court is the same as it was before the first round.

21. Contrary to what The Gambia suggests, it is not Myanmar's case that The Gambia is the real applicant by reason alone that it receives *support* from others[28]. Myanmar contends that the OIC is the real applicant by virtue of all of the circumstances that have previously been set out by Myanmar. I do not repeat all the details. Essentially, the evidence shows that the proposal to bring this case was made by the OIC Committee and endorsed by the OIC Council of Foreign Ministers, after which the Islamic Summit decided that the OIC Committee should bring the case on behalf of the OIC. It was only afterwards that the OIC then proposed to The Gambia that The Gambia be the

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[25] CR 2019/18, pp. 17-18, paras. 6-7 (Tambadou); CR 2022/2, pp. 22-23, paras. 13-15 (Loewenstein).

[26] CR 2022/2, pp. 23-24, paras. 17-22 (Loewenstein).

[27] See also CR 2022/2, p. 25, para. 25 (Loewenstein).

[28] CR 2022/2, pp. 25-27, paras. 24-25, 29 and 31 (Loewenstein).

applicant State and The Gambia agreed. That looks more like The Gambia providing assistance to the OIC than it looks like the OIC providing assistance to The Gambia.

22. I move on then to the question of law. It is common ground that the issue of proxy States has never arisen before[29]. There are two points I make in reply.

23. First, contrary to what The Gambia suggests, Article 35, paragraph 1, of the Statute is not fatal to Myanmar's argument[30]. It has no impact on Myanmar's arguments at all.

24. This provision states that "[t]he Court shall be open to the States parties to the present Statute".

25. Apart from anything else, this does not in any way qualify, or create an exception to, Article 34, paragraph 1, which provides that only States may be parties in cases before the Court. Additionally, Article 35, paragraph 1, does not suggest that the Court is "open" to international organizations or other entities that are not States. Furthermore, the mere fact that a State is a party to the Statute of the Court, and that the Court is therefore "open" to it pursuant to Article 35, paragraph 1, does not mean that the Court will have jurisdiction over any case brought by that State, or that any case brought by that State will be admissible.

26. The arguments previously presented in relation to Article 34, paragraph 1, apply equally to Article 35, paragraph 1, and the latter provision takes matters no further. The academic texts relied on by The Gambia in this respect[31] were not addressing the issue now before the Court and are not inconsistent with Myanmar's arguments.

27. Secondly, The Gambia conflates two separate issues, namely the motivation of a State for bringing proceedings, and the question of whether the applicant State is in fact bringing proceedings on behalf of another State or entity. The Gambia argues that if the applicant brings proceedings because another State or entity wants it to, that is simply the applicant State's motivation for doing so, and that motivation is irrelevant to jurisdiction[32]. This is incorrect. I will not repeat arguments I have already made, indicating how the use of proxy States by States and other entities not entitled to

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[29] CR 2022/1, p. 27, para. 60 (Staker); compare CR 2022/2, p. 20, para. 5 (Loewenstein).

[30] CR 2022/2, pp. 20-21, paras. 2-3 and 6 (Loewenstein).

[31] CR 2022/2, p. 21, paras. 6 and 9 (Loewenstein).

[32] CR 2022/2, pp. 21-22, paras. 7-10 (Loewenstein).

bring a case would be contrary to principles of reciprocity, good faith and effectiveness[33]. The bringing of a case as proxy for a third party engages principles and issues going well beyond the principle that motivation is irrelevant to jurisdiction. This distinction is far from "artificial"[34].

Fourth preliminary objection

28. Madam President, Members of the Court, I move on to the fourth preliminary objection.

29. As to the legal principles, Myanmar has not abandoned anything stated in the written preliminary objections[35]. I note that some of the definitions of "dispute" found in the case law[36] may in fact be worded somewhat too broadly to reflect the actual principles applicable to determine if there is a dispute[37]. Myanmar contends that the correct principles are those set out in its pleadings and oral argument.

30. I have already explained why the requirement for both parties to be aware of the other's position is reflected in the *Marshall Islands* cases[38]. I have also already explained why, contrary to what is claimed by The Gambia[39], this requirement would not give the respondent a "silent veto" over the bringing of cases before this Court[40].

31. Contrary to what The Gambia suggests, I did not say that the parties must enter into negotiations before a case is brought before the Court[41]. Rather, I said that both parties must be aware of the other's position. Two parties can be aware of each other's opposing positions without any negotiations between them taking place or having yet taken place, and indeed, this will be a common situation. I did not say that the parties must attempt friendly settlement before going to Court[42]. Rather, I said that, because the Court is an alternative to the direct and friendly settlement of disputes, there will not be a dispute for purposes of Court proceedings unless there is a dispute that could be

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[33] CR 2022/1, pp. 24-25, paras. 48-50 (Staker).

[34] CR 2022/2, p. 22, para. 10 (Loewenstein).

[35] Cf. CR 2022/2, p. 55, para. 39 (Suleman).

[36] CR 2022/2, p. 49, para. 7, and p. 55, para. 39 (Suleman).

[37] POM, para. 511.

[38] Cf. CR 2022/2, p. 55, para. 40 (Suleman).

[39] CR 2022/2, p. 48, para. 4 (Suleman), p. 56, paras. 41-43 (Suleman), p. 59, para. 7 (Sands).

[40] CR 2022/1, p. 51, paras. 16-17 (Staker).

[41] CR 2022/2, p. 56, para. 43 (Suleman).

[42] Cf. CR 2022/2, p. 56, para. 43 (Suleman).

the subject of friendly settlement and for this, both parties would need to be aware of the other's views[43].

32. Contrary to what The Gambia suggests, I did not say that an applicant must articulate its claims in such detail that it would effectively have to share a draft of the application with the potential respondent[44]. Rather, I made clear that only a *minimum* degree of particularity is required[45].

33. Contrary to what The Gambia apparently seems to suggest, the Court's case law does not indicate that there is any defined time after which silence by a respondent can be treated as positive opposition[46]. Clearly, the question whether a response is called for at all will depend on the individual facts of a particular case. If it is, the maximum reasonable length of time for a response will also vary, depending on the circumstances of the particular case. I did not say that Myanmar was entitled to an indefinite or unlimited amount of time to respond. I said that the Note Verbale did not call for a response at all, but that even if it did, a reasonable time for a response would have been more than a month.

34. For the reasons given in the written and oral arguments, matters relied on by The Gambia as establishing the existence of a dispute, apart from the 11 October 2019 Note Verbale, could not possibly establish the existence of a dispute.

35. As to the Note Verbale, it is indeed correct that the Note Verbale did not state any facts. It merely referred to the findings in the FFM report and to an OIC resolution. It is also correct that there is no suggestion that The Gambia had access to the Fact-Finding Mission's primary evidence on which the report was based, such as the witness interviews that it took. For all the reasons given in the earlier written and oral arguments, this Note Verbale was not a legal claim that called for a response.

36. And the mere fact that The Gambia announced in the General Assembly on 26 September 2019, prior to sending the Note Verbale on 11 October 2019, that it intended to bring a case before this Court[47] does not mean that the Note Verbale should be considered to satisfy the prior dispute

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

[44] CR 2022/2, p. 56, paras. 44-46 (Suleman).

[45] CR 2022/1, especially pp. 52-53, paras. 21 and 25-26 (Staker).

[46] CR 2022/2, p. 57, para. 48 (Suleman).

[47] POM, para. 676; WOG, para. 527; CR 2022/2, p. 55, para. 36 (Suleman).

requirement if it otherwise would not[48]. Indeed, once The Gambia announced publicly on 26 September 2019 that it intended to bring a case before this Court, the failure of the Note Verbale to mention this intention gave rise to an even stronger inference that it was not a document that itself was raising a legal claim, since after 26 September 2019 there would have been an even stronger expectation that the Note Verbale would refer to this intention if it was indeed a legal claim.

37. Madam President, Members of the Court, that concludes my arguments on the first and fourth preliminary objections. I would now invite you, Madam President, to call on Professor Talmon to address the second preliminary objection.

The PRESIDENT: I thank Mr. Staker. I now invite the next speaker, Mr. Stefan Talmon, to take the floor. You have the floor, Professor.

Mr. TALMON:

SECOND PRELIMINARY OBJECTION

1. Madam President, Mr. Vice-President, distinguished Members of the Court, my task today is to respond to The Gambia's observations made in reply to Myanmar's second preliminary objection — that The Gambia lacks standing in this case.

2. On Wednesday, you heard that Myanmar's argument was "absurd", "abject", "ahistorical", "erroneous", "tenuous", "concocted" and "unfortunate"[49] — what you did not hear was any positive argument that The Gambia does have standing in the present proceedings.

Distinction between invocation of responsibility and standing

3. Let me start by saying that The Gambia in its oral presentation — as in its written observations — constantly and consistently conflates or, better, mixes up the invocation of responsibility and the standing of a State in proceedings before this Court. For example, The Gambia speaks of "standing . . . to invoke the responsibility of the perpetrator of genocidal violence"[50]. Let me be clear: the invocation of responsibility and standing are two distinct concepts. The ILC

[48] CR 2022/2, p. 57, para. 48 (Suleman).

[49] CR 2022/2, p. 30, para. 9 (d'Argent); p. 31, para. 11 (d'Argent); pp. 58-59, para. 5 (Sands); p. 34, para. 18 (d'Argent); p. 31, para. 11 (d'Argent); p. 63, para. 19 (Sands); p. 32, para. 14 (d'Argent); respectively.

[50] CR 2022/2, p. 31, para. 9 (d'Argent).

expressly noted this in its commentary on the Articles on State Responsibility, which I quoted on Monday[51].

4. Myanmar addresses the question of the invocation of responsibility only because The Gambia erroneously equates a right to invoke the responsibility of a State with standing before this Court and draws the conclusion that whenever there is a right to invoke the responsibility of a State there must automatically be standing. This simply is not the case.

Invocation of responsibility and the nationality of claims rule

5. But let me address The Gambia's argument with regard to the invocation of responsibility.

6. First, contrary to The Gambia's assertion, Myanmar has not "accepted that The Gambia could invoke its international responsibility" in the present case[52]. No such admission was made and no such conclusion can be drawn from the Court's finding in its provisional measures Order that "Myanmar accepts that . . . The Gambia has an interest in Myanmar's compliance with [*erga omnes partes*] obligations"[53].

7. Second, and more importantly, The Gambia cannot invoke Myanmar's responsibility with regard to alleged acts of genocide committed against non-nationals outside its own territory because of the nationality of claims rule.

8. The Gambia cannot and has not explained away Article 44, subparagraph *(a)*, of the Articles on State Responsibility which provides: "The responsibility of a State may not be invoked if . . . [t]he claim is not brought in accordance with any applicable rule relating to the nationality of claims".

9. The text is clear and unequivocal and so is the ILC's commentary. There is no exception to the nationality of claims rule for certain treaties or certain types of obligations.

10. The Gambia seizes on the phrase "any applicable rule relating to the nationality of claims" and the statement in the commentary that the "rule of nationality of claims . . . is a general condition for the invocation of responsibility in cases where it is applicable"[54]. Let me first highlight that the

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[51] See CR 2022/1, p. 34, para. 38 (Talmon).

[52] CR 2022/2, p. 29, para. 4 (d'Argent).

[53] Provisional measures Order, p. 16, para. 39.

[54] Responsibility of States for Internationally Wrongful Acts, Commentary on Article 44, *YILC* 2001, Vol. II, Part 2, p. 121, para. 2, POM, Vol. III, Ann. 69, p. 562.

ILC itself calls the nationality of claims rule "a general condition for the invocation of responsibility" — so the nationality of claims requirement is the rule, not an exception, in all cases in which it is applicable.

11. It is correct that the nationality of claims rule is not applicable in all cases of State responsibility, but it is applicable in all cases in which a State invokes the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person. Thus, the rule is clearly applicable in the present case. The Gambia invokes the responsibility of Myanmar not for its own injuries but for injuries allegedly caused to individuals in Myanmar's northern Rakhine State.

12. So, what arguments has The Gambia put before you for its contention that in the case of the Genocide Convention, the nationality of claims rule is not applicable. First, it argued that "nothing in the Convention suggests that it would be"[55]. But, one must ask: must there be an indication or even express provision in the Convention on the application of the nationality of claims rule? The short answer is: no. The Genocide Convention deals with primary obligations. The nationality of claims rule, in the context of State responsibility, is a secondary rule: it deals with the general conditions under international law for a State to be considered responsible. These secondary rules apply to all treaties, so there is no need to deal with these general conditions in each and every treaty. The Gambia has not provided any example of a treaty that indicates or expressly provides for such application — the reason is simple: there is none. The application of the nationality of claims rule does not depend on the treaty, but on whether injuries have been caused to individuals.

13. The Gambia, secondly, advances that the application of the nationality of claims rule in the case of the Genocide Convention "would be contrary to the object and purpose of the Convention"[56]. However, The Gambia does not explain why the application of a general, secondary rule would be contrary to the Convention's object and purpose. First of all, The Gambia does not clarify the object and purpose of the Convention but simply states that genocide is contrary to "the sprit and purpose of the United Nations" and that it "shocks the conscience of mankind"[57]. This says

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[55] CR 2022/2, p. 32, para. 13 (d'Argent).

[56] *Ibid.*

[57] *Ibid.*

nothing about the object and purpose of the Convention and why a general, secondary rule of international law should not be applicable in the present case.

14. It is submitted that the object and purpose of the Convention is — to quote the Court's own words — to "condemn and punish genocide as a 'crime under international law'" by establishing individual criminal responsibility for acts of genocide and to bring the perpetrators of such acts to justice[58]. The Convention must be seen against the background of the Nuremberg and Tokyo war crimes trials and not against any inter-State claims before this Court. As the Tribunal at Nuremberg held, crimes against international law are committed by men, not abstract entities. Myanmar's argument is thus by no means "ahistorical"[59]. The object and purpose of the Convention does not demand that any contracting State can invoke the responsibility of every other contracting State with regard to alleged acts of genocide committed against non-nationals outside its territory.

15. If the nationality of claims rule were, in fact, contrary to the object and purpose of the Convention, one may ask why reservations to Articles VIII and IX of the Convention should not also be contrary to the Convention's object and purpose — they too prevent contracting States from bringing alleged acts of genocide before this Court.

16. The application of the nationality of claims rule to the invocation of responsibility in case of injury to individuals may — in the words of The Gambia — lead to "unfortunate" results[60], but The Gambia has not presented any convincing argument why it should not be applicable in the present case.

17. The nationality of claims rule precludes The Gambia from invoking Myanmar's responsibility with regard to alleged acts of genocide committed against persons who are not its nationals. Thus, even if the invocation of responsibility had any bearing on the question of standing — which it has not — this could not establish standing in the present case.

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[58] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23; UNGA, resolution 96 (I), 11 December 1946, MG, Vol. II, Ann. 4.

[59] CR 2022/2, p. 59, para. 5 (Sands).

[60] CR 2022/2, p. 32, para. 14 (d'Argent).

Common interest insufficient to establish standing

18. Madam President, Members of the Court, The Gambia asserts that in the case of the Genocide Convention, standing does not require an individual legal interest, but that a common interest in compliance with the Convention is sufficient[61].

19. It is correct that the Court held in its provisional measures Order that all States parties to the Genocide Convention had such an interest and, on that basis, found that "The Gambia has prima facie standing to submit to it the dispute with Myanmar"[62]. The Court reached this decision on the basis of its findings in *Belgium* v. *Senegal*, which — as I have demonstrated on Monday — can be distinguished both on grounds of fact and law.

20. I would also like to reiterate the Court's own statement in paragraph 85 of the provisional measures Order that

> "the decision given in the present proceedings in no way prejudges . . . any questions relating to the admissibility of the Application . . . It leaves unaffected the right of the [Parties] to submit arguments and evidence in respect of those questions."[63]

21. As The Gambia has noted, new argument has been submitted at this hearing on the admissibility of claims, which in Myanmar's view shows that The Gambia lacks standing in the present case.

22. If I may add, this would not be the first case where the Court decided at the provisional measures stage on a prima facie basis that it had jurisdiction or a claim was admissible, only to hold later that it was without jurisdiction or the claim was inadmissible[64]. It is thus far-fetched to assert that by welcoming the provisional measures Order, the United Nations General Assembly and the Member States confirmed that they "do consider The Gambia's standing to be established"[65]. There is no support for this assertion.

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[61] CR 2022/2, pp. 32-33, paras. 15 and 16 (d'Argent).

[62] Provisional measures Order, p. 17, para. 42.

[63] *Ibid.*, p. 30, para. 85.

[64] See *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, p. 93, and *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 114; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 388, para. 117, and *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 140, para. 184.

[65] CR 2022/2, p. 58, para. 5 (Sands).

23. Madam President, The Gambia tries to dismiss Myanmar's argument based on paragraph 91 of the Court's Judgment in *Barcelona Traction* because the paragraph does not expressly mention the Genocide Convention[66].

24. This paragraph, however, deals with the general question of standing in the case of violations of obligations *erga omnes* taking such obligations under universal human rights instruments only as an example. The Court held that the *erga omnes partes* character of these obligations have been established to protect a common interest but it has also held that these instruments "do not confer on States the capacity to protect the victims of infringements of such rights *irrespective of their nationality*"[67].

25. The question may thus be asked why the nationality of claims rule is applicable to obligations *erga omnes partes* in universal human rights instruments, but should not be applicable to the same such obligations under the Genocide Convention. The Gambia has offered no answer to this question.

26. In the *Barcelona Traction* case, the Court contrasted the situation under universal human rights instruments with the situation under the European Convention on Human Rights, another treaty established to protect the common interest of all States parties. The European Convention in its Article 33 expressly vests a right in all contracting States to refer any alleged breach of the Convention to the European Court of Human Rights. This shows that, absent an express authorization of standing, the mere fact that a treaty is established to protect the common interest does not suffice to establish the standing of all contracting States in any given case.

27. The Gambia also seeks to dismiss the Court's finding in paragraph 185 of the *Bosnian Genocide* case that a claim with regard to non-nationals "could raise questions about the legal interest or standing of the Applicant". For The Gambia this passage is irrelevant because the Court did not decide these questions. But this misses the point. The fact that the Court felt it necessary to raise the question shows that the finding of a common interest of the parties of the Genocide Convention does not settle the question of standing.

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[66] CR 2022/2, p. 34, para. 20 (d'Argent).

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

The Gambia's novel definition of standing

28. Madam President, Members of the Court, let me now turn to The Gambia's novel definition of standing. While the Court has defined standing as "legal right or interest regarding the subject-matter" of a party's claim[68], The Gambia now offers you a new definition. Standing now supposedly requires "nothing more than the interest in respecting the rules at the heart of the dispute"[69].

29. This new definition calls for several observations.

30. First, this is a purely results-driven definition. A new definition has been constructed only to prove that the requirements of the new definition are met in the present case.

31. Second, the case of the *S.S. "Wimbledon"* is a bad starting-point for any new general definition of standing. Standing in that case was based on Article 386, paragraph 1, of the Versailles Peace Treaty, which provided that in the event of violation of certain provisions of the Treaty, "any interested Power" could bring the case before the Permanent Court of International Justice[70]. Article 386, like Article 33 of the European Convention on Human Rights, thus provided an exceptional authorization of standing.

32. Third, there is no support for this new definition in the jurisprudence of the Court. On the contrary, the Court still uses the terms "standing" and "legal interest" interchangeably, as shown in the *Bosnian Genocide* case[71].

33. Madam President, Members of the Court, let me conclude again with a general observation.

34. Listening to The Gambia's conclusions on Wednesday, and its assertion that it has standing to bring this case against Myanmar because any other finding would "seriously undermine the value of the Convention" reminded me of a line in the poem "The Impossible Fact" by German poet Christian Morgenstern: "For, he reasons pointedly / That which must not, can not be."

35. But this is not the reasoning you are supposed to apply in this Court. Myanmar, therefore, invites the Court to find, in accordance with the established law on the admissibility of claims, that

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[68] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 18, para. 4.

[69] CR 2022/2, p. 35, para. 24 (d'Argent).

[70] *S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 20.

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

The Gambia lacks standing in the present case, and that, accordingly, its Application be dismissed as inadmissible.

36. I thank the Court for its kind attention.

37. Madam President, may I now ask you to call on Professor Kolb to present Myanmar's third preliminary objection.

The PRESIDENT: I thank Professor Talmon. I now give the floor to Professor Robert Kolb. You have the floor, Professor.

M. KOLB :

TROISIÈME EXCEPTION PRÉLIMINAIRE

1. Madame la présidente, Mesdames et Messieurs de la Cour, je reviens à mon fil d'argumentation relatif à la troisième exception préliminaire. J'ai attentivement écouté mon contradicteur. Mais je dois avouer que je ne suis pas apaisé par son interprétation de l'article VIII.

L'effet utile et les questions d'interprétation relatives à la réserve

2. Regardons les choses en face. Je le ferai d'abord en examinant notre question sous l'angle de l'article VIII ; puis je la reprendrai sous l'angle de la réserve. Les deux optiques ne sont pas identiques. L'univers qui s'offre à notre observation diffère selon le point de référence choisi.

3. Si l'article VIII ne concerne pas la saisine des organes des Nations Unies, quel peut être le sens de la réserve du Myanmar ? Avouons-le sans détour : la réserve choit dans le néant juridique. La Birmanie aurait fait une réserve qui n'a aucun effet du point de vue du droit. N'est-ce pas un résultat absurde et déraisonnable ? Un Etat prend le soin d'attacher une réserve à une disposition dans un traité important. Il vise certainement à obtenir un effet juridique. Mais on lui dit que son acte était gratuit, insensé, kafkaïen. Je ne peux m'y résoudre.

4. Admettons par hypothèse que l'article VIII ne concerne que les organes politiques de l'Organisation mondiale. A supposer qu'il touche à leur saisine, nous restons confrontés à la même situation juridique. Les organes politiques peuvent être saisis sur la base des dispositions pertinentes de la Charte, telles que les articles 35 et 39. Il serait outrecuidant de prétendre que la réserve à l'article VIII de la convention de 1948 pût entamer les compétences de ces organes en vertu de la

Charte. Le cas échéant, il resterait possible d'affirmer que leur saisine pour des questions d'interprétation ou d'application de la convention serait rendue impossible. Mais une telle limitation n'aurait aucun poids tangible. La saisine pourrait concerner un génocide en tant que menace contre la paix ou comme violation des droits de l'homme. La réserve ne s'y appliquerait pas. Dès lors, elle n'a aucun effet utile dans le domaine des organes politiques. Tel est à plus forte raison le cas si l'article VIII ne concerne pas la saisine. Dans cette éventualité, la réserve flotte entièrement dans l'apesanteur juridique.

5. Admettons désormais que l'article VIII concerne aussi la Cour. S'il ne régit pas la saisine de la haute juridiction, mais laisse cet aspect à l'article IX, la réserve du Myanmar n'a une fois de plus aucun effet quelconque. La Cour est saisie sur la base de l'article IX et a compétence.

6. Je tire la somme de ce que je viens d'exposer. Première hypothèse : l'article VIII ne couvre pas la saisine des organes visés mais se borne à rappeler qu'ils peuvent être saisis sur la base d'autres textes. Pourquoi faire une réserve à une telle disposition ? Elle ne sert à rien. C'est donc bien que la Birmanie ne l'entendait pas ainsi au moment où elle la formulait. Je rappelle que l'intention et le but recherchés par l'Etat réservataire sont déterminants dans l'interprétation des réserves.

7. Deuxième hypothèse : l'article VIII ne concerne que la saisine des organes politiques. Or, cette saisine ne peut pas être empêchée par le jeu de la réserve. Cette dernière ne s'étend pas aux dispositions pertinentes de la Charte. Une fois de plus la réserve n'a aucun effet.

8. Troisième hypothèse : l'article VIII concerne à la fois la saisine des organes politiques et de l'organe judiciaire, mais la saisine de la Cour est réglementée uniquement par l'article IX. La réserve sur l'article VIII n'a pour l'énième fois aucune consistance, aucun effet, aucune réalité. Les organes politiques peuvent être saisis en se fondant sur les dispositions de la Charte. La Cour peut être saisie sur la base de l'article IX.

9. Dès lors, j'ose formuler une quatrième hypothèse : l'article VIII touche à la saisine de la Cour. La réserve renaît alors de ses cendres. Elle a l'effet de ne pas permettre la saisine de la Cour. C'est la seule manière de conférer un effet utile à cette réserve. C'est la seule façon de respecter la volonté de l'Etat réservataire.

10. Renversons désormais la perspective et plaçons-nous dans le champ optique de la Birmanie. C'est ce basculement de relativité que je vous annonçais au début de mon allocution. Si

cet Etat avait eu des doutes sur le fait que sa réserve pût empêcher la saisine de la Cour, peut-on imaginer qu'il n'eût pas inséré une réserve à l'article IX, de la même manière que toute une série d'autres Etats ? Or si la Birmanie estimait que sa réserve à l'article VIII empêchait la saisine de tout organe des Nations Unies, on comprend aisément son omission en matière d'article IX. Dans le cas contraire, on ne la comprend pas. On hésite, on glisse plus ou moins discrètement : «Pourquoi n'avez-vous pas fait cela ?», avec en sous-œuvre l'accent fugace d'un reproche. L'explication plus simple et plus cohérente est de s'apercevoir que dans leur optique une réserve à l'article IX n'était plus nécessaire. La Birmanie pensait avoir exclu déjà en amont toute saisine d'un organe des Nations Unies qui pût s'immiscer dans ses affaires intérieures.

11. Il y a là un aspect très important sur lequel je veux capter votre attention. L'effort essentiel dans notre espèce est de donner un sens à la réserve birmane. Que peut-elle signifier ? Comment faut-il l'interpréter ? L'optique est résolument subjective. C'est l'intention et le but qu'avait à l'esprit la Birmanie qu'il faut scruter pour donner un sens fiable à sa réserve. S'il en est ainsi, l'interprétation objective de la relation entre les articles VIII et IX de la convention contre le génocide n'est pas décisive. Même si nos contradicteurs avaient raison et que l'article VIII ne concernait objectivement pas la Cour, il n'en resterait pas moins qu'il faut s'attacher aux représentations de la Birmanie pour comprendre le sens de sa réserve. Il faut sonder la manière dont *elle* comprenait ces dispositions ainsi que leur relation mutuelle. A ce propos, le doute n'est pas permis. Si la Birmanie n'avait pas conçu l'article VIII comme se rapportant à la saisine, sa réserve ne peut recevoir aucun sens utile.

12. Je change à nouveau de perspective. Voici un Etat greffant une réserve à laquelle il tient sur une disposition qu'il considère importante dans un traité d'insigne envergure. Mesdames et Messieurs les juges, vous êtes ressortissants d'Etats très différents. Vous connaissez des réserves que vos Etats ont estimé devoir insérer dans tel ou tel traité réputé important. Vous savez à quel point ils peuvent y tenir. Et voici que nos contradicteurs demandent à la Cour d'ignorer une telle réserve. Qu'ils lui enjoignent de faire comme si cette réserve n'existait pas. Quel message donneriez-vous aux Etats, qui suivent attentivement votre jurisprudence ? Que la Cour ne prend pas au sérieux leurs réserves ? Qu'elle se permet de gloser sur elles comme d'une quantité négligeable ? Que des réserves soigneusement formulées peuvent se trouver d'un seul coup précipitées dans l'abysse de l'inexistence ? Nous pouvons tous regretter d'un point de vue idéal que des réserves éborgnent

l'intégrité des textes. Mais il n'est pas dans notre mission de les ignorer parce qu'elles ne nous conviennent pas.

13. J'attire enfin l'attention de la Cour sur un paradoxe de l'interprétation adverse. Si l'article VIII concerne bien la saisine des organes politiques et que la réserve avait un effet à cet égard, cela reviendrait à dire que la saisine d'organes politiques serait barrée mais pas la saisine de la Cour, préservée par l'article IX. Résultat : le Myanmar serait protégé contre la saisine d'organes qui le plus souvent n'émettent que des recommandations ; mais il ne serait pas préservé contre la saisine d'un organe qui décide de manière contraignante. Curieux effet pour un Etat cherchant à se protéger d'immixtions tierces. Les immixtions mineures seraient entravées, l'immixtion majeure serait admise. Je peine à croire qu'un tel effet se réconcilie aisément avec l'intention de l'Etat réservataire en l'espèce. Dès lors, l'interprétation selon laquelle l'article VIII couvre la Cour semble plus cohérente si l'on tient compte du dessein de la réserve.

14. Je viens d'exposer le problème principal auquel je me heurte : pouvons-nous vraiment, d'un trait de plume, dénier tout effet utile à la réserve de la Birmanie et la transformer en un zombie juridique, plus même : la néantiser ? Madame la présidente, Mesdames et Messieurs les juges, je ne saurais spéculer sur vos sentiments. Mais j'avoue que j'ai, quant à moi, des difficultés à conclure en ce sens. Le néant est un concept intéressant en philosophie ; je ne crois pas qu'il le soit en matière des réserves aux traités. Nous ne pouvons pas adopter une solution qui équivaudrait à ignorer complètement la réserve que la Birmanie avait accrochée à l'article VIII. Cette réserve est là ; il faut bien lui donner un sens.

Réponses à certains arguments adverses

15. Je me tourne désormais vers trois arguments avancés par nos contradicteurs. Le temps me manque pour tous les égrener. Je ne crois pas utile de vous tenir en haleine avec des explications de détail, fastidieuses par leur technicité et inutiles au regard des informations déjà amassées dans nos débats.

16. Premier argument : la distinction entre Etats lésés et non lésés ne cadrerait pas avec les textes. Nos contradicteurs soulignent que l'article VIII ne l'étayerait pas. Il en serait de même des travaux préparatoires de cette disposition. J'en conviens. Je me référais quant à moi non pas à

l'article VIII, mais à la réserve. Est-ce que le texte de la réserve fonde une telle distinction ? Au risque de vous surprendre : ma réponse est négative. La réserve exclut *toute* application de l'article VIII du champ de l'acceptation de la Birmanie. Elle ne fait aucune distinction entre Etats lésés et non lésés. Mais alors, d'où vient cette bipartition ? Elle découle d'un geste gracieux du Myanmar. Ce dernier serait fondé à tabler sur l'exclusion de toute saisine en s'appuyant sur le texte implacable de sa réserve. Or, il n'a pas voulu aller aussi loin. Il a préféré limiter la projection de sa réserve aux seules saisines d'Etats non lésés. Sans doute aurait-il été plus simple qu'il ne le fît pas. Mais peut-on reprocher au Myanmar de vouloir adoucir la rigueur de sa réserve ? Si nos contradicteurs préfèrent s'en tenir au seul texte de cette réserve, la réponse juridique, dans l'optique de l'intention birmane, est simple : toute saisine quelconque est exclue, qu'elle provienne d'un Etat lésé ou d'un Etat non lésé. J'en reste là, car cette distinction ne me paraît pas importante pour résoudre notre espèce. Le point essentiel est ailleurs. Il concerne l'objet et le but de la réserve : exclure une saisine aboutissant à des immixtions dans les affaires intérieures[72]. La saisine de la Cour est manifestement une telle «immixtion». Elle l'est d'autant plus qu'elle aboutit à une décision contraignante.

17. Si la réserve ne portait que sur les questions liées à l'article 2, paragraphe 7, de la Charte, on comprend mal la teneur de son texte. Pourquoi alors exclure radicalement l'application de l'article VIII et ne pas se borner à reproduire les formules courantes dès l'époque sur les affaires intérieures ?

18. Deuxième argument : on vous a parlé longuement des travaux préparatoires des articles VIII et IX. Il s'agit là d'une série de faits alambiqués dans un long enchaînement de prises de position parfois changeantes et dont l'interprétation n'est pas aisée. Ils ne se prêtent pas à un exposé oral mettant en exergue les aspects les plus saillants. Je me permets donc de vous renvoyer à cet égard aux pièces écrites[73]. Mon objectif était de vous rendre attentifs au fait que la limitation de l'article VIII aux seuls organes politiques que sont l'Assemblée générale et le Conseil de sécurité a

[72] Myanmar, Pyithu Hluttaw, Motion pour que le Gouvernement de l'Union ratifie, avec deux réserves, la convention pour la prévention et la répression du crime de génocide adoptée par l'Assemblée générale des Nations Unies en 1948, 2 septembre 1955, traduction non officielle, p. 2, EPM, annexe 127.

[73] EPM, par. 402-435, p. 122-132.

été rejetée en faveur d'une approche plus large, encapsulée dans la formule «organes des Nations Unies».

19. Il y a une autre raison pour laquelle je n'ai pas insisté sur les travaux préparatoires. La convention contre le génocide est un traité multilatéral. L'interprétation de tels traités est fondée avant tout sur le texte et d'autres éléments objectifs. Les travaux ne forment qu'un élément subsidiaire, ayant pour mission de confirmer ou clarifier un résultat interprétatif, ou d'infirmer un tel résultat lorsqu'il est absurde ou déraisonnable. Est-il ici déraisonnable de suggérer que la Cour est un organe compétent des Nations Unies ? La jurisprudence est fixée sur ce rôle subsidiaire des travaux. Si les méthodes d'interprétation dites objectives prévalent, il convient de les appliquer à toutes les dispositions. On ne saurait pratiquer des choix arbitraires, en ne les utilisant que pour les dispositions «civilisatrices» tout en les excluant pour des dispositions plus techniques. Une convention n'est pas un pot-pourri au sein duquel l'interprète se comporte à sa guise.

20. Il y a une raison de plus pour ne pas avoir mis beaucoup d'accent sur les travaux préparatoires. Ils sont secondaires pour interpréter le sens de la réserve de la Birmanie. Comptent ici les représentations subjectives. Dès lors, l'intention de la Birmanie est capitale.

21. Je dirai toutefois un mot des travaux, pour que vous ne pensiez pas que je veux les éluder parce qu'ils n'apporteraient pas assez d'eau à mon moulin. J'évoque deux faits significatifs. Les articles VIII et IX ont été négociés ensemble. Ils ont même été fusionnés pendant une phase des négociations, avant d'être à nouveau séparés[74]. L'article VIII apparaissait comme la disposition générale, le portique d'entrée, alors que l'article IX précisait les aspects de compétence particuliers à la Cour. On ne note pas cette séparation étanche entre le domaine politique et judiciaire qu'exaltent nos contradicteurs.

22. De plus, en novembre 1948, à un stade très avancé des négociations, le texte de l'article X (désormais article VIII) utilisait les termes «*any* competent organ of the United Nations»[75]. Tout organe compétent ! Sauf la Cour ?

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[74] EPM, par. 428, p. 130-131.

[75] United Nations General Assembly, Sixth Committee, Genocide – Draft Convention and Report of the Economic and Social Council, Text as adopted by the Sixth Committee for articles VII to XIII of the draft Convention (E/794), doc. A/C.6/269, 15 November 1948, draft article X, EPM, annexe 54 (les italiques sont de nous).

23. La Partie adverse a analysé le sens des termes «saisir» et «recurrir» en soulignant leur caractère englobant. Mon contradicteur a utilisé le mot «aussi» («also») pour dire que ces termes conviennent à la fois aux organes judiciaires et aux organes politiques[76]. Elle voulait ainsi étayer son argumentation selon laquelle l'article VIII concerne les organes politiques — parce que ces organes ne seraient pas exclus par le terme «saisir». Mais elle ne s'est peut-être pas rendu compte qu'elle a admis à travers sa formule que ces termes incluent les tribunaux. Les travaux préparatoires contiennent quelques éléments épars attestant ce sens inclusif. Voyez la prise de position de sir Hartley Shawcross au nom du Royaume-Uni. Il englobait dans les organes visés par l'article VIII le tribunal pénal international à créer pour réprimer le crime de génocide[77].

24. Troisième argument : nos contradicteurs ont cru bien faire de tenter de me mettre en difficulté en produisant mes propres écrits. C'est un pari risqué, car qui mieux que l'auteur sait ce qu'il a dit. Un commentaire a été cité à mon détriment. Il se rapporte à l'article IX de la convention. Il touche ainsi à la compétence de la Cour sur la base de la clause compromissoire. Je ne retire pas un mot de ce que j'ai écrit à l'époque. S'il n'y avait pas de réserve applicable en l'espèce et qu'on se situait exclusivement dans les sphères épurées de l'article IX, la Cour aurait cette compétence étendue dont je fais état dans le commentaire. Or, je n'y traitais pas de l'article VIII et encore moins de la réserve de la Birmanie. Ces questions étaient hors de mon champ visuel.

25. Les académiques parmi vous, Mesdames et Messieurs les juges, me comprennent aisément ; je suis sûr qu'il en va de même des juges privés du privilège très relatif d'avoir été professeur. Les écrits doctrinaux partent d'une table rase et n'ont pas de repères fixes. Au contraire, dans le contentieux, vous êtes d'emblée saisis de circonstances particulières ou idiosyncrasiques. Elles vous imposent le poids de leur gravitation. Je ne vois là rien qui ressemble à une contradiction ou à une volte-face. Le contexte et le sous-fonds du raisonnement ne sont pas identiques. Tout cela n'est pas décisif pour notre espèce. Je ne voulais même pas évoquer ce point. J'ai toutefois craint que mon silence pût éveiller le soupçon d'un embarras. J'ai préféré le dissiper.

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[76] CR 2022/2, p. 42, par. 13 (Pasipanodya).

[77] Abtahi & Webb, *The Genocide Convention: The Travaux Préparatoires*, Martinus Nijhoff, 2008, vol. 1, p. 403-404.

Conclusion

26. Qu'est-ce que je voudrais que vous gardiez surtout à l'esprit de mes deux plaidoiries ? Ceci : quelle que soit l'interprétation objectivement correcte de la relation entre les articles VIII et IX, pouvons-nous dans les circonstances de l'espèce adopter une exégèse dont le résultat est de spolier de tout effet utile la réserve birmane ? Votre Cour peut-elle se permettre d'ignorer entièrement une réserve qu'un Etat a pris le soin d'attacher à une convention au moment où il en devenait partie ? Une telle proposition me met mal à l'aise. Je suis sûr que vous y réfléchirez avec grande attention et je ne crains d'aucune manière les résultats auxquels vous amèneront les chemins de votre sagesse.

27. Ces réflexions mettent un terme à mon exposé de ce jour. Je remercie la Cour de m'avoir prêté attention. Puis-je vous prier, Madame la présidente, de bien vouloir appeler à la barre l'agent du Myanmar pour les conclusions ?

The PRESIDENT: I thank Professor Kolb. I shall now give the floor to the Agent of Myanmar, H.E. Mr. Ko Ko Hlaing. You have the floor, Your Excellency.

Mr. HLAING:

CLOSING STATEMENT OF THE AGENT OF THE REPUBLIC OF THE UNION OF MYANMAR

1. Madam President, distinguished Members of the Court, counsel for Myanmar have dutifully presented their arguments to the Court. As this stage of the proceedings is concerned only with matters of law concerning jurisdiction and the admissibility of the case, that has been our focus. We have refrained from entering into matters relevant to the merits.

2. Unfortunately, on Wednesday, counsel for The Gambia made many factual and political allegations that were not relevant to the preliminary objections. The tone of these statements was inappropriate to a court of law at this stage of the proceedings. Myanmar will not respond to these allegations as now is neither the right place nor time to do so. We will not waste the Court's valuable time by making statements not really addressed to the Court but to an audience outside the Great Hall of Justice. In my understanding, these allegations are aimed at intimating to the Members of the Court and the public that the authorities in Myanmar should be considered perpetrators of genocide, even before there has been any decision on whether there will be a merit phase, let alone any decision by

this Court. Counsel for The Gambia also appear to suggest that the preliminary objections should not be considered seriously as the Court has already rejected them in the previous provisional measures Order.

3. I must respond by emphasizing, first, that Myanmar is exercising its right as Respondent by submitting these preliminary objections, as clearly foreseen by paragraph 85 of the provisional measures Order. Secondly, a respondent has the right not to be prejudged on the merits at the preliminary objections phase. At any merit phase, the burden of proof would be on The Gambia as Applicant to prove its claims. However, it cannot seek to discharge that burden now, or speak as if that burden had already been discharged. As of today, The Gambia's claims have neither been admitted to be heard nor have they been proved, and The Gambia should not act as if it were otherwise.

4. Nevertheless, given that The Gambia have used this hearing as a platform to make allegations about the merits, as Agent for Myanmar I cannot just sit here in silence without responding at all. In my closing remarks, I would like to take just a moment to say that Myanmar is committed to ensuring compliance with the Genocide Convention. For instance, on 25 August 2021, Myanmar amended its Penal Code and the Code of Criminal Procedure in order to insert additional articles criminalizing genocide and providing for the trial and punishment of perpetrators. Myanmar, as a responsible party, is also implementing its obligations under the provisional measures Order.

5. There also are continuous efforts to improve the general situation on the ground. The region now is relatively calm and peaceful without any significant incidents of violence.

6. Before concluding with the reading of Myanmar's final submissions, I would like to thank you all for your careful and patient attention to the arguments presented. I am very grateful to the Registrar and all the staff of the Registry who have enabled the smooth and efficient conduct of this hearing, including the interpreters.

7. It now falls to me, in accordance with Article 60, paragraph 2, of the Rules of Court to read the final submissions of the Republic of the Union of Myanmar. These are as follows:

> "For the reasons given in Myanmar's written preliminary objections and in its oral arguments at the hearing of the preliminary objections, and for any other reasons the Court might deem appropriate, Myanmar respectfully requests the Court to adjudge and declare:

1. that the Court lacks jurisdiction to hear the case brought by The Gambia against Myanmar; and/or

2. that The Gambia's Application is inadmissible."

8. Madam President, Mr. Vice-President, distinguished Members of the Court, that concludes the arguments of Myanmar at this hearing of the preliminary objections. I thank you.

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

Your statement brings to an end Myanmar's second round of oral argument. I recall that on Monday 28 February 2022, between 3 p.m. and 4.30 p.m., The Gambia will present its second round of oral argument.

The sitting is adjourned.

The Court rose at 4.30 p.m.

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