Note: This translation has been prepared by the Registry for internal purposes and has no official character

RESPONSE OF THE DEMOCRATIC REPUBLIC OF THE CONGO TO THE WRITTEN OBSERVATIONS OF MYANMAR PURSUANT TO ARTICLE 82, PARAGRAPH 1, OF THE RULES OF COURT ON THE ADMISSIBILITY OF THE DECLARATION OF INTERVENTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO

[Translation]

1. On 10 February 2025, the Republic of the Union of Myanmar (hereinafter "Myanmar") submitted written observations on the declaration of intervention filed on 10 December 2024 by the Democratic Republic of the Congo (hereinafter the "DRC") in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar: 7 States intervening)*. In its written observations, Myanmar contends that the DRC's declaration of intervention is inadmissible for the following three reasons:

— the declaration of intervention was not signed in the manner provided for in Article 38, paragraph 3, of the Rules of Court (hereinafter the "Rules");

— the declaration of intervention was not filed "as soon as possible", as required by Article 82, paragraph 2, of the Rules;

— the declaration of intervention goes beyond the scope permitted under Article 63 of the Statute of the Court (hereinafter the "Statute").

2. The DRC will respond herein to each of those arguments, demonstrating that none of the objections raised by Myanmar constitutes a bar to the admissibility of its declaration of intervention. It should be noted at the outset that similar objections were raised by Myanmar to other declarations of intervention previously filed in this case and that all of those objections were rejected by the Court in its Order of 3 July 2024[1].

I. The requirements for signature set out in Article 38, paragraph 3, of the Rules have been met

3. According to Myanmar, the DRC's declaration of intervention is inadmissible because the Agent's signature was not authenticated by the DRC's diplomatic representative in the country in which the Court has its seat or by the competent authority of its Ministry of Foreign Affairs, as required by Article 38, paragraph 3, of the Rules of Court[2].

4. The DRC does not dispute that the signature of its Agent appointed in this case was initially authenticated by the Minister of Justice and Keeper of the Seals, rather than the Minister for Foreign Affairs. It would point out, however, that this was a logical consequence of the domestic situation in the DRC, where international dispute management falls under the remit of the Minister of Justice and Keeper of the Seals and not the Minister for Foreign Affairs.

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[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Admissibility of the Declarations of Intervention, Order of 3 July 2024*.

[2] Written observations of the Republic of the Union of Myanmar pursuant to Article 83, paragraph 1, of the Rules of Court on the declaration of intervention on the Democratic Republic of the Congo (hereinafter the "written observations of Myanmar"), paras. 11-13.

5. In any event, and in so far as it was necessary, the signature of the DRC's Agent was duly authenticated by the Deputy-Minister for Foreign Affairs, International Co-operation and Francophone Affairs, acting on behalf of the Minister of State for Foreign Affairs, in a letter sent to the Registry on 20 February 2025. The situation here is thus one in which, as the Court recalled in its Order of 3 July 2024, the Court "cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned"[3].

6. Myanmar contends however that this authentication should be considered ineffective, since it took place after the expiry of the time-limit for the filing of declarations of intervention in this case[4]. According to this line of argument, no procedural defect affecting the DRC's declaration may be remedied after that time-limit, the expiry of which therefore renders the declaration irreparably inadmissible[5].

7. It is revealing that Myanmar cites no authority in support of its position. Myanmar also contradicts itself when it notes, in respect of the declaration of intervention filed in the present case by the Maldives, that the defect resulting from the initial lack of authentication by the Minister for Foreign Affairs of the Maldives of the signature appearing on that State's declaration "had subsequently been remedied before the Court gave its decision on the admissibility of that declaration of intervention"[6]. Myanmar's observations thus make very clear that the point at which a declaration of intervention is to be assessed for compliance with the requirements of Article 38, paragraph 3, of the Rules is not the expiry of the time-limit for the filing of declarations of intervention, but rather when the Court is called upon to pronounce on the admissibility of those declarations. This is, moreover, a perfectly logical conclusion given the raison d'être of the rule set forth in Article 38, paragraph 3, of the Rules, which is to ensure that written pleadings submitted in proceedings before the Court are filed on behalf of and with the authorization of the State concerned. What is important in this respect is that the Court may be sure of this when it rules on the admissibility of those pleadings. And this is undoubtedly the case as far as the DRC's declaration of intervention is concerned.

II. The declaration of intervention was filed within the time-limits fixed by Article 82, paragraph 2, of the Rules

8. Myanmar further alleges that the declaration of intervention is inadmissible because it was not filed "as soon as possible", as required by Article 82, paragraph 2, of the Rules. Myanmar states in this regard that the provision in question lays down two requirements relating to the time-limit for the filing of a declaration of intervention, namely that a declaration must be "filed 'as soon as possible' . . . [and] in any event . . . 'not later than the date fixed for the filing of the last written pleading'"[7]. According to this line of argument, these two requirements are cumulative, and a declaration of intervention filed on the deadline for the submission of the last written pleading would therefore be inadmissible if it had not been filed "as soon as possible"[8]. In this instance, Myanmar observes that the DRC's declaration of intervention was filed more than two years and four months

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[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Admissibility of the Declarations of Intervention, Order of 3 July 2024*, para. 31, citing *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14.

[4] Written observations of Myanmar, para. 14.

[5] *Ibid*.

[6] *Ibid*.

[7] *Ibid*., para. 18.

[8] *Ibid*., para. 19.

after the Court's Judgment on the preliminary objections, and that the DRC has offered no explanation to justify that delay[9].

9. However, Myanmar's proposed interpretation of the time-limit requirements set forth in Article 82, paragraph 2, find no support in the practice of the Court. Myanmar refers for this purpose to the Court's 2001 Judgment on the Philippines' Application for permission to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*[10]. It focuses in particular on paragraph 21 of that Judgment, in which the Court states that, in its opinion,

> "[g]iven th[e] circumstances, the time chosen for the filing of the Application by the Philippines can hardly be seen as meeting the requirement that it be filed 'as soon as possible' as contemplated in Article 81, paragraph 1, of the Rules of Court. This requirement which, although when taken on its own might be regarded as not sufficiently specific, is nevertheless essential for an orderly and expeditious progress of the procedure before the Court. In view of the incidental character of intervention proceedings, it emphasizes the need to intervene before the principal proceedings have reached too advanced a stage."[11]

10. The conclusions that Myanmar draws from this passage are nevertheless unfounded, for two reasons. First, in the aforementioned case, the Philippines filed its Application for permission to intervene after Indonesia and Malaysia "had already completed three rounds of written pleadings as provided for as mandatory in the Special Agreement — Memorials, Counter-Memorials and Replies"[12]. That is not the case in these proceedings, in which the DRC's declaration of intervention was filed several weeks before "the date fixed [by the Court] for the filing of the last written pleading"[13], here the Rejoinder of Myanmar. On this point alone, the comparison is therefore irrelevant.

11. Second, and furthermore, Myanmar's argument also lacks any legal basis. As Myanmar itself observes, the Court concluded in the *Indonesia/Malaysia* case that

> "despite the filing of the Application at a late stage in the proceedings, which does not accord with the stipulation of a general character contained in Article 81, paragraph 1, of the Rules requiring that '[a]n application for permission to intervene . . . shall be filed as soon as possible', the Philippines cannot be held to be in violation of the requirement of the same Article, which establishes a specific deadline for an application for permission to intervene, namely 'not later than the closure of the written proceedings'"[14].

12. Myanmar seeks to reduce the scope of this conclusion, arguing that since the Philippines' Application for permission to intervene was in any event rejected on other grounds, the above-cited

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[9] *Ibid*., para. 22.

[10] *Ibid*., para. 25.

[11] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 585, para. 21.

[12] *Ibid*., p. 584, para. 20.

[13] Art. 82, para. 2, of the Rules.

[14] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, pp. 585-586, para. 23.

passage is merely an *obiter dictum* of no real significance for interpreting the relevant provision of the Rules[15]. This contention is clearly erroneous, however.

13. Far from being an *obiter dictum*, i.e. a "statement made by a court . . . which is not essential to the reasoning of a decision adopted by that court"[16], the above-cited passage is in fact part of the *ratio decidendi* of the 2001 Judgment. Indeed, the Court concludes this part of the Judgment by expressly stating that it "cannot uphold the objection raised by Indonesia and Malaysia based on the alleged untimely filing of the Philippine Application"[17]. Shortly thereafter it reiterates its finding that "the Philippine Application was not filed out of time"[18]. It is quite clear, therefore, that even if it could be concluded in a given case that an application for permission to intervene — or a declaration of intervention — had not been filed "as soon as possible", such application or declaration would nevertheless be admissible provided that it had been filed within the "specific deadline". This is indisputably so in the case of the DRC's declaration of intervention in the present case.

III. The DRC's declaration of intervention falls within the framework of Article 63 of the Statute

14. According to Myanmar, a substantial part of the DRC's declaration of intervention goes beyond the scope set out in Article 63 of the Statute. Myanmar argues that this is the case because part of the declaration addresses questions relating to the means by which facts that may constitute violations of the Genocide Convention might be proved and the applicable standards of proof[19]. Myanmar is of the view that these arguments do not concern the construction of the Convention as such, since the latter does not prescribe rules of evidence or the standard of proof to be applied[20]. According to Myanmar, the inclusion of such arguments should lead the Court to declare that the DRC's declaration of intervention is inadmissible in its entirety[21].

15. Here too, Myanmar's argument proves unfounded. While it is true that the DRC's declaration of intervention contains a number of arguments relating to the question of evidence in the context of the application of the Genocide Convention, such arguments are purely conceptual and do not relate to more specific issues, such as the establishment of the facts in the case or the probative value of various categories of evidence. The declaration of intervention thus focuses on the establishment of genocidal intent in the context of the construction of Article II of the Genocide Convention. In so doing, it seeks to contribute to clarifying the very scope of the notion of "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". This is clearly an intrinsic part of the interpretation exercise provided for in Article 63 of the Statute.

16. It is telling in this respect that the Court, when making known that it will disregard parts of declarations of intervention considered by it as falling outside the scope of Article 63 of the Statute, has identified in this regard such matters as "the existence of a dispute between the Parties,

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[15] Written observations of Myanmar, para. 27.

[16] J. Salmon (ed.), *Dictionnaire de droit international public*, Brussels, Bruylant/AUF, 2001, p. 762 *[Translation by the Registry]*.

[17] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 586, para. 26.

[18] *Ibid.*, p. 587, para. 30.

[19] Written observations of Myanmar, para. 43.

[20] *Ibid.*

[21] *Ibid.*, paras. 46-47.

the evidence, the facts or the application of the Convention in the present case"[22] and even "the evidentiary value of a certain category of documents"[23]. Yet the arguments contained in paragraphs 51 to 76 of the DRC's declaration of intervention, which Myanmar erroneously calls into question, clearly do not fall into any of these categories.

17. Moreover, it is obvious that, even if the Court considers this objection of Myanmar to be founded, in no event can the objection have the effect of rendering inadmissible the entirety of the DRC's declaration of intervention. In its most recent order on this kind of issue, the Court simply stated that, in so far as the declarations of intervention on whose admissibility it was required to pronounce, "in some instances, address[ed] matters other than the construction of provisions of the Genocide Convention . . . , the Court w[ould] not consider such issues and expect[ed] the interveners to refrain from addressing them any further"[24]. In such circumstances, there is therefore no question of dismissing the declaration of intervention concerned in its entirety, and it is hard to see why the Court should suddenly depart from this course of action.

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18. Just like Myanmar's legal arguments, the arguments of appropriateness put forward by that State in the concluding section of its written observations should not lead the Court to declare the DRC's declaration of intervention inadmissible. In that conclusion, Myanmar draws the Court's attention to the notable increase in the number of interventions under Article 63 of the Statute in recent years[25]. According to Myanmar, this growing practice risks the Court's workload becoming unmanageable and is a major reason for examining the admissibility of declarations of intervention more rigorously[26].

19. This is clearly an overly dramatized presentation of the situation. While there is no denying that interventions under Article 63 of the Statute have increased recently, this is a far cry from the worrying picture painted by Myanmar. In the majority of the contentious cases currently pending before the Court in which the construction of a multilateral convention is at issue, no third State has expressed a wish to intervene. And although the present case in particular has attracted attention in international fora, it has ultimately given rise to a total of only 11 declarations of intervention from States, accounting for a mere 7 per cent of all parties to the Genocide Convention.

20. This is by no means the tidal wave portended by Myanmar. These interventions should in fact be seen as salutary, because they reflect a concern to ensure the preservation of values and principles at the heart of the contemporary international legal order, particularly as regards the protection of individuals and groups against the worst international crimes. They also reflect the belief that States have in the rule of international law and the trust they place in the Court's foremost

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[22] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Admissibility of the Declarations of Intervention, Order of 5 June 2023, I.C.J. Reports 2023 (II)*, p. 374, para. 85.

[23] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Admissibility of the Declarations of Intervention, Order of 3 July 2024*, para. 45.

[24] *Ibid.*

[25] Written observations of Myanmar, paras. 52-53.

[26] *Ibid.*, para. 52.

role in the peaceful settlement of disputes. Hence they should certainly not be seen as a pathological condition of international legal disputes that should be brought to an end.

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21. For all the reasons set out above, the DRC respectfully requests the Court to adjudge that its declaration of intervention is admissible in its entirety.

Done at Kinshasa, 17 March 2025.

(Signed) Ivon MINGASHANG,

Agent of Democratic Republic of the Congo.

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