

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

APPLICATION DE LA CONVENTION
POUR LA PRÉVENTION ET LA RÉPRESSION
DU CRIME DE GÉNOCIDE

(GAMBIE c. MYANMAR)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 22 JUILLET 2022

2022

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

APPLICATION OF THE CONVENTION
ON THE PREVENTION AND PUNISHMENT
OF THE CRIME OF GENOCIDE

(THE GAMBIA v. MYANMAR)

PRELIMINARY OBJECTIONS

JUDGMENT OF 22 JULY 2022

Mode officiel de citation :

*Application de la convention pour la prévention et la répression
du crime de génocide (Gambie c. Myanmar), exceptions préliminaires,
arrêt, C.I.J. Recueil 2022, p. 477*

Official citation:

*Application of the Convention on the Prevention and Punishment
of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections,
Judgment, I.C.J. Reports 2022, p. 477*

ISSN 0074-4441
ISBN 978-92-1-003921-5
e-ISBN 978-92-1-002563-8

N° de vente :
Sales number

1258

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IMPRIMÉ EN FRANCE/PRINTED IN FRANCE

22 JUILLET 2022

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JUDGMENT

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INTERNATIONAL COURT OF JUSTICE

YEAR 2022

22 July 2022

2022
22 July
General List
No. 178

APPLICATION OF THE CONVENTION
ON THE PREVENTION AND PUNISHMENT
OF THE CRIME OF GENOCIDE

(THE GAMBIA v. MYANMAR)

PRELIMINARY OBJECTIONS

Application filed by The Gambia — Alleged breaches by Myanmar of its obligations under the Genocide Convention through acts against the Rohingya group — Article IX of Genocide Convention invoked as basis of jurisdiction — Both States parties to Genocide Convention, no reservations to Article IX — Four preliminary objections by Myanmar to jurisdiction of Court and admissibility of Application — Court not bound to follow order in which preliminary objections presented.

*

Whether The Gambia is the “real applicant” (first preliminary objection).

Jurisdiction ratione personae — Articles 34 and 35 of Statute of Court and Article 93, paragraph 1, of Charter of United Nations — The Gambia being a Member of United Nations and ipso facto party to Statute of Court — Allegation that The Gambia acted as organ or proxy of Organisation of Islamic Cooperation (OIC), the “real applicant” in the case — Institution of proceedings by The Gambia in its own name — The Gambia alleging a dispute between it and Myanmar regarding its own rights under Genocide Convention — Support from intergovernmental organization to a State in instituting proceedings not detracting from status as applicant before the Court — Court satisfied that The Gambia is the Applicant in the case.

Admissibility of the Application — Allegation that attempt to bring case on behalf of OIC constitutes abuse of process or is inadmissible on basis of other

considerations — No evidence that conduct of The Gambia amounts to abuse of process — No other grounds of inadmissibility either.

First preliminary objection rejected.

*

Existence of dispute between the Parties (fourth preliminary objection).

“Dispute” being a disagreement on a point of law or fact — Two sides must hold clearly opposite views — No requirement that respondent expressly opposes claims of applicant — Rejection of claims may sometimes be inferred from silence of respondent.

Statements of Parties’ representatives before United Nations General Assembly in September 2018 and September 2019 — No specific mention of Genocide Convention in The Gambia’s statements — However, specific reference to treaty or its provisions not required — Parties’ statements indicating opposition of views on whether treatment of the Rohingya group by Myanmar was consistent with its obligations under Genocide Convention — Note Verbale of 11 October 2019 expressing specifically and in legal terms The Gambia’s position — Rejection of claims also inferred from Myanmar’s failure to respond to Note Verbale.

Dispute existed on date of Application — Fourth preliminary objection rejected.

*

Myanmar’s reservation to Article VIII of Genocide Convention (third preliminary objection).

Whether Article VIII governs seisin of Court — Ordinary meaning of terms in Article VIII — Article VIII addressing the prevention and suppression of genocide at the political level — Article VIII to be interpreted in context — Article IX providing conditions for recourse to Court — Article VIII not governing seisin of Court — No need to resort to supplementary means of interpretation.

Myanmar’s reservation to Article VIII irrelevant — Third preliminary objection rejected.

*

The Gambia’s standing (second preliminary objection).

Common interest of all States parties to Genocide Convention to ensure prevention, suppression and punishment of genocide — Any State party entitled to invoke the responsibility of another State party for alleged breach of obligations erga omnes partes — Special interest not required — Nationality of victims not relevant — Article IX not limiting category of States parties entitled to bring claims for alleged breaches of obligations erga omnes partes under Convention.

Bangladesh facing large influx of members of the Rohingya group — This fact not affecting right of all other Contracting Parties to assert common interest in compliance with obligations erga omnes partes under Genocide Convention or pre-

cluding The Gambia's standing — No need to address arguments relating to Bangladesh's reservation to Article IX.

The Gambia has standing to invoke responsibility of Myanmar for alleged breaches of obligations under Articles I, III, IV and V of Convention — Second preliminary objection rejected.

*

Court has jurisdiction on basis of Article IX of Genocide Convention — Application is admissible.

JUDGMENT

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.

In the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide,

between

the Republic of The Gambia,

represented by

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

as Agent;

H.E. Mr. Mamadou Tangara, Minister for Foreign Affairs, Republic of The Gambia,

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

as Co-Agents;

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

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

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

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

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

as Counsel;

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

as Adviser;

Ms Nancy Lopez,

Ms Rachel Tepper,

Ms Amina Chaudary,

as Assistants,

and

the Republic of the Union of Myanmar,

represented by

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

as Agent;

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

as Alternate Agent;

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

as Lead Counsel and Advocate;

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

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

as Counsel and Advocates;

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

Ms Khin Oo Hlaing, member of the Advisory Board to the Chair of the State Administration Council, Republic of the Union of Myanmar,

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

Mr. Kyaw Thu Nyein, Deputy Director General, International Organizations and Economic Department, Ministry of Foreign Affairs, Republic of the Union of Myanmar,
 Ms Myo Pa Pa Htun, Minister Counsellor, Embassy of the Republic of the Union of Myanmar in Brussels,
 Mr. Kyaw Thu Hein, Director, Ministry of Legal Affairs, Republic of the Union of Myanmar,
 Mr. Thwin Htet Lin, Director, Ministry of Foreign Affairs, Republic of the Union of Myanmar,
 Mr. Ngwe Zaw Aung, Director, Ministry of Legal Affairs, Republic of the Union of Myanmar,
 Mr. Swe Sett, Deputy Director, Ministry of Foreign Affairs, Republic of the Union of Myanmar,
 Ms Khin Myo Myat Soe, Counsellor, Embassy of the Republic of the Union of Myanmar in Brussels,
 Mr. Thu Rein Saw Htut Naing, Deputy Director, Ministry of Foreign Affairs, Republic of the Union of Myanmar,
 Mr. Ye Maung Thein, Deputy Director, Ministry of Foreign Affairs, Republic of the Union of Myanmar,
 Ms Cho Nge Nge Thein, Deputy Director, Ministry of Legal Affairs, Republic of the Union of Myanmar,
 Mr. Thurein Naing, Judge Advocate, Office of the Judge Advocate General, Republic of the Union of Myanmar,
 Ms Ei Thazin Maung, Assistant Director, Ministry of Foreign Affairs, Republic of the Union of Myanmar,
 Ms May Myat Noe Naing, First Secretary, Embassy of the Republic of the Union of Myanmar in Brussels,
 Ms Aye Chan Lynn, First Secretary, Embassy of the Republic of the Union of Myanmar in Brussels,
 Ms M Ja Dim, Assistant Director, Ministry of Legal Affairs, Republic of the Union of Myanmar,
 Mr. Zin Myat Thu, Head of Branch (1), Ministry of Foreign Affairs, Republic of the Union of Myanmar,
 Mr. Wunna Kyaw, Head of Branch (2), Ministry of Foreign Affairs, Republic of the Union of Myanmar,
 Mr. Zaw Yu Min, Third Secretary, Embassy of the Republic of the Union of Myanmar in Brussels,
 Ms Mary Lobo,
 Mr. Momchil Milanov, PhD student and teaching assistant, University of Geneva,
 as Members of the Delegation,

THE COURT,

composed as above,
 after deliberation,

delivers the following Judgment :

1. 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 “Myan-

mar”) 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”).

2. 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.

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

4. The Registrar immediately communicated to the Government of Myanmar the Application containing the Request for the indication of provisional measures, in accordance with Article 40, paragraph 2, of the Statute of the Court, and Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing by The Gambia of the Application and the Request for the indication of provisional measures.

5. In addition, by a letter dated 11 November 2019, the Registrar informed all States entitled to appear before the Court of the filing of the above-mentioned Application and Request.

6. Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Registrar notified the Member States of the United Nations through the Secretary-General, and any other State which is entitled to appear before the Court, of the filing of the Application, by transmission of the printed bilingual text.

7. By a letter dated 11 November 2019 accompanying its Application, The Gambia appointed H.E. Mr. Abubacarr Marie Tambadou, then Attorney General and Minister of Justice of The Gambia, as Agent for the purposes of the case. By a letter dated 19 June 2020, The Gambia appointed Mr. Cherno Marenah, then Solicitor General of The Gambia, as Co-Agent. By a letter dated 28 July 2020, The Gambia informed the Court of the appointment of H.E. Mr. Dawda Jallow, new Attorney General and Minister of Justice of The Gambia, as Agent, in place of H.E. Mr. Abubacarr Marie Tambadou. By a letter dated 3 February 2021, The Gambia informed the Court of the appointment of H.E. Mr. Mamadou Tangara, Minister for Foreign Affairs of The Gambia, and Mr. Hussein Thomasi, new Solicitor General of The Gambia, as Co-Agents, and indicated that the appointment of Mr. Cherno Marenah as Co-Agent had been terminated.

8. By a letter dated 20 November 2019, Myanmar, for its part, appointed H.E. Ms Aung San Suu Kyi, Union Minister for Foreign Affairs of Myanmar, as Agent for the purposes of the case, and H.E. Mr. Kyaw Tint Swe, Union Minister for the Office of the State Counsellor of Myanmar, as Alternate Agent. Subsequently, by a letter dated 12 April 2021, Myanmar informed the Court of the appointment of H.E. Mr. Ko Ko Hlaing, Union Minister for International Cooperation of Myanmar, as Agent and H.E. Ms Thi Da Oo, Union Attorney General of Myanmar, as Alternate Agent, in place of H.E. Ms Aung San Suu Kyi and H.E. Mr. Kyaw Tint Swe.

9. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute of the Court to choose a judge *ad hoc* to sit in the case. The Gambia chose Ms Navanethem Pillay, and Myanmar, Mr. Claus Kress.

10. By an Order dated 23 January 2020, the Court, having heard the Parties, indicated the following provisional measures:

“(1) The Republic of the Union of Myanmar shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to the members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
- (d) imposing measures intended to prevent births within the group;

(2) The Republic of the Union of Myanmar shall, in relation to the members of the Rohingya group in its territory, ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in point (1) above, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide;

(3) The Republic of the Union of Myanmar shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide;

(4) The Republic of the Union of Myanmar shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court.”

11. Pursuant to subparagraph 4 of the operative clause of the Order of 23 January 2020, Myanmar submitted reports on the measures taken to give effect to that Order on 22 May 2020, 23 November 2020, 20 May 2021, 23 November 2021 and 23 May 2022. The Gambia submitted comments on each of these reports on 8 June 2020, 7 December 2020, 16 August 2021, 7 December 2021 and 7 June 2022, respectively, within the time-limits fixed by the Court.

12. By another Order of 23 January 2020, the Court fixed 23 July 2020 and 25 January 2021 as the respective time-limits for the filing of a Memorial by The Gambia and a Counter-Memorial by Myanmar.

13. In accordance with Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to the Genocide Convention the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In addition, in accordance with Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the United Nations, through its Secretary-General, the notification provided for in Article 34, paragraph 3, of the Statute of the Court.

14. By a letter dated 24 April 2020, The Gambia requested the Court to extend the time-limit for the filing of the Memorial by at least three months, in light of problems relating to the COVID-19 pandemic. By a letter dated 28 April 2020, Myanmar indicated that, although in its view the COVID-19 pandemic

was not by itself a sufficient justification for The Gambia's request, it took no position on the request and considered that it was for the Court to "decide whether The Gambia has established a sufficient justification for an extension of time". By an Order of 18 May 2020, the Court extended to 23 October 2020 and 23 July 2021 the respective time-limits for the filing of the Memorial of The Gambia and the Counter-Memorial of Myanmar. The Gambia filed its Memorial within the time-limit as extended.

15. By a joint letter dated 11 November 2020, the Governments of the Kingdom of the Netherlands and Canada, referring to Article 53, paragraph 1, of the Rules of Court, requested to be furnished with copies of pleadings and documents when they are filed with the Court in the case. After ascertaining the views of the Parties in accordance with the above-mentioned provision, the Court decided that it would not be appropriate to grant that request. The Registrar communicated this decision to the Governments of the Kingdom of the Netherlands and Canada and to the Parties by letters dated 27 November 2020.

16. On 20 January 2021, within the time-limit prescribed by Article 79*bis*, paragraph 1, of the Rules of Court, Myanmar raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Consequently, by an Order of 28 January 2021, the Court, noting that, by virtue of Article 79*bis*, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended, and taking account of Practice Direction V, fixed 20 May 2021 as the time-limit within which The Gambia could present a written statement of its observations and submissions on the preliminary objections raised by Myanmar. The Gambia filed its written statement on 20 April 2021, within the time-limit thus fixed.

17. By letters dated 7 September 2021, the Parties were informed that hearings on the preliminary objections raised by Myanmar would be held from 6 to 10 December 2021, and a detailed schedule of the hearings was communicated to them.

18. By a letter dated 24 September 2021, Myanmar requested the Court to postpone the hearings on the preliminary objections by four months owing to the COVID-19 pandemic and issues relating to changes in the composition of its legal team. By a letter dated 1 October 2021, The Gambia submitted arguments against a postponement of the hearings but stated that it would leave the matter to the discretion of the Court. By letters dated 6 October 2021, the Parties were informed that the Court had decided to postpone the hearings to the week of 21 February 2022, and a revised schedule of the hearings was communicated to them.

19. By a letter dated 15 October 2021, the Registrar, acting pursuant to Article 69, paragraph 3, of the Rules of Court, transmitted to the Secretary-General of the United Nations copies of the written proceedings filed thus far in the case, and asked whether the Organization intended to present observations in writing under that provision in relation to the preliminary objections raised by Myanmar. By a letter dated 25 October 2021, the Under-Secretary-General for Legal Affairs of the United Nations stated that the Organization did not intend to submit any observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court.

20. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the preliminary objections of Myanmar and the written statement of The Gambia on those objections, and the documents annexed thereto, would be made accessible to the public on the opening of the oral proceedings.

21. Public hearings on the preliminary objections raised by Myanmar were held on 21, 23, 25 and 28 February 2022. The oral proceedings were conducted in a hybrid format, in accordance with Article 59, paragraph 2, of the Rules of Court and on the basis of the Court's Guidelines for the parties on the organization of hearings by video link, adopted on 13 July 2020 and communicated to the Parties on 13 December 2021. During the oral proceedings, a number of judges were present in the Great Hall of Justice, while others joined the proceedings via video link, allowing them to view and hear the speaker and see any demonstrative exhibits displayed. Each Party was permitted to have up to four representatives present in the Great Hall of Justice and up to five other representatives in an additional room in the Peace Palace equipped with the necessary facilities to follow the proceedings remotely. The remaining members of each Party's delegation were given the opportunity to participate via video link from other locations of their choice.

22. During the above-mentioned hearings, the Court heard the oral arguments and replies of:

For Myanmar: H.E. Mr. Ko Ko Hlaing,
Mr. Christopher Staker,
Mr. Stefan Talmon,
Mr. Robert Kolb.

For The Gambia: H.E. Mr. Dawda Jallow,
Mr. Paul S. Reichler,
Mr. Andrew Loewenstein,
Mr. Pierre d'Argent,
Ms Tafadzwa Pasipanodya,
Mr. M. Arsalan Suleman,
Mr. Philippe Sands.

*

23. In the Application, the following requests were made by The Gambia:

“While reserving the right to revise, supplement or amend this Application, and subject to the presentation to the Court of the relevant evidence and legal arguments, The Gambia respectfully requests the Court to adjudge and declare that Myanmar:

- has breached and continues to breach its obligations under the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI;
- must cease forthwith any such ongoing internationally wrongful act and fully respect its obligations under the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI;
- must ensure that persons committing genocide are punished by a competent tribunal, including before an international penal tribunal, as required by Articles I and VI;

- must perform the obligations of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group, including but not limited to allowing the safe and dignified return of forcibly displaced Rohingya and respect for their full citizenship and human rights and protection against discrimination, persecution, and other related acts, consistent with the obligation to prevent genocide under Article I; and
- must offer assurances and guarantees of non-repetition of violations of the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI.”

24. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of The Gambia in its Memorial:

“For the reasons given in this Memorial, and reserving the right to supplement, amplify or amend the present Submissions, the Republic of The Gambia respectfully requests the International Court of Justice to adjudge and declare:

- (1) That the Republic of the Union of Myanmar is responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide:
 - (a) in that members of its armed forces, police and other security forces, and also persons for whose conduct it is responsible, committed genocide against members of the Rohingya group on its territory by:
 - (i) killing members of the group;
 - (ii) causing deliberate bodily or mental harm to members of the group;
 - (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
 - (iv) imposing measures intended to prevent births within the group; with the intent to destroy that group in whole or in part, contrary to Article II of the Convention;
 - (b) in that persons for whose conduct it is responsible conspired to commit the acts of genocide referred to in paragraph (a), were complicit in respect of those acts, attempted to commit further such acts of genocide and incited others to commit such acts, contrary to Article III of the Convention;
 - (c) in that, aware that the acts of genocide referred to in paragraph (a) were being or would be committed, it failed to take any steps to prevent those acts, contrary to Article I of the Convention;
 - (d) in that it has failed to bring to trial persons within its jurisdiction who are suspected on probable grounds of involvement in the acts of genocide referred to in paragraph (a), or in the other acts referred to in paragraph (b), and is thus in continuing breach of Articles I and IV of the Convention;

- (*e*) in that it has failed to enact the necessary legislation to give effect to the provisions of the Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III, and is thus in continuing breach of Article V of the Convention.
- (2) That, as a consequence of its responsibility for these breaches of the Convention, the Republic of the Union of Myanmar:
- (*a*) must cease forthwith any ongoing internationally wrongful act referred to in paragraph (1), in particular:
- (i) take immediate and effective steps to enact the specific genocide criminal legislation referred to in paragraph (1) (*e*);
 - (ii) take immediate and effective steps to submit to trial before an independent and effective tribunal, including before an international penal tribunal, those members of its armed forces, police and other security forces or any other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (1) (*a*), or any of the other acts referred to in paragraph (1) (*b*), notably Senior-General Aung Min Hlaing, Vice Senior-General Soe Win, Lieutenant-General Aung Kyaw Zaw, Major-General Maung Maung Soe, Brigadier-General Aung Aung and Brigadier-General Than Oo, and to ensure that those persons, if convicted, are duly punished for their crimes;
 - (iii) take immediate and effective steps to suppress and prevent any direct and public incitement to commit genocide;
- (*b*) must perform the obligation of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group, and must:
- (i) by way of restitution:
 - (1) allow the safe and dignified return to their place of residence of displaced members of the Rohingya group, whether they are displaced within Myanmar or abroad;
 - (2) return to the Rohingya their individual and collective property, including their land, houses, places of worship and communal life, fields, livestock and crops, or replace them in kind;
 - (3) allow and facilitate the safe and dignified reunification of families;
 - (4) provide for the rehabilitation of the physically or mentally injured members of the Rohingya group; such rehabilitation must include adequate medical and psychological care as well as legal and social services;
 - (5) facilitate the search for the disappeared and assist in the recovery, identification and reburial of the bodies of those killed in accordance with the expressed or presumed wishes of the victims and in accordance with the cultural and religious practices of the Rohingya;

- (6) ensure the protection of the Rohingya against discrimination and persecution;
- (7) ensure the right of the Rohingya to identify as such;
- (8) ensure the liberty and freedom of movement of the Rohingya within Myanmar and remove any restriction on their place of residence;
- (9) remove any restriction or discrimination on the employment or access to livelihoods of the Rohingya.
- (ii) compensate, and provide any additional forms of reparation, for any harm, loss or injury suffered by the Rohingya victims that is not capable of full reparation by restitution.
- (c) must offer assurances and guarantees of non-repetition by notably providing full and equal citizenship to all members of the Rohingya group who are present in Myanmar or have been displaced due to the events for which Myanmar bears responsibility under the Convention.
- (3) That the Republic of the Union of Myanmar has failed to fully and adequately implement the Provisional Measures Order and must:
 - (a) by way of restitution as referred to in paragraph (2) (b) (i) above, make good any bodily or mental injury, including death, suffered by members of the Rohingya group, or any material injury caused to their property, as a result of Myanmar's violations of paragraph 86 (1), (2) or (3) of the Order;
 - (b) compensate, and provide any additional forms of reparation, for any harm, loss or injury referred to in paragraph (3) (a) above that is not capable of full reparation by restitution.
- (4) That, failing agreement between the Parties on the amount of compensation and any additional forms of reparation referred to in paragraph (2) (b) (ii) and paragraph (3) (b) above, the question will be decided by the Court in a subsequent phase of the proceedings in this case.

The Gambia reserves the right to supplement or amend these submissions in light of further pleadings and as necessary."

25. In the preliminary objections, the following submissions were presented on behalf of the Government of Myanmar:

"On the basis of each of the four independent preliminary objections set out above, Myanmar respectfully requests the Court to adjudge and declare that the Court lacks jurisdiction over The Gambia's Application of 11 November 2019, and/or that the Application is inadmissible.

Myanmar reserves the right to amend and supplement this submission in accordance with the provisions of the Statute and the Rules of Court. Myanmar also reserves the right to submit further objections to the jurisdiction of the Court and to the admissibility of The Gambia's claims if the case were to proceed to any subsequent phase."

26. In the written statement of its observations and submissions on the preliminary objections, the following submissions were presented on behalf of the Government of The Gambia:

“For the reasons set forth above, The Gambia respectfully requests that the Court:

- (1) Reject the Preliminary Objections presented by Myanmar;
- (2) Find that it has jurisdiction to hear the claims presented by The Gambia as set forth in its Application and Memorial, and that these claims are admissible; and
- (3) Proceed to hear those claims on the merits.”

27. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of Myanmar,

at the hearing of 25 February 2022:

“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.”

On behalf of the Government of The Gambia,

at the hearing of 28 February 2022:

“In accordance with Article 60 of the Rules of Court, for the reasons explained in our Written Observations of 20 April 2021 and during these hearings, the Republic of The Gambia respectfully asks the Court to:

- (a) Reject the Preliminary Objections presented by the Republic of the Union of Myanmar;
- (b) Hold that it has jurisdiction to hear the claims presented by The Gambia as set out in its Application and Memorial, and that those claims are admissible; and
- (c) Proceed to hear those claims on the merits.”

* * *

I. INTRODUCTION

28. In the Application, The Gambia alleges that Myanmar has breached and continues to breach its obligations under the Genocide Convention through acts adopted, taken and condoned by its Government against the members of the Rohingya group. Specifically, The Gambia asserts that in October 2016 the Myanmar military and other Myanmar security forces began widespread and systematic “clearance

operations” against the Rohingya group, during the course of which they committed mass murder, rape and other forms of sexual violence, and engaged in the systematic destruction by fire of Rohingya villages, often with inhabitants locked inside burning houses, with the intent to destroy the Rohingya as a group, in whole or in part. The Gambia further asserts that, from August 2017 onwards, such genocidal acts continued with Myanmar’s resumption of “clearance operations” on a more massive and wider geographical scale.

29. The Court’s references to the “Rohingya” in this Judgment should be understood as references to the group that is commonly called the Rohingya, self-identifies as such and claims a long-standing connection to Rakhine State, which forms part of the Union of Myanmar (see *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. 9, paras. 14-15).

30. The Gambia seeks to found the jurisdiction of the Court on Article IX of the Genocide Convention, in conjunction with Article 36, paragraph 1, of the Statute of the Court. Article IX of the Convention 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.”

31. The Gambia and Myanmar are parties to the Genocide Convention. Myanmar deposited its instrument of ratification on 14 March 1956, without entering a reservation to Article IX, but making reservations to Articles VI and VIII. The Gambia acceded to the Convention on 29 December 1978, without entering any reservation.

32. Myanmar raises four preliminary objections to the jurisdiction of the Court and the admissibility of the Application. In its first preliminary objection, Myanmar argues that the Court lacks jurisdiction, or alternatively that the Application is inadmissible, on the ground that the “real applicant” in the proceedings is the Organisation of Islamic Cooperation (hereinafter the “OIC”). According to the second preliminary objection, the Application is inadmissible because The Gambia lacks standing to bring this case. Myanmar asserts in its third preliminary objection that the Court lacks jurisdiction or that the Application is inadmissible since The Gambia cannot validly seise the Court in light of Myanmar’s reservation to Article VIII of the Genocide Convention. In its fourth preliminary objection, Myanmar contends that the Court lacks jurisdiction, or alternatively that the Application is inadmissible, because there was no dispute between the Parties under the Genocide Convention on the date of filing of the Application.

33. 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 (see, for example, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2016 (I)*, p. 110, para. 17). In the present case, the Court will start 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 will deal 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)

34. 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 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 will first examine the question of its jurisdiction.

A. *Jurisdiction Ratione Personae*

35. According to Myanmar, this preliminary objection raises a question of law and a question of fact. On the question of law, Myanmar argues that the determination of who is the “real applicant” in every case is a matter of substance, not a question of form or procedure. It contends that the approach taken by the Court to determine 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 must 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. For Myanmar, the question that arises in this case is whether, by “appointing” or “tasking” a State to bring a case on its behalf, an entity that is not a State can circumvent the limitations that only States may be parties in cases before the Court and that the Court may only exercise jurisdiction in contentious cases with the consent of both parties. In the view of Myanmar, a third party that is not a State and does not have a reciprocal acceptance of jurisdiction with the respondent State cannot use a “proxy State” to circumvent the limits of the Court’s jurisdiction and

invoke the compromissory clause of the Genocide Convention on its behalf.

36. On the question of fact, Myanmar submits that, whilst The Gambia is the nominal Applicant in these proceedings, the record makes it clear that The Gambia has acted as an “organ, agent or proxy” of the OIC, which is the “true applicant” in this case. According to Myanmar, both the OIC and The Gambia have recognized on multiple occasions that The Gambia was “appointed” or “tasked” by the OIC to bring the present proceedings before the Court on behalf of the OIC, in its capacity as chair of an *Ad Hoc* Ministerial Committee on Accountability for Human Rights Violations against the Rohingyas (hereinafter the “*Ad Hoc* Committee”) that was established on 5-6 May 2018 by the OIC Council of Foreign Ministers. In this context, Myanmar asserts that the proposal to bring these proceedings was recommended by the *Ad Hoc* Committee in February 2019, endorsed by the OIC Council of Foreign Ministers in March 2019 and approved by the Islamic Summit Conference in May 2019.

37. Myanmar also refers to additional elements which, in its view, demonstrate that the “real applicant” in these proceedings is the OIC. It points, in particular, to a press release issued by counsel for The Gambia in these proceedings on 11 November 2019, in which it was stated that the case was brought by The Gambia “acting on behalf of the 57 Member States” of the OIC and that “[t]he OIC appointed The Gambia, an OIC member, to bring the case on its behalf”. It further claims that The Gambia briefs the OIC on the progress of the case and that The Gambia’s legal costs in these proceedings are funded entirely by the OIC from a special fund financed by donations of various OIC Member States and the Islamic Solidarity Fund. According to Myanmar, control over these funds is exercised jointly by the chair of the *Ad Hoc* Committee and the OIC Secretary-General.

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38. The Gambia submits that Myanmar’s preliminary objection must be rejected as it lacks any basis either in law or in fact. As to the law, The Gambia contends that the relevant requirements for jurisdiction *ratione personae* under the Court’s Statute and the Genocide Convention are met. The Gambia is a State as required by Article 34, paragraph 1, of the Statute and, as a Member of the United Nations, is *ipso facto* a party to the Statute, pursuant to Article 35, paragraph 1, thereof. The Gambia and Myanmar are both parties to the Genocide Convention, and there is a dispute between them over Myanmar’s compliance with the Convention, which has been brought to the Court pursuant to Article IX of the

Convention. For The Gambia, a State's motivation for commencing litigation before the Court is irrelevant to matters of jurisdiction.

39. As to the facts, The Gambia argues that it is, by any measure, the "real applicant" in these proceedings and this is evidenced by the letters accompanying its Application, which make clear that the proceedings were instituted only on behalf of the Republic of The Gambia. The Gambia affirms that it expressed its concerns in a variety of international fora. It refers, in particular, to the statement of the President of The Gambia, Mr. Adama Barrow, before the United Nations General Assembly on 25 September 2018, in which he declared that The Gambia had undertaken, as the upcoming chair of the next OIC Summit, "to champion an accountability mechanism that would ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book". The Gambia also refers to the speech of the Vice-President of The Gambia, Ms Isatou Touray, before the United Nations General Assembly on 26 September 2019, in which she announced The Gambia's intention to "lead concerted efforts to take the Rohingya issue to the International Court of Justice".

40. Moreover, The Gambia affirms that it raised the matter bilaterally in a Note Verbale sent to the Permanent Mission of Myanmar to the United Nations on 11 October 2019, which made clear that The Gambia, as a State party to the Genocide Convention, was in dispute with Myanmar concerning the latter's obligations under the Convention and requested Myanmar to take all necessary actions to comply with those obligations.

41. The Gambia acknowledges that it sought and obtained the support of the OIC to hold Myanmar accountable for the international crimes allegedly committed against the Rohingya, but it maintains that this support has no bearing on the Court's jurisdiction. The Gambia claims that it was instrumental in the establishment of the OIC *Ad Hoc* Committee, the mandate of which, however, did not include instituting or participating in international dispute settlement proceedings on behalf of the OIC. It also affirms that the decision to initiate the proceedings before the Court under the Convention was undertaken at the highest levels of The Gambian Government, which did not act under the pressure, coercion or inducement of the OIC. The fact that the OIC supported this initiative does not mean that the OIC has somehow become the applicant in substitution of The Gambia. In this regard, The Gambia points out that neither the Islamic Summit nor the OIC Council of Foreign Ministers has the institutional competence under the Charter of the OIC to direct or instruct The Gambia in its litigation before the Court. It also refers to the report of the *Ad Hoc* Committee of 25 September 2019, which acknowledged The Gambia's prerogative to select a legal firm to pursue the case undertaken by The Gambia in the Court.

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42. The Court 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. As the Court held in the case concerning the *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, “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” (*Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 299, para. 46). 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.

43. 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 (see paragraphs 36-37 above).

44. 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. As the Court held in *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, “the Court’s judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement” (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52).

45. With regard 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 (see paragraph 35 above), the Court 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.

46. 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

47. In the alternative, Myanmar contends that, even if the Court were to find that it has jurisdiction, The Gambia’s Application would in the circumstances be inadmissible. In its view, an application would be inadmissible if, in reality, the case is brought by the named applicant on behalf of another State or entity that could not itself have brought the proceedings as the applicant. For Myanmar, this may be characterized as an abuse of process on the part of the nominal applicant State that seeks to facilitate the circumvention of the limits of the Court’s jurisdiction. Myanmar also maintains that, independently of any consideration of principles of abuse of process, the inadmissibility of The Gambia’s Application follows from considerations of judicial propriety, the integrity of the Court as an institution and the principle that the jurisdiction of the Court rests on the consent of the parties.

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48. In The Gambia’s view, the reformulation of Myanmar’s argument on jurisdiction as a challenge to admissibility must also fail. The Gambia observes that Myanmar has cited no authority for its argument that the Application should be found inadmissible if it amounts to a circumvention of a limitation to the Court’s jurisdiction, and that such an objection bears no resemblance to other recognized grounds for declining to exercise jurisdiction. The Gambia denies the existence of any abuse of process on its part, as it did not initiate these proceedings with an improper intent. On the contrary, it points out that The Gambia’s efforts have been well received by the international community, and refers to the fact that the Court’s Order indicating provisional measures has been welcomed by the Secretary-General and the General Assembly of the United Nations.

* *

49. The Court has found above 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. As the Court 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 (*Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, pp. 42-43, para. 113). 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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50. 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)

51. 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.

52. Myanmar identifies two requirements which, in its view, must be met in order to establish the existence of a dispute within the meaning of Article IX of the Genocide Convention. First, Myanmar argues that the claim made by the applicant State must be articulated with a minimum degree of particularity so that the respondent State is made aware of the facts allegedly constituting a breach of international law, including the provisions or norms of international law said to have been violated. The claim must be a legal one and not merely a political statement. Secondly, it contends that the existence of a dispute at the time of the filing of the application requires "mutual awareness" of the opposing views of the parties. For Myanmar, the applicant must have made a legal claim which the respondent was aware of or could not have been unaware of, and the respondent must have positively opposed that legal claim in a manner which the applicant was aware of or could not have been unaware of. However, Myanmar states that, in certain cases, the applicant may be aware of the respondent's position from its silence, after a reasonable time to respond has passed.

53. In Myanmar's view, an examination of the facts relied upon by The Gambia does not establish the existence of a dispute between the

Parties under the Genocide Convention at the time of the filing of the Application on 11 November 2019. In particular, Myanmar considers that neither the resolutions previously adopted by the OIC, nor the Final Communiqué of the 14th Islamic Summit Conference issued on 31 May 2019 may serve as evidence of the existence of a dispute between the Parties under the Genocide Convention, as they did not emanate from the official organs of The Gambia, they were not addressed to Myanmar, and Myanmar could not have been aware, on the basis of these documents, of any particularized claims being made against it that it bears State responsibility for a breach of the Genocide Convention. Myanmar contends that these documents relate to the criminal accountability of individuals rather than State responsibility for acts of genocide and are formulated as political statements rather than legal claims with sufficient particularity to disclose the existence of a dispute within the meaning of Article IX of the Convention.

54. With respect to the reports of the United Nations Independent International Fact-Finding Mission on Myanmar (hereinafter the “Fact-Finding Mission”) issued in 2018 and 2019, Myanmar considers that they too cannot serve as evidence of a dispute between the Parties under the Genocide Convention, as they express the personal views of the three individual members addressed to the Human Rights Council rather than the legal views of The Gambia on Myanmar’s responsibility under the Convention. Myanmar also points out that the 2018 report of the Fact-Finding Mission did not suggest that Myanmar bears State responsibility under international law for acts of genocide, while the 2019 report and its “Detailed Findings” (see paragraph 66 below) were too general to satisfy the requirement for a legal claim to have been made by The Gambia.

55. Myanmar also discounts the relevance of the statements made by the Parties themselves prior to the filing of the Application. In Myanmar’s view, the statement of the President of The Gambia before the United Nations General Assembly on 25 September 2018 contains nothing to suggest that the OIC or The Gambia were contemplating to make a claim that Myanmar was in breach of its obligations under the Genocide Convention. Myanmar also contends that the statement of the Vice-President of The Gambia before the United Nations General Assembly on 26 September 2019 was not directly addressed to Myanmar, made no reference to genocide or the Genocide Convention, and was not sufficiently specific. For the same reasons, Myanmar considers that the statement of the Union Minister for the Office of the State Counsellor of Myanmar before the United Nations General Assembly on 29 September 2019 cannot be considered as establishing a positive opposition of views between the two Parties on a legal issue related to genocide, let alone the Genocide Convention.

56. The Respondent further contends that the Note Verbale sent by The Gambia to Myanmar on 11 October 2019 cannot, in the circumstances as a whole, be understood as advancing a legal claim against it. Myanmar argues that the wording of the Note Verbale reads as a political statement rather than a legal claim based on specific facts and legal grounds. According to Myanmar, the Note Verbale did not set out The Gambia's views with a sufficient degree of particularity to conclude that Myanmar "could not have been unaware" that a legal claim was being made against it on the basis of specific facts and evidence under the Convention, nor did the Note Verbale advance a legal claim that Myanmar could meaningfully take a position on. In these circumstances, a dispute between the Parties cannot be inferred from the lack of reaction by Myanmar. Finally, Myanmar asserts that, even if a response was called for, it was entitled to an appropriate period of time to give a considered reaction to that Note Verbale, and that a one-month period was not sufficient to warrant the inference of Myanmar's positive opposition to the broad and unparticularized claims in the Note Verbale.

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57. The Gambia requests the Court to reject Myanmar's fourth preliminary objection as it has no merit either in law or in fact. With respect to the applicable legal standard, The Gambia contends that Myanmar's attempt to set a higher bar than is required for establishing the existence of a dispute does not find support in the jurisprudence of the Court and should therefore be rejected. In its view, the respondent's awareness of the applicant's opposed views is sufficient to establish a dispute; it is not necessary to show the applicant's awareness of the respondent's specific opposition to its claims. Myanmar's proposed standard would, according to The Gambia, create a one-way veto in which a respondent's silence in the face of a legal claim could prevent the finding of a dispute. Furthermore, the Applicant considers that the very exacting standards of specificity in the assertion of a claim suggested by Myanmar would impose a major new burden on potential applicants and significantly restrict access to the Court by requiring States fully to develop their legal and factual claims prior to seising the Court. The Gambia considers in any event that, even under the standards proposed by Myanmar, the existence of a dispute between the Parties prior to the filing of the Application would be established on the basis of the relevant evidence.

58. With respect to the facts, The Gambia maintains that the evidence makes clear that, prior to the filing of the Application, there was an unresolved dispute between the Parties relating to Myanmar's fulfilment of its obligations under the Genocide Convention. It considers that Myanmar was aware of the fact that the Parties held opposite views regarding

Myanmar's compliance with its obligations under the Genocide Convention and that The Gambia positively opposed Myanmar's denials of its acts of genocide against the Rohingya group in Myanmar.

59. According to The Gambia, Myanmar was aware of the Applicant's views on its responsibility for acts of genocide against the Rohingya as of 6 May 2018, when The Gambia led an effort at an OIC ministerial meeting to issue the Dhaka Declaration, in which the OIC Member States expressed their serious concerns over the "systematic brutal acts perpetrated by security forces against the Rohingya Muslim Community in Myanmar that ha[ve] reached the level of ethnic cleansing, which constitute[s] a serious and blatant violation of international law". Myanmar's awareness of this Declaration is demonstrated by the statement of its Ministry of Foreign Affairs three days later, in which Myanmar categorically rejected the description of the events in the Rakhine State and disclaimed any responsibility for violating applicable international obligations. The Gambia also points to the rejection by a spokesperson of the Myanmar Government of various resolutions adopted by OIC Member States, which demonstrates Myanmar's awareness of the views of OIC Members, including The Gambia as the chair of the *Ad Hoc* Committee responsible for these issues.

60. The Gambia also relies on the statements made by representatives of both Parties before the United Nations General Assembly as further evidence of the existence of a dispute. The Gambia notes that the report of the Fact-Finding Mission dated 12 September 2018 stated that the crimes in Rakhine State were similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts. On 25 September 2018, the President of The Gambia, Mr. Adama Barrow, declared before the United Nations General Assembly that his Government had undertaken "to champion an accountability mechanism that would ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book". Three days later, Myanmar's Union Minister for the Office of the State Counsellor, Mr. Kyaw Tint Swe, delivered a speech to the United Nations General Assembly, in which he dismissed the findings of the Fact-Finding Mission as "based on narratives and not on hard evidence". According to The Gambia, these statements at the United Nations General Assembly in 2018 indicate that the Parties held clearly opposed views regarding the question whether international crimes had been committed against the Rohingya and the need for international accountability measures.

61. The Gambia also refers to the report issued by the Fact-Finding Mission in 2019, which stated that "Myanmar incurs State responsibility under the prohibition against genocide" and welcomed the efforts of

The Gambia and the OIC “to encourage and pursue a case against Myanmar before the International Court of Justice (ICJ) under the Genocide Convention”. Following the publication of this report, the Vice-President of The Gambia, Ms Isatou Touray, announced before the United Nations General Assembly on 26 September 2019 that it was her Government’s intention to “lead concerted efforts to take the Rohingya issue to the International Court of Justice”. Two days later, Myanmar’s Union Minister for the Office of the State Counsellor, Mr. Kyaw Tint Swe, dismissed the Fact-Finding Mission’s report as “biased and flawed, based not on facts but on narratives” and stated that his Government “reject[ed] the establishment of the new Independent Investigative Mechanism for Myanmar, which was set up to bring Myanmar before such tribunals as the International Criminal Court, to which [his Government] strongly object[ed]”. In view of these exchanges, The Gambia considers that Myanmar could not possibly have been unaware that The Gambia held views positively opposed to its own regarding the legal responsibility of Myanmar under the Genocide Convention.

62. In addition to these exchanges in multilateral settings, The Gambia refers to a Note Verbale that it sent to Myanmar on 11 October 2019. In that Note Verbale, The Gambia referred to the findings of the Fact-Finding Mission of 2019 “regarding the ongoing genocide against the Rohingya people”, rejected Myanmar’s denial of its responsibility and its refusal to fulfil its obligations under the Convention, and asked Myanmar to take all necessary actions to comply with the Convention. According to The Gambia, the Note Verbale establishes that the Parties held clearly opposite views regarding Myanmar’s fulfilment of its obligations under the Convention. The Applicant underscores that Myanmar did not respond to the Note Verbale in the month that followed “even though the gravity of the communication and The Gambia’s insistence on Myanmar desisting from acts of genocide clearly called for a response”. The Gambia also rejects Myanmar’s argument that the latter was entitled to an appropriate period of time to give a considered reaction, pointing out that Myanmar had already received the various reports from the Fact-Finding Mission and was sufficiently aware of their contents. Finally, The Gambia points out that Myanmar’s silence cannot be interpreted to mean that it was unaware that The Gambia positively opposed its views on Myanmar’s responsibility under the Convention, noting that five days after the filing of the Application a spokesperson for the Government of Myanmar publicly admitted that his Government had expected for over a month that it could face litigation before the Court, a factual element that has not been addressed by Myanmar anywhere in these proceedings.

63. The existence of a dispute between the parties is a requirement for the Court's jurisdiction under Article IX of the Genocide Convention. According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11*). In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328*). The two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I), p. 270, para. 34; Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I), p. 26, para. 50*).

64. The Court's determination of the existence of a dispute is a matter of substance and not a question of form or procedure (*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. 84, para. 30*). In principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I), p. 27, para. 52*). However, conduct of the parties subsequent to the application may be relevant for various purposes, in particular to confirm the existence of a dispute (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I), p. 272, para. 40*). The Court has also previously held that, in making such a determination, it takes into account in particular any statements or documents exchanged between the parties (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (II), pp. 443-445, paras. 50-55*), as well as any exchanges made in multilateral settings (*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), pp. 94-95, paras. 51 and 53*). In so doing, it pays special attention to "the author of the statement or document, their intended or actual addressee, and their content" (*ibid.*, p. 100, para. 63).

65. 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, 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.

66. In its first report, dated 12 September 2018, the Fact-Finding Mission stated that “[t]he crimes in Rakhine State, and the manner in which they were perpetrated, are similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts” (United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/64, 12 September 2018, para. 85). On that basis, the Fact-Finding Mission concluded that there was sufficient information “to warrant the investigation and prosecution of senior officials in the Tatmadaw chain of command, so that a competent court can determine their liability for genocide in relation to the situation in Rakhine State” and called upon the international community, through the United Nations, to use all peaceful means “to assist Myanmar in meeting its responsibility to protect its people from genocide” (*ibid.*, paras. 87 and 104). The Fact-Finding Mission reiterated these statements in the “Detailed Findings” version of the same report published on 17 September 2018, where it noted that “the Myanmar authorities have demonstrated that they are unable and unwilling to meaningfully engage” in the process of “investigating and prosecuting crimes under international law” and that consequently “the impetus for accountability must come from the international community” (United Nations, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/CRP.2, 17 September 2018, para. 1648). A copy of the report was shared with the Government of Myanmar prior to its release (*ibid.*, para. 3).

67. On 25 September 2018, the President of The Gambia, Mr. Adama Barrow, stated in his address to the General Assembly that, as the upcoming chair of the next summit of the OIC, The Gambia “ha[d] undertaken, through a resolution, to champion an accountability mechanism that would ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book” (United Nations, *Official Records of the General Assembly*, UN doc. A/73/PV.7, 25 September 2018, p. 29). In a speech delivered three days later in the same session of the General Assembly, Myanmar’s Union Minister for the Office of the State Counsellor, Mr. Kyaw Tint Swe, expressed Myanmar’s serious concerns over the report of the Fact-Finding Mission and rejected its findings as “based

on narratives and not on hard evidence” (United Nations, *Official Records of the General Assembly*, UN doc. A/73/PV.13, 28 September 2018, p. 45).

68. In its second report published on 8 August 2019, the Fact-Finding Mission stated that it had reasonable grounds to conclude, *inter alia*, that “Myanmar incurs State responsibility under the prohibition against genocide” and

“welcome[d] the efforts of States, in particular Bangladesh and The Gambia, and the Organization of Islamic Cooperation to encourage and pursue a case against Myanmar before the International Court of Justice under the Convention on the Prevention and Punishment of the Crime of Genocide” (United Nations, Report of the Independent International Fact-Finding Mission on Myanmar (8 August 2019), UN doc. A/HRC/42/50, paras. 18-19 and 107).

The Fact-Finding Mission repeated these statements in the “Detailed Findings” version of the same report published on 16 September 2019 and added that “Myanmar is failing in its obligation to prevent genocide, to investigate genocide and to enact effective legislation criminalizing and punishing genocide” (United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/42/CRP.5, 16 September 2019, paras. 40, 58, 213 and 220). A copy of this report was also provided to Myanmar (*ibid.*, para. 29).

69. Following the publication of the second report and the “Detailed Findings” of the Fact-Finding Mission, the Vice-President of The Gambia, Ms Isatou Touray, in an address to the General Assembly on 26 September 2019, stated that “[a]s a global community with a conscience, we cannot continue to ignore the plight of the Rohingya”, and declared her Government’s intention to “lead concerted efforts to take the Rohingya issue to the International Court of Justice on behalf of the Organization of Islamic Cooperation” (United Nations, *Official Records of the General Assembly*, UN doc. A/74/PV.8, 26 September 2019, p. 31). Two days after the address by The Gambia, Myanmar’s Union Minister for the Office of the State Counsellor, Mr. Kyaw Tint Swe, stated before the General Assembly that the Fact-Finding Mission’s reports “without exception, have been biased and flawed” and that “[t]he latest reports are even worse” (United Nations, *Official Records of the General Assembly*, UN doc. A/74/PV.12, 28 September 2019, p. 24). Myanmar also “reject[ed] the establishment of the new Independent Investigative Mechanism for Myanmar, which was set up to bring Myanmar before such tribunals as the International Criminal Court, to which [it] strongly object[ed]” (*ibid.*).

70. 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 will now examine these two grounds advanced by Myanmar to contest the existence of a dispute between the Parties.

71. 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 (see paragraph 52 above), 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.

72. 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,

“[w]hile 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” (*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. 85, para. 30).

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 specifi-

cally 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.

73. 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.

74. 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.

75. 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” (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89). 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” (*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. 84, para. 30). The question whether such an inference may be drawn depends on the particular circumstances of each case.

76. 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.

77. 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. The fourth preliminary objection of Myanmar must therefore be rejected.

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

78. 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.

79. 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."

As recalled above, Myanmar, then the Union of Burma, deposited its instrument of ratification of the Convention on 14 March 1956 (see paragraph 31). 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." (United Nations, *Treaty Series*, Vol. 230, p. 435.)

80. Myanmar submits that the reference in Article VIII to the "competent organs of the United Nations" includes the Court. It claims that this interpretation is supported by the plain wording of Article VIII, which does not contain any qualifier indicating that its scope is limited to specific organs of the United Nations. Myanmar also maintains that the terms used in the equally authentic French and Spanish versions of Article VIII to describe the capacity of a Contracting Party ("saisir" and "recurrir", respectively) are typically used in relation to proceedings before the Court, thus confirming that the Court is included among the organs envisaged therein.

81. Myanmar argues that Article VIII would be rendered meaningless if it only applied to the political organs of the United Nations, because the Charter of the United Nations already permits Member States to call upon the General Assembly or the Security Council to take appropriate action in the face of genocide. In Myanmar's view, since the Charter governs the seisin of political organs of the United Nations, then Article VIII must have a different purpose. Myanmar thus submits that Article VIII is intended to govern the seisin of the Court. By contrast, Myanmar considers that Article IX governs the Court's jurisdiction only.

82. In Myanmar's view, because Article VIII governs the seisin of the Court, its reservation to that provision precludes the valid seisin of the Court by The Gambia in the present case. Myanmar has not entered a reservation to Article IX, but it suggests that its reservation to Article VIII must be interpreted as barring "non-injured States" from seising

the Court in a case arising under the Genocide Convention. Emphasizing the importance of respecting the intention of States when entering reservations, Myanmar contends that any different interpretation of its reservation would render it devoid of legal effect.

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83. For The Gambia, Myanmar's reservation to Article VIII of the Convention is irrelevant, because that provision does not govern the seisin of the Court.

84. The Gambia argues that, according to the ordinary meaning of Article VIII, the Court cannot be one of the "competent" organs of the United Nations, because it may not take "action" under the Charter of the United Nations based on what it considers "appropriate". The Gambia further contends that the expression to "call upon" in the equally authentic English version of the text is not commonly employed in connection with judicial proceedings, but that such terminology is instead routinely used to refer to appeals to the exercise of discretion. The Gambia also contests the relevance of the argument concerning the verbs used in the French and Spanish texts of Article VIII ("saisir" and "recurrir", respectively). In The Gambia's view, while these terms are sometimes used in legal contexts, they are also employed in connection with appeals to political bodies.

85. The Gambia offers three arguments in response to Myanmar's contention that Article VIII would be deprived of meaning if it did not encompass the seisin of the Court. First, in The Gambia's view, Article VIII clarifies that the engagement of the political organs of the United Nations in the face of genocide is not barred by Article 2, paragraph 7, of the Charter. Second, The Gambia argues that Article VIII permits Contracting Parties that are not Member States of the United Nations to call upon the Organization's political organs to take action, including action against States that are not Contracting Parties. Third, The Gambia maintains that, unlike Article IX, Article VIII permits Contracting Parties to call upon the competent organs to take action even without a dispute having crystallized under international law or against non-State actors.

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86. Myanmar's third preliminary objection raises the question of the seisin of the Court. The Court has previously held that,

"as an act instituting proceedings, seisin is a procedural step independent of the basis of jurisdiction invoked and, as such, is governed by the Statute and the Rules of Court. However, the Court is unable to entertain a case so long as the relevant basis of jurisdiction has not been supplemented by the necessary act of seisin: from this point of

view, the question of whether the Court was validly seised appears to be a question of jurisdiction.” (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1995*, p. 23, para. 43.)

87. For the purpose of ascertaining whether Article VIII governs the seisin of the Court, the Court will have 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”) (see *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2019 (II)*, p. 598, para. 106; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007 (I)*, pp. 109-110, para. 160).

88. 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” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007 (I)*, p. 109, para. 159).

89. 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.

90. 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.

91. 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.

92. 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)

93. 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. In particular, 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" (a term that Myanmar appears to use interchangeably with the term "specially affected 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.

94. Myanmar draws a distinction between the right to invoke State responsibility under general international law and standing before the Court. It argues that, even if it were established that a "non-injured" Contracting Party to the Genocide Convention has the right to invoke another State's responsibility for violations of the Convention, this would not necessarily entail the right to bring a case before the Court. To this end, Myanmar contends that there exists a difference between the common interest in the accomplishment of the purposes of the Genocide Convention and a State's individual legal interest that may be enforced through the institution of proceedings before the Court. In Myanmar's view, only States "specially affected" by an internationally wrongful act have standing to bring a claim before the Court.

95. Myanmar insists that the Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* did not affirm the standing of "non-injured" States to institute proceedings

because, in Myanmar's view, that case was different from the present one in two respects. First, according to Myanmar, Belgium considered itself a "specially affected" State, because it had availed itself of the right under Article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter the "Convention against Torture") to exercise jurisdiction and to request extradition. Second, Myanmar submits that the Convention against Torture is to be distinguished from the Genocide Convention, in so far as the former explicitly contemplates the exercise of universal jurisdiction. By contrast, according to Myanmar, Article VI of the Genocide Convention only provides an obligation to exercise territorial jurisdiction and does not envisage any form of enforcement by Contracting Parties other than those on whose territory the alleged acts of genocide were committed.

96. Myanmar also argues that the wording and structure of the Genocide Convention exclude the possibility of a "non-injured" State bringing a case before the Court. In Myanmar's view, the omission of the terms "any" or "all" before the term "[d]isputes" in Article IX indicates that the disputes contemplated therein only include those between Contracting Parties rather than all disputes that could arise under the Convention. Myanmar makes a similar claim with respect to the phrase "[a]ny Contracting Party" used in Article VIII, compared to the phrase "*the* Contracting Parties" used in Article IX (emphasis added). Myanmar interprets this as meaning that Article IX does not include all Contracting Parties within its ambit.

97. Myanmar contends that its interpretation is supported by the drafting history of the Genocide Convention. For Myanmar, a clear consensus existed among the negotiating States that Article VIII could be triggered by every Contracting Party to the Convention, whereas no similar consensus is evident with respect to the scope of Article IX. Myanmar also points to the phrase "at the request of any of the parties to the dispute" at the end of Article IX, which was adopted instead of the alternative proposed wording "at the request of any of the High Contracting Parties". According to Myanmar, the adopted wording demonstrates an intention to limit the parties that could bring a dispute before the Court under Article IX to those "specially affected" by alleged violations of the Convention.

98. Myanmar further 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 (hereinafter the "ILC Articles on State Responsibility"). 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.

99. Finally, 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. Myanmar further argues that "non-injured" States may not override the right of a State "specially affected" by the alleged breach to decide how to vindicate its rights in a way that would best serve its own interests. Myanmar warns that the opposite conclusion would lead to a proliferation of disputes and raise questions concerning the entitlement of "non-injured" States to claim reparation on behalf of alleged victims who are not their nationals.

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100. The Gambia rejects Myanmar's arguments in support of its second preliminary objection and insists that all the conditions of Article IX of the Convention have been met. The Gambia argues that all Contracting Parties have a common interest in compliance with the obligations under the Genocide Convention, which The Gambia considers to be owed *erga omnes partes*, and that therefore a breach of those obligations injures all Contracting Parties to the Convention. For that reason, according to The Gambia, any State party to the Convention is entitled to invoke the responsibility of another State party for breach of obligations *erga omnes partes* under the Convention. Rejecting Myanmar's separation of the right to invoke the responsibility of a State from the right to institute proceedings before the Court, The Gambia contends that the right to invoke responsibility for a breach of obligations *erga omnes partes* entails the right to submit a dispute resulting from such breach to the Court.

101. Relying on the Court's jurisprudence, The Gambia maintains that the Court's jurisdiction under Article IX is not limited to cases brought by States "specially affected" (a term that The Gambia treats as equivalent to "directly injured") by an alleged violation of the Convention. The Gambia points to the Court's Judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, where, in its

view, the Court affirmed Belgium's standing solely on the basis of the *erga omnes partes* character of the obligations allegedly breached. The Gambia also disputes Myanmar's argument distinguishing the Convention against Torture from the Genocide Convention. It acknowledges that, unlike the Convention against Torture, the Genocide Convention does not establish universal jurisdiction, but it contends that this has no bearing on The Gambia's standing in the present case.

102. The Gambia argues that the ordinary meaning of the terms of Article IX in their context does not support a finding that States must be, in its words, "specially injured" by an alleged breach of the Genocide Convention in order to bring a dispute before the Court. It considers that the use of the terms "[d]isputes" and "the Contracting Parties" in Article IX cannot be understood to limit the scope of the Court's jurisdiction. In The Gambia's view, Article IX should be interpreted to encompass any dispute between any of the Contracting Parties, provided that the dispute relates to the interpretation, application or fulfilment of the Convention, which includes disputes relating to the responsibility of a State for failing to fulfil its obligations under the Convention.

103. According to The Gambia, the drafting history further supports its interpretation of Article IX. The Gambia submits that, from its inception, this compromissory clause was intended to give effect to the fact that any dispute arising under the Convention is a matter that affects all Contracting Parties. The Gambia claims that the negotiating States embraced a broad jurisdictional scope for the Court, on the understanding that the limitation of standing to "specially injured" States would undermine the effectiveness of the Convention with respect to acts committed within a State's territory against a minority population. The Gambia refutes Myanmar's interpretation of the phrase "at the request of any of the parties to the dispute", arguing that that revision was regarded by the negotiating States as editorial in character, without substantive effect.

104. The Gambia also contends that the rule concerning the nationality of claims, as reflected in Article 44 (a) of the ILC Articles on State Responsibility, is inapplicable in cases such as the present one, where its application would be contrary to the object and purpose of a treaty. The Gambia observes that genocide is likely to be directed against nationals of the State committing it, or against individuals who have been deprived of their nationality by the persecuting State. According to The Gambia, the rule concerning the nationality of claims would preclude the invocation of responsibility in relation to these individuals and would therefore be inconsistent with the object and purpose of the Convention, rendering that treaty a "dead letter". Recalling the drafting history of the Genocide Convention and the circumstances of its conclusion, The Gam-

bia argues that the rule concerning the nationality of claims is inconsistent with the aims of the Convention and that it is therefore inapplicable.

105. Finally, The Gambia challenges Myanmar's alternative argument that the standing of States not "specially affected" by a breach of an obligation *erga omnes partes* is subsidiary to and dependent upon the standing of "specially affected" States. The Gambia submits that the Court's jurisdiction over a dispute between two States under the Convention depends only upon the consent of those States rather than that of any third party. The Gambia disputes the contention that its rights under the Convention are subordinate to those of Bangladesh or that any waiver of rights by Bangladesh would entail a valid waiver of its own rights.

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106. The question to be answered by the Court 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 notes a significant terminological variety in the arguments of both Parties with reference to the position and rights of a Contracting Party to the Genocide Convention in the face of an alleged breach by another Contracting Party of obligations arising thereunder. Relying in part on the ILC Articles on State Responsibility, Myanmar uses the terms "(non-) injured State" and "specially affected State", whereas The Gambia refers to "specially injured State" and "directly injured State". The Court does not find it necessary, in the present case, to explore the legal significance of the various terms employed by the Parties. It suffices to recall the Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, in which the Court 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." (*I.C.J. Reports 1951*, p. 23.)

107. 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. As the Court has affirmed, 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 (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (II), p. 449, para. 68; see also *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33).

108. Having concluded, in its Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, that all States parties to the Convention against Torture had a common interest in compliance with the relevant obligations under that treaty, the Court held that there was no need to pronounce on whether Belgium, as the applicant, had a “special interest” in respect of Senegal’s compliance with those obligations (*Judgment, I.C.J. Reports 2012 (II)*, pp. 449-450, paras. 68-70). 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 these reasons, Myanmar’s purported distinction between the entitlement to invoke responsibility under the Genocide Convention and standing to pursue a claim for this purpose before the Court has no basis in law.

109. 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 (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007 (II), p. 599, para. 39). The Court further notes that the scope of diplomatic protection has been extended to include, *inter alia*, alleged violations of internationally guaranteed human rights (*ibid.*). 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*.

110. 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 (see, for example, Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes (concluded 18 April 1961; entered into force 24 April 1964), United Nations, *Treaty Series*, Vol. 500, p. 241). The Court notes that this formulation appears in the first draft of the Convention prepared by the Secretary-General of the United Nations (Article XIV of the Draft Convention on the Crime of Genocide, UN doc. E/447, 26 June 1947) and was included in the final text of the Convention without any debate.

111. 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.

112. 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.

113. 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. As the Court has affirmed, the Genocide Convention “was manifestly adopted for a purely humanitarian and civilizing purpose”, and “its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality” (*Reservations to the Convention on the Prevention and Punishment of the Crime of*

Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23). Accordingly, the Court does not need to address the arguments of Myanmar relating to Bangladesh's reservation to Article IX of the Genocide Convention.

114. 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. Therefore, Myanmar's second preliminary objection must be rejected.

* * *

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.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-second day of July, two thousand and twenty-two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of The Gambia and the Government of the Republic of the Union of Myanmar, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Philippe GAUTIER,
Registrar.

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.

(Initialed) J.E.D.

(Initialed) Ph.G.
