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Summary
Unofficial

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

History of the proceedings (paras. 1-27)

The Court begins by recalling that, on 11 November 2019, the Republic of The Gambia (hereinafter "The Gambia") filed in the Registry of the Court an Application instituting proceedings against the Republic of the Union of Myanmar (hereinafter "Myanmar") concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter the "Genocide Convention" or the "Convention"). In its Application, The Gambia seeks to found the Court's jurisdiction on Article IX of the Genocide Convention, in conjunction with Article 36, paragraph 1, of the Statute of the Court.

The Application contained a Request for the indication of provisional measures. By an Order dated 23 January 2020, the Court indicated certain provisional measures.

On 20 January 2021, Myanmar raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application.

I. INTRODUCTION (PARAS. 28-33)

The Court notes that The Gambia and Myanmar are parties to the Genocide Convention and that they did not enter any reservation to Article IX, which reads as follows:

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

After setting out the four preliminary objections to the jurisdiction of the Court and the admissibility of the Application raised by Myanmar, the Court notes that, when deciding on preliminary objections, it is not bound to follow the order in which they are presented by the respondent. In the present case, the Court starts by addressing the preliminary objection relating to the "real applicant" in the case (first preliminary objection), before turning to the existence of a dispute (fourth preliminary objection) and Myanmar's reservation to Article VIII of the Genocide

Convention (third preliminary objection). Finally, the Court deals with the preliminary objection pertaining to the standing of The Gambia (second preliminary objection), which presents a question of admissibility only.

II. WHETHER THE GAMBIA IS THE "REAL APPLICANT" IN THIS CASE (FIRST PRELIMINARY OBJECTION) (PARAS. 34-50)

The Court notes that, in its first preliminary objection, Myanmar argues that the Court lacks jurisdiction, or alternatively that the Application is inadmissible, because the "real applicant" in the proceedings is the Organisation of Islamic Cooperation (hereinafter the "OIC"), an international organization, which cannot be a party to proceedings before the Court pursuant to Article 34, paragraph 1, of the Statute of the Court. The Court first examines the question of its jurisdiction.

A. Jurisdiction *ratione personae* (paras. 35-46)

The Court explains that it establishes its jurisdiction *ratione personae* on the basis of the requirements laid down in the relevant provisions of its Statute and of the Charter of the United Nations. It is incumbent upon it to examine first of all the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute and whether the Court is thus open to it. Pursuant to Article 34, paragraph 1, of the Statute, "[o]nly States may be parties in cases before the Court". According to Article 35, paragraph 1, of the Statute, "[t]he Court shall be open to the States parties to the present Statute". Article 93, paragraph 1, of the Charter of the United Nations provides that "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice". The Gambia has been a Member of the United Nations since 21 September 1965 and is *ipso facto* a party to the Statute of the Court. The Court therefore considers that The Gambia meets the above-mentioned requirements.

Myanmar submits, however, that in bringing its claims before the Court, The Gambia has in fact acted as an "organ, agent or proxy" of the OIC, which is the "true applicant" in these proceedings. Its main contention is that a third party, namely the OIC, which is not a State and cannot therefore have a reciprocal acceptance of jurisdiction with the respondent State, has used The Gambia as a "proxy" in order to circumvent the limits of the Court's jurisdiction *ratione personae* and invoke the compromissory clause of the Genocide Convention on its behalf.

The Court notes that The Gambia instituted the present proceedings in its own name, as a State party to the Statute of the Court and to the Genocide Convention. It also notes The Gambia's assertion that it has a dispute with Myanmar regarding its own rights as a State party to that Convention. The Court observes that the fact that a State may have accepted the proposal of an intergovernmental organization of which it is a member to bring a case before the Court, or that it may have sought and obtained financial and political support from such an organization or its members in instituting these proceedings, does not detract from its status as the applicant before the Court. Moreover, the question of what may have motivated a State such as The Gambia to commence proceedings is not relevant for establishing the jurisdiction of the Court.

The Court then responds to Myanmar's argument that the approach taken by the Court to establish the existence of a dispute should be followed in cases where the identity of the "real applicant" is at issue. According to Myanmar, the Court should look beyond the narrow question of who is named in the proceedings as the applicant and make an objective determination as to the identity of the "real applicant", based on an examination of the relevant facts and circumstances as a whole. The Court states that it is of the view that these are distinct legal questions. In the present case, the Court sees no reason why it should look beyond the fact that The Gambia has instituted proceedings against Myanmar in its own name. The Court is therefore satisfied that the Applicant in this case is The Gambia.

The Court concludes that, in light of the above, the first preliminary objection raised by Myanmar, in so far as it concerns the jurisdiction of the Court, must be rejected.

B. Admissibility (paras. 47-49)

The Court recalls that it has already found that the Applicant in these proceedings is The Gambia, a State party to the Statute of the Court and a party to the Genocide Convention, which confers on the Court jurisdiction over disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention. The Court notes that, as it has held previously, it is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process. The Court observes that no evidence has been presented to it showing that the conduct of The Gambia amounts to an abuse of process. Nor is the Court confronted in the present case with other grounds of inadmissibility which would require it to decline the exercise of its jurisdiction. Thus, the first preliminary objection of Myanmar, in so far as it concerns the admissibility of The Gambia's Application, must be rejected.

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In light of the foregoing, the Court concludes that the first preliminary objection of Myanmar must be rejected.

III. Existence of a dispute between the Parties (fourth preliminary objection) (paras. 51-77)

The Court notes that, 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 Parties on the date of filing of the Application instituting proceedings.

The Court recalls that the existence of a dispute between the Parties is a requirement for its jurisdiction under Article IX of the Genocide Convention. According to its established case law, a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between parties. In order for a dispute to exist, it must be shown that the claim of one party is positively opposed by the other. The two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations. The Court's determination of the existence of a dispute is a matter of substance and not a question of form or procedure. In principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court. However, conduct of the parties subsequent to the application may be relevant for various purposes, in particular to confirm the existence of a dispute. In making such a determination, the Court takes into account in particular any statements or documents exchanged between the parties, as well as any exchanges made in multilateral settings. In so doing, it pays special attention to the author of the statement or document, their intended or actual addressee, and their content.

In this regard, the Court notes that in the present case there are four relevant statements made by representatives of the Parties before the United Nations General Assembly in September 2018 and September 2019. These statements were made during the 2018 and 2019 general debates of the Assembly, which took place in the weeks following the publication of two reports by the Fact-Finding Mission on Myanmar established by the Human Rights Council of the United Nations (hereinafter the "Fact-Finding Mission"), on 12 September 2018 and on 8 August 2019, respectively. Also relevant to the determination of the existence of a dispute is the Note Verbale that The Gambia sent to the Permanent Mission of Myanmar to the United Nations on 11 October 2019.

After examining the content and context of the Parties' statements before the United Nations General Assembly in September 2018 and September 2019, the Court notes that Myanmar contests the existence of a dispute between the Parties on two grounds. First, Myanmar argues that the statements made in the General Assembly and the Note Verbale sent by The Gambia on 11 October 2019 lacked sufficient particularity, in the sense that The Gambia did not specifically articulate its legal claims. Secondly, Myanmar maintains that the requirement of "mutual awareness" is not satisfied because it has never rejected specific claims by The Gambia. The Court examines these two grounds advanced by Myanmar to contest the existence of a dispute between the Parties.

With regard to Myanmar's argument that the existence of a dispute requires what Myanmar refers to as "mutual awareness" by both parties of their respective positively opposed positions, the Court is of the opinion that the conclusion that the parties hold clearly opposite views concerning the performance or non-performance of legal obligations does not require that the respondent must expressly oppose the claims of the applicant. If that were the case, a respondent could prevent a finding that a dispute exists by remaining silent in the face of an applicant's legal claims. Such a consequence would be unacceptable. It is for this reason that the Court considers that, in case the respondent has failed to reply to the applicant's claims, it may be inferred from this silence, in certain circumstances, that it rejects those claims and that, therefore, a dispute exists at the time of the application. Consequently, the Court is of the view that the requirement of "mutual awareness" based on two explicitly opposed positions, as put forward by Myanmar, has no basis in law.

Turning to Myanmar's argument that the statements made by The Gambia before the United Nations General Assembly lacked sufficient particularity, the Court notes that those statements did not specifically mention the Genocide Convention. The Court, however, does not consider that a specific reference to a treaty or to its provisions is required in this regard. As the Court has affirmed in the past, while it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court, the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. In this context, the Court notes that the statements of The Gambia in September 2018 and in September 2019 were made shortly after the publication of the Fact-Finding Mission's reports. The 2018 report specifically alleged the perpetration of crimes in Rakhine State that were similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts, while the 2019 report specifically referred to Myanmar's responsibility under the Genocide Convention. The Gambia was undoubtedly referring in its statement to the findings of these reports, which were the key United Nations reports on the situation of the Rohingya population in Myanmar and which had been referred to in various reports that were before the General Assembly. In particular, the second report of the Fact-Finding Mission identified The Gambia as one of those States making efforts to pursue a case against Myanmar before the Court under the Convention. Myanmar could not have been unaware of this fact. Similarly, Myanmar's rejection of the findings of these reports demonstrates that it was positively opposed to any allegations of genocide being committed by its security forces against the Rohingya communities in Myanmar, as well as to the allegations of its responsibility under the Genocide Convention for carrying out acts of genocide. Such allegations were contained in the two reports and publicly taken up by The Gambia.

The Court considers that the statements made by the Parties before the United Nations General Assembly in 2018 and 2019 indicate the opposition of their views on the question whether the treatment of the Rohingya group was consistent with Myanmar's obligations under the Genocide Convention. Myanmar could not have been unaware of the fact that The Gambia had expressed the view that it would champion an accountability mechanism for the alleged crimes against the Rohingya, following the release of the Fact-Finding Mission's report of 2018. More importantly, Myanmar could not have failed to know of the announcement by the Vice-President of The Gambia before the General Assembly during the general debate in September 2019 that her Government intended to lead concerted efforts to take the Rohingya issue to the Court. It was The Gambia, and The Gambia alone, that had expressed such an intention before the General Assembly in 2019. The

statements made in both 2018 and 2019 before the General Assembly by Myanmar's Union Minister for the Office of the State Counsellor express views of his Government which are opposed to those of The Gambia's and clearly reject the reports and findings of the Fact-Finding Mission.

Moreover, the Note Verbale sent by The Gambia to the Permanent Mission of Myanmar to the United Nations on 11 October 2019 brought clearly into focus the positive opposition of views between the Parties, by expressing specifically and in legal terms The Gambia's position concerning Myanmar's alleged violations of its obligations under the Genocide Convention. In its Note Verbale, The Gambia referred to the findings of the Fact-Finding Mission, especially those regarding the "ongoing genocide against the Rohingya people of the Republic of the Union of Myanmar in violation of Myanmar's obligations under the Convention on the Prevention and Punishment of the Crime of Genocide", which it considered to be "well-supported by the evidence and highly credible". It also "emphatically reject[ed] Myanmar's denial of its responsibility for the ongoing genocide against Myanmar's Rohingya population, and its refusal to fulfill its obligations under the Genocide Convention", and it asked Myanmar to comply with those obligations.

The Court further notes that Myanmar never responded to this Note Verbale. As was previously held by the Court, the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*; the position or the attitude of a party can be established by inference, whatever the professed view of that party. In particular, the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for.

The Court recalls that Myanmar was informed, through the reports of the Fact-Finding Mission of 2018 and 2019, of the allegations made against it concerning violations of the Genocide Convention. It also had an indication of The Gambia's opposition to its views on this matter, as reflected in statements by the representatives of The Gambia and Myanmar before the United Nations General Assembly. Thus, the Note Verbale did not constitute the first time that these allegations were made known to Myanmar. In light of the nature and gravity of the allegations made in The Gambia's Note Verbale and Myanmar's prior knowledge of their existence, the Court is of the view that Myanmar's rejection of the allegations made by The Gambia can also be inferred from its failure to respond to the Note Verbale within the one-month period preceding the filing of the Application.

In light of the foregoing, the Court concludes that a dispute relating to the interpretation, application and fulfilment of the Genocide Convention existed between the Parties at the time of the filing of the Application by The Gambia on 11 November 2019, and that the fourth preliminary objection of Myanmar must therefore be rejected.

IV. MYANMAR'S RESERVATION TO ARTICLE VIII OF THE GENOCIDE CONVENTION (THIRD PRELIMINARY OBJECTION) (PARAS. 78-92)

The Court notes that, in its third preliminary objection, Myanmar submits that the Court lacks jurisdiction, or that The Gambia's Application is inadmissible, because The Gambia cannot validly seise the Court under the Genocide Convention. In Myanmar's view, this is the effect of its reservation to Article VIII of the Genocide Convention. Myanmar argues that the seisin of the Court is governed by Article VIII of the Genocide Convention, which 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."

Myanmar, then the Union of Burma, deposited its instrument of ratification of the Convention on 14 March 1956. That instrument of ratification contained the following reservation: "With reference

to Article VIII, the Union of Burma makes the reservation that the said Article shall not apply to the Union." Myanmar submits that the reference in Article VIII to the "competent organs of the United Nations" includes the Court, and that, because that provision governs the seisin of the Court, Myanmar's reservation to it precludes the valid seisin of the Court by The Gambia in the present case.

For the purpose of ascertaining whether Article VIII governs the seisin of the Court, the Court has recourse to the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969 (hereinafter the "Vienna Convention").

The Court observes that the ordinary meaning of the expression "competent organs of the United Nations", viewed in isolation, could appear to encompass the Court, the principal judicial organ of the United Nations. However, reading Article VIII as a whole leads to a different interpretation. In particular, Article VIII provides that the competent organs of the United Nations may "take such action . . . as they consider appropriate", which suggests that these organs exercise discretion in determining the action that should be taken with a view to "the prevention and suppression of acts of genocide or any of the other acts enumerated in article III". The function of the competent organs envisaged in this provision is thus different from that of the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it" pursuant to Article 38, paragraph 1, of its Statute and to give advisory opinions on any legal question pursuant to Article 65, paragraph 1, of its Statute. In this sense, Article VIII may be seen as addressing the prevention and suppression of genocide at the political level rather than as a matter of legal responsibility.

Furthermore, pursuant to customary international law, as reflected in Article 31 of the Vienna Convention, the terms of Article VIII must be interpreted in their context and, in particular, in light of other provisions of the Genocide Convention. In this regard, the Court pays specific attention to Article IX of the Genocide Convention, which constitutes the basis of its jurisdiction under the Convention. In the Court's view, Articles VIII and IX of the Genocide Convention have distinct areas of application. Article IX provides the conditions for recourse to the principal judicial organ of the United Nations in the context of a dispute between Contracting Parties, whereas Article VIII allows any Contracting Party to appeal to other competent organs of the United Nations, even in the absence of a dispute with another Contracting Party.

It thus follows from the ordinary meaning of the terms of Article VIII considered in their context that that provision does not govern the seisin of the Court. In light of this finding, the Court is of the view that there is no need to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the Genocide Convention.

Given that Article VIII does not pertain to the seisin of the Court, Myanmar's reservation to that provision is irrelevant for the purposes of determining whether the Court is properly seised of the case before it. Consequently, it is not necessary for the Court to examine the content of Myanmar's reservation to Article VIII.

The Court therefore concludes that Myanmar's third preliminary objection must be rejected.

V. THE GAMBIA'S STANDING TO BRING THE CASE BEFORE THE COURT (SECOND PRELIMINARY OBJECTION) (PARAS. 93-114)

The Court notes that, in its second preliminary objection, Myanmar submits that The Gambia's Application is inadmissible because The Gambia lacks standing to bring this case before the Court. First, Myanmar considers that only "injured States", which Myanmar defines as States "adversely affected by an internationally wrongful act", have standing to present a claim before the Court. In

Myanmar's view, The Gambia is not an "injured State" and has failed to demonstrate an individual legal interest. Therefore, according to Myanmar, The Gambia lacks standing under Article IX of the Genocide Convention. Secondly, Myanmar submits that The Gambia's claims are inadmissible in so far as they are not brought before the Court in accordance with the rule concerning the nationality of claims which, according to Myanmar, is reflected in Article 44 *(a)* of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. Myanmar asserts that the rule concerning the nationality of claims 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. Consequently, in Myanmar's view, The Gambia lacks standing to invoke Myanmar's responsibility in the interest of members of the Rohingya group, who are not nationals of The Gambia. Thirdly, Myanmar maintains that, even if Contracting Parties that are not "specially affected" by an alleged violation of the Convention are assumed to have standing to submit a dispute to the Court under Article IX, this standing is subsidiary to and dependent upon the standing of States that are "specially affected". Myanmar argues that Bangladesh would be "the most natural State" to institute proceedings in the present case, because it borders Myanmar and has received a significant number of the alleged victims of genocide. In Myanmar's view, the reservation by Bangladesh to Article IX of the Genocide Convention not only precludes Bangladesh from bringing a case against Myanmar, but it also bars any "non-injured" State, such as The Gambia, from doing so.

The Court considers that the question to be answered by it is whether The Gambia is entitled to invoke Myanmar's responsibility before the Court for alleged breaches of Myanmar's obligations under the Genocide Convention. The Court recalls the Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, in which it explained the legal relationship established among States parties under the Genocide Convention:

> "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."

All the States parties to the Genocide Convention thus have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention. Such a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case.

The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*. Responsibility for an alleged breach of obligations *erga omnes partes* under the Genocide Convention may be invoked through the institution of proceedings before the Court, regardless of whether a special interest can be demonstrated. If a special interest were required for that purpose, in many situations no State would be in a position to make a claim.

For the purpose of the institution of proceedings before the Court, a State does not need to demonstrate that any victims of an alleged breach of obligations *erga omnes partes* under the Genocide Convention are its nationals. The Court recalls that, where a State causes injury to a natural or legal person by an internationally wrongful act, that person's State of nationality may be entitled to exercise diplomatic protection, which consists of the invocation of State responsibility for such injury. However, the entitlement to invoke the responsibility of a State party to the Genocide

Convention before the Court for alleged breaches of obligations *erga omnes partes* is distinct from any right that a State may have to exercise diplomatic protection in favour of its nationals. The aforementioned entitlement derives from the common interest of all States parties in compliance with these obligations, and it is therefore not limited to the State of nationality of the alleged victims. In this connection, the Court observes that victims of genocide are often nationals of the State allegedly in breach of its obligations *erga omnes partes*.

In the opinion of the Court, the Genocide Convention does not attach additional conditions to the invocation of responsibility or the admissibility of claims submitted to the Court. The use of the expression "the Contracting Parties" in Article IX is explained by the fact that the Court's jurisdiction under Article IX requires the existence of a dispute between two or more Contracting Parties. By contrast, "[a]ny Contracting Party" may seek recourse before the competent organs of the United Nations under Article VIII, even in the absence of a dispute with another Contracting Party. Besides, the use of the word "[d]isputes", as opposed to "any dispute" or "all disputes", in Article IX of the Genocide Convention, is not uncommon in compromissory clauses contained in multilateral treaties. Similarly, the terms of Article IX providing that disputes are to be submitted to the Court "at the request of any of the parties to the dispute", as opposed to any of the Contracting Parties, do not limit the category of Contracting Parties entitled to bring claims for alleged breaches of obligations *erga omnes partes* under the Convention. This phrase clarifies that only a party to the dispute may bring it before the Court, but it does not indicate that such a dispute may only arise between a State party allegedly violating the Convention and a State "specially affected" by such an alleged violation.

It follows that any State party to the Genocide Convention may invoke the responsibility of another State party, including through the institution of proceedings before the Court, with a view to determining the alleged failure to comply with its obligations *erga omnes partes* under the Convention and to bringing that failure to an end.

The Court acknowledges that Bangladesh, which borders Myanmar, has faced a large influx of members of the Rohingya group who have fled Myanmar. However, this fact does not affect the right of all other Contracting Parties to assert the common interest in compliance with the obligations *erga omnes partes* under the Convention and therefore does not preclude The Gambia's standing in the present case. Accordingly, the Court does not need to address the arguments of Myanmar relating to Bangladesh's reservation to Article IX of the Genocide Convention.

For these reasons, the Court concludes that The Gambia, as a State party to the Genocide Convention, has standing to invoke the responsibility of Myanmar for the alleged breaches of its obligations under Articles I, III, IV and V of the Convention, and that, therefore, Myanmar's second preliminary objection must be rejected.

OPERATIVE CLAUSE (PARA. 115)

For these reasons,

THE COURT,

(1) Unanimously,

Rejects the first preliminary objection raised by the Republic of the Union of Myanmar;

(2) Unanimously,

Rejects the fourth preliminary objection raised by the Republic of the Union of Myanmar;

(3) Unanimously,

Rejects the third preliminary objection raised by the Republic of the Union of Myanmar;

(4) By fifteen votes to one,

Rejects the second preliminary objection raised by the Republic of the Union of Myanmar;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; *Judges* ad hoc Pillay, Kress;

AGAINST: *Judge* Xue;

(5) By fifteen votes to one,

Finds that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to entertain the Application filed by the Republic of The Gambia on 11 November 2019, and that the said Application is admissible.

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; *Judges* ad hoc Pillay, Kress;

AGAINST: *Judge* Xue.

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Judge XUE appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* KRESS appends a declaration to the Judgment of the Court.

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Dissenting opinion of Judge Xue

1. In her dissenting opinion, Judge Xue regrets to be unable to concur with the Court's decision on The Gambia's standing and gives the following reasons for her vote on paragraph 115 (4) and (5) of the Judgment.

2. First of all, Judge Xue considers that Myanmar's first preliminary objection raises a substantive issue, namely whether the Court is competent under the Statute to entertain a case which is in fact initiated by an international organization and entrusted to one of its members to act on its behalf. According to Judge Xue, the evidence adduced by the Respondent sufficiently proves that The Gambia was tasked and appointed by the Organisation of Islamic Cooperation (hereinafter the "OIC") to institute the proceedings against Myanmar in the Court. In this regard, Judge Xue refers, among other things, to resolutions adopted by the OIC and the public acknowledgment by its Member States, in particular The Gambia itself. She states that, being the chair of the Ad Hoc Ministerial Committee on Accountability for Human Rights Violations against the Rohingyas, The Gambia was specifically instructed and directed by the OIC to take legal action in the Court and that the decision of the OIC to file a case in the Court was negotiated and agreed upon among its Members, particularly with regard to the representation and funding of the envisaged legal action. Judge Xue points out that The Gambia does not deny the relevant facts but maintains that it instituted the proceedings in its own name and has a dispute with Myanmar regarding "its own rights". At the same time, The Gambia does not claim any link with the alleged acts in Myanmar and asserts that it has no individual interest in the case but acts for the common interest of the States parties to the Genocide Convention. Given its character, Judge Xue considers that The Gambia's legal action is arguably tantamount to a public-interest litigation.

3. In Judge Xue's view, the reasoning of the Court on the Respondent's first preliminary objection avoids the real hard issue before the Court. By virtue of Article 34, paragraph 1, of the Statute, international organizations do not enjoy access to the Court. According to Judge Xue, the issue in the present case is not about in whose name the proceedings are instituted, what motive the Applicant may pursue, or who has arranged the litigation team, but to determine whether The Gambia is acting on behalf of the OIC for the common interest of its Member States, some of which are parties to the Genocide Convention, while others are not. In her view, the evidence shows that it was the OIC, not The Gambia, that took the decision to submit the issue of the Rohingyas to the Court and that The Gambia was entrusted to implement this decision. Moreover, the issue of the Rohingyas was never considered as a bilateral dispute between The Gambia and Myanmar in the OIC. Although The Gambia independently made its decision to institute proceedings in the Court, Judge Xue considers that the fact remains that The Gambia's legal action is initiated by the OIC and that The Gambia is acting under the mandate and with the financial support of the OIC. In her view, to establish the existence of a bilateral dispute between the parties, there must exist some link between the applicant and the alleged acts of the respondent. This linkage requirement has a substantive bearing on the merits phase. Allegations of genocide require serious investigation and proof. When the applicant has no link whatsoever with the alleged acts, it is apparently difficult, if not impossible, for it to collect evidence and conduct investigation on its own. Relying entirely on the evidence and material sources collected by third parties only reinforces the argument that the case is a public-interest action, *actio popularis*. Such action, even in the form of a bilateral dispute, may in fact allow international organizations to have access to the Court in the future.

4. While Judge Xue agrees with the Court's finding that the conduct of The Gambia to institute proceedings before the Court does not amount to an abuse of process, she doubts very much the Court's conclusion that there are no other grounds of inadmissibility which would require it to decline the exercise of its jurisdiction.

5. Judge Xue explains that under the Statute, the Court's function in contentious cases is confined to dispute settlement between two or more States, not suitable for entertaining public-interest actions. When the applicant is in fact acting on behalf of an international organization, albeit in its own name, the respondent may be placed in a disadvantageous position before the Court. This is particularly true, in her view, if several judges on the bench are nationals of member States of the international organization concerned. In the present case, with the organization in the shadow, inequality of the Parties may be hidden in the composition of the Court, thereby undermining the principle of equality of the parties. Judge Xue emphasizes that however desirable it is to provide judicial protection to the victims of the alleged acts, the respondent, as a party, is entitled to a fair legal process in accordance with the provisions of the Statute and the Rules of Court.

6. Moreover, Judge Xue observes that The Gambia's legal action may challenge the principle of finality in the adjudication of the dispute. In accordance with Articles 59 and 60 of the Statute, the Court's decision is only binding on the parties to the dispute and shall be final and without appeal. She wonders, if The Gambia is acting for the common interest of the States parties to the Genocide Convention, whether the Court's decision would have binding force on all other States parties as well. She notes that by the Court's reasoning, those other States parties will not be prevented from exercising their right to institute separate proceedings for the same cause against the same State before the Court, which, in her view, is not consistent with the rules of State responsibility.

7. For Judge Xue, these concerns give rise to the issue of judicial propriety for the Court to consider whether it is appropriate to exercise jurisdiction in the present case. Ultimately, they boil down to the very question whether the "dispute" over the alleged acts of Myanmar could be settled by the Court as wished by The Gambia or the OIC.

8. With regard to Myanmar's second preliminary objection on The Gambia's standing, Judge Xue points out that, due to the character of The Gambia's legal action, in the present case the question of jurisdiction *ratione personae* and the issue of standing are delicately interlinked. Whether Article IX of the Genocide Convention provides jurisdiction *ratione personae* to a case instituted by a non-injured State party also bears on the standing of the Applicant. Judge Xue notes that the Court, in determining whether it has jurisdiction *ratione personae*, only examines whether The Gambia meets the conditions laid down in Articles 34 and 35 of the Statute, without examining the terms of the compromissory clause of the Genocide Convention. Articles 34 and 35, however, basically concern the right or "the legal capacity" of a party to appear before the Court, a question concerning statutory requirements for access to the Court, not a matter of consent for jurisdiction. Judge Xue is of the view that the issue before the Court is not about The Gambia's legal capacity to institute the proceedings, but whether the Court has jurisdiction *ratione personae* to entertain the case instituted by a non-injured State. In her view, the matter relates, first and foremost, to the interpretation of Article IX of the Genocide Convention, namely, whether the States parties have agreed to grant a general standing to all the States parties for the invocation of responsibility of any other State party solely on the basis of their common interest in compliance with the obligations under the Convention.

9. Judge Xue indicates that the Genocide Convention provides several means and mechanisms for the implementation of the obligations under the Convention, which take into account the situation where a non-injured State party may raise the issue of genocide against another State party. The United Nations organs to which such a non-injured State party may resort, however, do not include the International Court of Justice, an interpretation which, according to Judge Xue, can be confirmed by the *travaux préparatoires* of the Genocide Convention.

10. Judge Xue notes that the treaty was drafted at a time when the notions of obligations *erga omnes partes* or *erga omnes* were not established in general international law and that the ordinary meaning of the term "disputes" was presumed to refer to bilateral disputes. She observes that, although at the time of the negotiations of the Genocide Convention the contracting parties primarily focused on the meaning and scope of the phrase "responsibility of a State for genocide" and whether to include it in the clause, records show that they did not intend to provide standing to any of the States parties for the invocation of State responsibility of any other State party. In their understanding, the principle that no action could be instituted save by a party concerned in a case should apply and responsibility would arise whenever genocide was committed by a State in the territory of another State. In Judge Xue's view, the *travaux préparatoires* do not support the proposition that any State party is entitled to invoke the responsibility of any other State party merely on the basis of the raison d'être of the Genocide Convention.

11. Judge Xue agrees with the Court that in the present case The Gambia is not exercising diplomatic protection but, in her view, this does not mean there need not be a link between the applicant and the alleged acts of the respondent. Although the word "[d]isputes" in Article IX is without any qualification, opposition of views between the two parties must relate to a legal interest that the applicant may claim for itself under international law. Unless otherwise expressly provided for in a treaty, general standing of the States parties cannot be presumed. In this regard, she refers to Article 33 of the European Convention on Human Rights as a provision in contrast.

12. In cases concerning alleged violations of the Genocide Convention, Judge Xue notes, the Court has affirmed that Article IX includes all forms of State responsibility, including the responsibility of a State for an act of genocide perpetrated by the State itself through the acts of its organs, which reflects the development of international law on State responsibility. She points out, however, that in none of those cases did the Court consider or even imply that a State party may invoke international responsibility of another State party solely on the basis of the raison d'être of the Genocide Convention; the applicant must have a territorial, national or some other form of connection with the alleged acts. In her view, the Court's interpretation is not conducive to the security and stability of treaty relations between the States parties.

13. Further, Judge Xue considers that the Court's reliance on the pronouncement of the Court in the Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter the "Advisory Opinion") for upholding The Gambia's standing does not seem consistent with the established practice of the States parties. Notwithstanding the common interest identified in the Advisory Opinion, the Court did not consider that reservations to the Genocide Convention should be categorically prohibited. Instead, it took the view that the compatibility of a reservation with the object and purpose of the Convention should furnish a criterion for assessing a particular reservation made by a State on accession and appraising an objection lodged by another State to the reservation. Pursuant to that criterion, in the subsequent treaty practice reservations to Article IX of the Genocide Convention have generally been accepted as permissible by the States parties, a position which the Court's jurisprudence has confirmed.

14. Judge Xue notes that while reservations to Article IX could also lead to many situations where no State party would be in a position to make a claim before the Court against another State party who has made a reservation to the Court's jurisdiction, no State party has ever complained that the Court's decisions upholding the effect of the relevant reservations prejudiced the common interest of the States parties to the Convention. Logically, the reason given by the Court in the present case for discarding the requirement of a special interest cannot be established; just as in the situation of a reservation to the Court's jurisdiction, dismissal of an application for lack of standing of a non-injured State is also just to exclude a particular method of settling a dispute relating to the

interpretation, application or fulfilment of the Convention, and does not affect substantive obligations relating to acts of genocide themselves under that Convention.

15. Judge Xue observes that the Court's decision in the second phase of the *South West Africa* cases stands as a constant reminder that in cases where the common interest of the international community is purportedly at stake, the issue of standing of the applicant must be handled with great care. While endorsing the notions of obligations *erga omnes* or *erga omnes partes* as a positive development of international law, Judge Xue notes that, in the *South West Africa* cases, an adjudication clause was inserted into the Mandate for South West Africa among the guarantees provided to ensure its success and that standing of the member States before the Court was based on the statutory provisions of the mandate rather than merely on a common interest; it was granted in advance to the individual member States of the League, and subsequently to the Member States of the United Nations, on the basis of the consent of the member States. Judge Xue states that this unique system cannot be generalized to all other conventions, where a common interest of the States parties may exist.

16 Judge Xue indicates that, largely as a rectification of its position taken in the *South West Africa* cases, the Court in the *Barcelona Traction* case made its first pronouncement on the concept of obligation *erga omnes*, recognizing the common interest of the international community as a whole in the protection of certain important rights. The Court, however, stopped short of indicating whether such obligations, either on the basis of treaty provisions or customary international law, would by themselves provide standing for any State to institute proceedings against any other State before the Court for the protection of the common interest. Judge Xue observes that, since *Barcelona Traction*, the Court has referred to obligations *erga omnes* in a number of other cases, in none of which, however, it dealt with the relationship between such obligations and the question of standing.

17. Judge Xue indicates that the only case in which the Court explicitly affirms the entitlement of a State party to make a claim against another State party on the basis of the common interest in compliance with the obligations *erga omnes partes* is the *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* case. On the issue of standing, she does not wish to repeat her dissenting opinion appended to that Judgment but highlights three points.

18. First, Judge Xue points out that the issue raised by the applicant in *Belgium* v. *Senegal* essentially concerns the interpretation and application of the principle of extradition or prosecution under Article 7, paragraph 1, of the Convention against Torture. As its national courts were seised of cases against Mr. Hissène Habré for alleged torture offences, Belgium was a specially affected State in that case. Belgium claimed that the respondent, having failed to prosecute Mr. Habré and refused to extradite him to Belgium, had breached its obligation under Article 7, paragraph 1, of the Convention against Torture. Logically, the question before the Court whether Senegal had fulfilled its obligation under Article 6, paragraph 2, to conduct a preliminary inquiry into the facts of the alleged offences constituted part of the legal issues relating to the principle of extradition or prosecution.

19. Secondly, Judge Xue notes that the Court has consistently maintained a clear distinction between substantive norms and procedural rules. It has firmly held that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things". According to Judge Xue, the inference drawn from the common interest in the *Belgium* v. *Senegal* case and in the present case confuses the legal interest of the States parties in compliance with the substantive obligations of the Genocide Convention and the procedure for dispute settlement.

20. Thirdly, Judge Xue observes that the common interest enunciated by the Court in the Advisory Opinion exists not solely in the Genocide Convention. By analogy, such common interest could equally be identified in many other conventions relating to, for example, human rights, disarmament and the environment. If obligations under those conventions are therefore regarded as obligations *erga omnes partes*, by virtue of the Court's reasoning in the present case, it means that any of the States parties, specially affected or not by an alleged breach of the relevant obligations, would have standing to institute proceedings in the Court against the alleged State party, provided no reservation to the jurisdiction of the Court is entered by either of the parties. In Judge Xue's view, this approach has two potential consequences: one is that more States would make reservations to the jurisdiction of the Court and the second is that vague and insubstantial allegations may arise.

21. Judge Xue states that the situation of the Rohingyas in Myanmar deserves serious responses from the international community. She notes that various organs of the United Nations possess powers which can be exercised for the prevention and suppression of acts of genocide pursuant to the initiative of one or more United Nations Member States, even without the exercise of the right under Article VIII of the Genocide Convention. The fact is that the situation of Myanmar and the Rohingya refugees has been on the agenda of various United Nations organs for years, with the human rights situation of the Rohingyas having been under the investigation of a UN Fact-Finding Mission and the Special Rapporteur for Myanmar. Above all, Myanmar remains bound by its obligations under the Genocide Convention.

22. Finally, Judge Xue observes that the situation in Myanmar, as is found in the 2017 Final Report of the Advisory Commission on Rakhine State, represents a development crisis, a human rights crisis and a security crisis; while all communities have suffered from violence and abuse, protracted statelessness and profound discrimination have made the Muslim community particularly vulnerable to human rights violations. She reiterates Kofi Annan's words that "the challenges facing Rakhine State and its peoples are complex and the search for lasting solutions will require determination, perseverance and trust".

Declaration of Judge *ad hoc* Kress

While expressing his general agreement with the Judgment, Judge *ad hoc* Kress comments on two distinct sets of questions. First, he makes some remarks on the change in the representation of Myanmar that occurred during the proceedings, and on the way this issue was addressed by the Court. Second, he elaborates on the reasoning of the Court with regard to the issue of the standing of The Gambia.

Concerning the issue of the change in representation of Myanmar, Judge *ad hoc* Kress observes that it resulted from events that took place after the declaration of the state of emergency by the armed forces of Myanmar and that were a cause for grave concern for the international community, as attested by statements of the General Assembly and the Security Council of the United Nations. He expresses the view that the Judgment's failure to state the reasons leading the Court to act upon such replacement is less than satisfactory.

On the issue of the standing of The Gambia, Judge *ad hoc* Kress welcomes that the Court refrained from adopting the terms "injured State" and "State other than an injured State" used by the International Law Commission in connection with the entitlement to invoke responsibility, and that the Court, in keeping with its previous jurisprudence, rather referred to a broad notion of "legal interest". Judge *ad hoc* Kress notes that the use of the term "legal interest" in a broader sense conveys the community dimension of the concept of obligation *erga omnes (partes)*, and that it does so in essentially the same way as the concept of *préjudice juridique*.

Judge *ad hoc* Kress then offers a few additional reflections on the concept of obligation *erga omnes (partes)* and its application in the present case.

Regarding the rejection by the Court of Myanmar's argument based on Bangladesh's reservation to Article IX of the Genocide Convention and the fact that Bangladesh had to face a large influx of refugees, Judge *ad hoc* Kress is very reluctant to accept that such circumstances could have the effect of turning Bangladesh into a "specially affected State" with regard to the alleged breaches of the Genocide Convention. Judge *ad hoc* Kress expresses the view that, even if Bangladesh could be considered a "specially affected State", it would not be able to dispose entirely of the collective interest enshrined in the *erga omnes (partes)* obligations of the Genocide Convention.

In response to Myanmar's concerns regarding possible wider ramifications of admitting The Gambia's standing in the present case, Judge *ad hoc* Kress observes that it would have been wrong had the Court, impressed by the concern about an increase in litigation, left the fundamental community interest at issue in the present case without the judicial protection which is due to it under the applicable law. At the same time, he acknowledges that there might be a need to find a balance between the protection of community interests and the risk of proliferation of disputes.

Finally, Judge *ad hoc* Kress stresses that it is important to show particular sensitivity with a view to ensuring procedural fairness for all parties to proceedings instituted for the protection of community interests. He notes that, while it is certainly important to provide collective interests and, in particular, the core interests of the international community as a whole with international judicial protection, it is also necessary never to lose sight of the fact that the respondent State whose responsibility for the violation of an obligation *erga omnes (partes)* has been invoked through proceedings before the Court may not be responsible for the alleged violation.

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