INTERNATIONAL COURT OF JUSTICE

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

THE GAMBIA

v.

MYANMAR

PRELIMINARY OBJECTIONS OF
THE REPUBLIC OF THE UNION OF MYANMAR

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20 JANUARY 2021

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TABLE OF ABBREVIATIONS AND DEFINED TERMS

2011 ILC Draft Articles	ILC Draft Articles on the Responsibility of International Organizations, 2011
2018 FFM report	Report of the independent international fact-finding mission on Myanmar, 27 August 2018 (submitted on 12 September 2018)
2019 FFM Detailed Findings	Detailed findings of the Independent International Fact-Finding Mission on Myanmar, 16 September 2019
2019 FFM report	Report of the independent international fact-finding mission on Myanmar, 8 August 2019
AG	Application instituting proceedings of The Gambia, 11 November 2019
Application	Application instituting proceedings of The Gambia, 11 November 2019
Convention Against Torture	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984
ECOSOC	UN Economic and Social Council
FFM	UN Independent International Fact-Finding Mission on Myanmar
The Gambia	Republic of The Gambia
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948
IC Charter	Charter of the Islamic Conference, 4 March 1972
ILC	International Law Commission
ILC Draft Articles on State Responsibility	ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001

MG	Memorial of The Gambia, 23 October 2020
Myanmar	Republic of the Union of Myanmar
OG	Observations of the Republic of The Gambia for the Hearing on Provisional Measures, 2 December 2019
OIC	Organisation/Organization of Islamic Cooperation
OIC Ad Hoc Committee	Ad Hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas established by OIC Res. No. 59/45-POL
OIC Charter	Charter of the Organisation/Organization of the Islamic Conference, 14 March 2008 (as amended)
POM	Preliminary Objections of Myanmar, 20 January 2021
Provisional Measures Order	Order of the Court on the Request for the Indication of Provisional Measures, 23 January 2020
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea, 10 December 1982
USD	United States dollars
USSR	Union of Soviet Socialist Republics

INTRODUCTION

1. By an application dated 11 November 2019 and filed with the Registry of the Court on the same date (the "**Application**"), the Republic of The Gambia ("**The Gambia**") instituted the present proceedings against the Republic of the Union of Myanmar ("**Myanmar**") alleging violations by Myanmar of the Convention on the Prevention and Punishment of the Crime of Genocide (the "**Genocide Convention**").[1]

2. The only basis for the jurisdiction of the Court invoked by The Gambia[2] in its application is Article 36, paragraph 1, of the Statute of the Court[3] in conjunction with Article IX of the Genocide Convention.[4]

3. The application of The Gambia included a request for the indication of provisional measures by the Court. The Court held hearings on this request on 10-12 December 2019. By an Order of 23 January 2020 (the "**Provisional Measures Order**"), the Court indicated certain provisional measures. One of these provisional measures required Myanmar to submit a report to the Court on all measures taken to give effect to the Provisional Measures Order within four months from the date of that Order, and requires Myanmar to submit further reports every six months thereafter, until a final decision on the case is rendered by the Court.

4. In compliance with that provisional measure, Myanmar submitted its first such report on 22 May 2020, and its second report on 23 November 2020.

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[1] Done at Paris, 9 December 1948, *UNTS*, vol. 78, p. 277. The text of the English version of the Genocide Convention is reproduced in the Memorial of The Gambia ("**MG**"), vol. II, Annex 1. The official Chinese, English, French, Russian and Spanish versions are annexed to these Preliminary Objections of Myanmar ("**POM**"), Annex 1.

[2] See The Gambia's Application instituting proceedings of 11 November 2019 ("**AG**"), paras. 16-19, 22 and 120; MG, para. 2.1.

[3] Article 36, paragraph 1, of the Statute of the Court relevantly provides that "The jurisdiction of the Court comprises … all matters specially provided for … in treaties and conventions in force".

[4] Article IX of the Genocide Convention provides: "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".

5. At the hearing on provisional measures in December 2019, Myanmar argued that the Court lacked prima facie jurisdiction to deal with the case, and that The Gambia lacked prima facie standing to bring the case.

6. In the Provisional Measures Order, the Court found that, prima facie, it had jurisdiction to deal with the case and that The Gambia had prima facie standing to submit the dispute to the Court. However, those findings were made only on a *prima facie* basis, and for the sole purpose of determining whether the requirements for the indication of provisional measures were met. The Provisional Measures Order made clear that:

> The Court further reaffirms that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of The Gambia and Myanmar to submit arguments and evidence in respect of those questions.[5]

7. On 23 October 2020, pursuant to the order of the Court dated 23 January 2020 fixing the time limits for the Memorial and the Counter-Memorial, as amended by a subsequent order of 18 May 2020, The Gambia filed its Memorial.

8. Pursuant to Article 79*bis*, paragraph 1, of the Rules of Court, Myanmar now hereby raises objections to the jurisdiction of the Court to deal with the merits of the case, and to the admissibility of the application, and requests that these preliminary objections be determined before any further proceedings on the merits.[6]

9. The mandatory effect of Article 79*bis*, paragraph 3, of the Rules of Court is that upon receipt by the Registry of these preliminary objections, proceedings on the merits shall be suspended.[7]

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5 Provisional Measures Order, para. 85.

6 Article 79*bis*, paragraph 1, sentence 1, of the Rules of Court provides: "When the Court has not taken any decision under Article 79, an objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial."

7 Article 79*bis*, paragraph 3, of the Rules of Court provides: "Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time-limit for the presentation by the other party of a written statement of its

10. Myanmar raises herewith four separate preliminary objections. Each of these is properly preliminary in character. Any one of these preliminary objections alone, if upheld by the Court, would put an end to these proceedings with a finding by the Court either that it lacks jurisdiction to deal with any part of the merits of the case, or that the entirety of the application is inadmissible. Each of the preliminary objections necessitates a decision by the Court at this preliminary stage since if any of the preliminary objections is upheld by the Court, it must refrain from examining the merits of the case. Each of the preliminary objections can be determined without consideration of any part of the merits of the case.

11. As the Court has held, "the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits".[8] Consistently with this, and in accordance with Article 79*ter*, paragraph 1, of the Rules of Court,[9] these preliminary objections do not deal in any way with the merits of the application, or with facts relevant to the merits of the case.

12. Myanmar does, however, wish to emphasize at the outset the following.

13. First, the raising of these preliminary objections in no way signifies a lack of respect by Myanmar for the Court and its processes. It is recalled that at the hearing on 11 December 2019, the Agent for Myanmar began by stating that:

> For materially less resourceful countries like Myanmar, the World Court is a vital refuge of international justice. We look to the Court to establish conditions conducive to respect for obligations arising from treaties and other sources of international law, one of the fundamental objectives of the United Nations Charter.[10]

14. At that hearing, Myanmar objected to the indication of provisional measures. However, the Court decided in its Provisional Measures Order to indicate certain

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observations and submissions, which shall include any evidence on which the party relies. Copies of the supporting documents shall be attached."

8 *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6, p. 44.

9 Article 79*ter*, paragraph 1, of the Rules of Court provides: "Pleadings with respect to preliminary questions, or objections filed pursuant to Article 79, paragraph 2, or Article 79*bis*, paragraphs 1 and 3, shall be confined to those matters that are relevant to the preliminary questions or objections."

10 CR 2019/19, p. 12, para. 1 (Daw Aung San Suu Kyi).

measures, and Myanmar has respected and implemented that Order. The reports submitted by Myanmar pursuant to that Order set out the measures it has taken to give effect to those provisional measures.

15. Secondly, the raising of these preliminary objections does not signal any lack of appreciation on the part of Myanmar of the importance of the Genocide Convention. Again, it is recalled that at the hearing on 11 December 2019, the Agent for Myanmar acknowledged the Genocide Convention to be one of the most fundamental multilateral treaties of our time, and noted that invoking that Convention is a matter of utmost gravity.[11]

16. Thirdly, the raising of these preliminary objections does not mean that the Government of Myanmar is denying that certain crimes might have been committed during the events of 2016 and 2017, or that Myanmar lacks awareness of the broader problems and challenges faced in relation to northern Rakhine State.

17. At the hearing on 11 December 2019, Myanmar accepted that it cannot be ruled out that disproportionate force was used by members of the Myanmar Defence Services in some cases in disregard of international humanitarian law, and that this was a matter to be determined in the due course of the criminal justice process, not by any individual in the Myanmar Government.[12] Nor could all these matters fall for determination by this Court in these proceedings given its limited jurisdiction.[13]

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11 CR 2019/19, p. 12, para. 2 (Daw Aung San Suu Kyi).

12 CR 2019/19, p. 15, para. 15 (Daw Aung San Suu Kyi).

13 Given that the only basis of jurisdiction relied upon by The Gambia is Article IX of the Genocide Convention, then even if all preliminary objections were rejected by the Court, its jurisdiction would on any view be confined to alleged breaches of the Genocide Convention. The Court could have no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, such as crimes against humanity, war crimes and human rights norms. Furthermore, the compromissory clause in Article IX of the Genocide Convention is confined to obligations arising under the Genocide Convention, and would not provide the Court with jurisdiction to consider claims of violations of customary international law obligations regarding genocide. Nor does Article IX give the Court the power to determine the criminal responsibility of any individual for alleged acts of genocide. See *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. 43, p. 104, para. 147; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 3, pp. 45-48, 60, 61, paras. 85-89, 124, 129.

18. In relation to the wider problems, the cycles of inter-communal violence in northern Rakhine State were also spoken of at the hearing in December 2019.[14] The Advisory Commission on Rakhine State, which was chaired by the late former Secretary-General of the United Nations ("**UN**"), Kofi Annan, reported in 2017 that:

> Rakhine enjoys fertile soils, an abundance of natural resources and is strategically located for regional trade. Yet, today, Rakhine State suffers from a pernicious mix of underdevelopment, inter-communal conflict, and lingering grievances towards the central government. The Rakhine Advisory Commission recognizes the complexity of the problems in the state, and cautions that there are no "quick fix" solutions to these challenges. Yet, finding a path to move forward is an urgent task. The status quo is not tenable. […]
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> […] The state is marked by chronic poverty from which all communities suffer, and lags behind the national average in virtually every area. Protracted conflict, insecure land tenure and lack of livelihood opportunities have resulted in significant migration out of the state, reducing the size of the work force and undermining prospects of development and economic growth. […]
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> As witnessed by the Commission during its many consultations across Rakhine State, all communities harbour deep-seated fears, with the legacy of the violence of 2012 fresh in many minds. While Muslims resent continued exclusion, the Rakhine community worry about becoming a minority in the state in the future. Segregation has worsened the prospects for mutual understanding. The Government has to step up its efforts to ensure that all communities feel safe and in doing so, restore inter-communal cohesion. Time alone will not heal Rakhine.[15]

19. It is obviously regrettable that there can be no "quick fix" solutions to the myriad of social, economic, developmental and security issues that need to be addressed in this region, which is presently additionally afflicted by an internal armed conflict involving the terrorist insurgent group, the Arakan Army, and terrorist activity by the Arakan Rohingya Salvation Army. However, that does not mean that the Government of Myanmar is not resolved to addressing them. Steps that have and are being taken have been referred to at the hearing in December 2019, and in the two reports submitted by Myanmar so far pursuant to the Provisional Measures Order. One key objective is the

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[14] CR 2019/19, p. 14, para. 10 (Daw Aung San Suu Kyi).

[15] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State*, August 2017, MG, vol. IV, Annex 103, pp. 9-10.

restoration of inter-communal cohesion, with a view to fostering a sense of unity amongst all of the different groups in the ethnically very diverse Union of Myanmar.[16]

20. The four preliminary objections that Myanmar is raising all relate to the proper functioning of the international dispute settlement system, not just in the present case, but in any case brought within the contentious jurisdiction of the Court, and indeed, in any inter-State case brought before any other international court or tribunal.

21. All four preliminary objections engage the fundamental principle, now so firmly established as not to require extensive citation of authority, that:

> [the Court's] jurisdiction is based on the consent of the parties and is confined to the extent accepted by them […] When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon.[17]

22. This fundamental principle is no less applicable in cases involving obligations of an *erga omnes* or *erga omnes partes* character. As the Court affirmed in the *Armed Activities* case:

> The Court observes, however, as it has already had occasion to emphasize, that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.
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> The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to

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16 A description of the ethnically very diverse character of Myanmar's population, and the history since Myanmar's independence of internal armed conflict involving different ethnically based insurgent groups in different parts of the country, is given in Myanmar's First Provisional Measures Report at paragraphs 6-34. That report then provides a background to the current conflict in Rakhine State at paragraphs 35-77.

17 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, p. 39, para. 88; see also, for instance, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, p. 125, para. 131; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 177, pp. 200-201, para. 48; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, p. 23, para. 43.

> entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.
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> As it recalled in its Order of 10 July 2002, the Court has jurisdiction in respect of States only to the extent that they have consented thereto (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 241, para. 57). When a compromissory clause in a treaty provides for the Court's jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are bound by that clause and within the limits set out therein (*ibid*., p. 245, para. 71).[18]

23. The consent of Myanmar relied upon by The Gambia is the consent that Myanmar gave when it became a party to the Statute of the Court, and a Contracting Party to the Genocide Convention. Myanmar has given no consent going beyond the conditions and limits of the terms of those instruments, and in particular, the terms of Article 34, paragraph 1, of the Statute, and the terms of Articles VIII and IX of the Genocide Convention read in the light of Myanmar's reservations to Articles VI and VIII.

24. The contentions in the four preliminary objections set out below were all raised by Myanmar at the provisional measures hearing in December 2019. They were considered by the Court at that time only upon a prima facie basis. The Court is now requested to make a definitive decision in relation to each of these preliminary objections.

25. The **first preliminary objection** is that the Court lacks jurisdiction, or alternatively that the application is inadmissible, on the ground that the real applicant in these proceedings is the Organisation of Islamic Cooperation (the "**OIC**"), an international organization. Because Article 34, paragraph 1, of the Statute of the Court provides that "[o]nly States may be parties in cases before the Court", it cannot deal with a case in its contentious jurisdiction that is in reality brought by an international organization. Furthermore, because only States can be parties to the Genocide Convention, the OIC as an international organization is not a party to that Convention, and therefore cannot invoke the compromissory clause in its Article IX. The determination of who is the

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[18] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, pp. 31-32, paras. 64-65. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, p. 47, para. 88.

real applicant in the case is a matter of substance, not a matter of form or procedure, and it is absolutely clear from the record that in substance the real applicant in this case is the OIC.

26. It must therefore be emphasized that any references in these preliminary objections to The Gambia as a "party" to these proceedings, or as the "applicant" in this case, are intended to be understood as references to the fact that The Gambia is formally named as the applicant in the Application instituting proceedings, and in documents filed in Court, and in orders issued by the Court. Such references are without prejudice to Myanmar's position that while The Gambia may, as a matter of form, be the nominal applicant in the case, the Court must determine issues of jurisdiction and admissibility on the basis that, as a matter of substance, the real applicant is the OIC.

27. The **second preliminary objection** is that The Gambia, as a non-injured Contracting Party to the Genocide Convention, lacks standing to bring the case against Myanmar under Article IX thereof, because the Convention does not provide for the concept of an *actio popularis*. Furthermore, The Gambia is also barred from bringing the case because Bangladesh, as the Contracting Party specially affected by the alleged violations of the Genocide Convention purportedly committed by Myanmar, has entered a reservation to Article IX and has thereby waived its right to settle disputes relating to the interpretation, application or fulfilment of the Convention by bringing a case before the Court under that provision.

28. The **third preliminary objection** is that The Gambia, as a non-injured Contracting Party to the Genocide Convention, may not seise the Court with a case arising under that Convention since Myanmar, when acceding to the Convention, has entered a reservation to its Article VIII. This reservation precludes non-injured States, such as in the case at hand The Gambia, from seising the Court because Article VIII addresses the seisin of the Court, and because Myanmar's reservation to Article VIII, read in conjunction with its acceptance of Article IX of the Convention, limits the scope *ratione personae* of Article VIII, in relation to Myanmar, to those Contracting Parties that are injured States, thereby excluding any form of *actio popularis*.

29. The **fourth preliminary objection** is that the Court lacks jurisdiction, or alternatively the application is inadmissible, as there was no dispute between The Gambia and

Myanmar on the date of filing of the Application instituting proceedings. It is for The Gambia to demonstrate the facts underlying its case that a dispute exists. The Gambia has identified fourteen particular facts which it says, individually or collectively, constitute, or evidence the existence of, a dispute prior to the filing of The Gambia's application on 11 November 2019.

30. Most of these facts involve the adoption of resolutions by the OIC or the issuing of reports by the Human Rights Council's Independent International Fact-Finding Mission on Myanmar (the "**FFM**"). However, the adoption or issuing of such documents by third parties neither constitutes nor provides evidence of a dispute between The Gambia and Myanmar, and indeed, The Gambia's reliance on OIC resolutions to establish the existence of a dispute if anything supports Myanmar's first preliminary objection that the real applicant in the proceedings is the OIC.

31. The Gambia also relies on two statements made by The Gambia in the UN General Assembly, one press statement issued by an official of Myanmar, and one statement made in the UN General Assembly by Myanmar, none of which refers to genocide or the Genocide Convention. The sole direct communication between The Gambia and Myanmar was a note verbale sent by The Gambia to Myanmar on 11 October 2019, only one month before The Gambia filed its Application with the Court, even though a decision to bring these proceedings before the Court had already been taken over seven months before the note verbale was sent. For the reasons given below, it cannot therefore be concluded from Myanmar's failure to respond to that note verbale within a month that a legal dispute existed between The Gambia and Myanmar on 11 November 2019.

32. Myanmar submits that the Court should accordingly find that it is without jurisdiction to deal with the case, or alternatively that the application is inadmissible. It goes without saying that in the event that the Court were to find, contrary to the position set out in these preliminary objections, that the Court has jurisdiction in the case and that The Gambia's application is admissible, Myanmar reserves all of its rights to respond on the merits at the appropriate subsequent phase. Nothing contained in the present statement can be taken in any way as implying the submission by Myanmar to the jurisdiction of the Court in this case or as an acceptance of the admissibility of the application, or as implying any admission of any contention of The Gambia relating to

the merits of the case, or of the relevance, admissibility or reliability of any evidence submitted by The Gambia relating to the merits of the case.

I. FIRST PRELIMINARY OBJECTION: The Court lacks jurisdiction, or alternatively the application is inadmissible, as the real applicant in these proceedings is the Organisation of Islamic Cooperation

A. Introduction

33. At the provisional measures hearing before the Court on 10-12 December 2019, Myanmar made clear its position that the Court lacked even prima facie jurisdiction, or alternatively that the application of The Gambia was not even prima facie admissible, on the ground that the real applicant in this case is not in fact The Gambia, but rather the OIC.[19]

34. In particular, in relation to the question of the jurisdiction of the Court, Myanmar made clear its position that the actual seisin of the Court in this case was performed by The Gambia as chair of an OIC Ad Hoc Committee, that is to say, in The Gambia's capacity as an organ of the OIC, or alternatively as "proxy" (or agent) of the OIC, and not in its capacity as a Contracting Party to the Genocide Convention.[20]

35. Article 34, paragraph 1, of the Statute of the Court states that "[o]nly States may be parties in cases before the Court". Article 36, paragraph 1, of the Statute provides that "[t]he jurisdiction of the Court comprises all cases which the parties refer to it". It follows from these provisions that it is a fundamental requirement for the existence of the Court's jurisdiction in a case that the applicant be a *State*. The Court only has jurisdiction where a case is referred to it by an applicant that is a *State*, and where that applicant State is the actual party to the proceedings. The Court has no jurisdiction to entertain a case that is referred to it by an international organization.

36. Nevertheless, despite the fact that the role of the OIC in these proceedings was one of the major issues at the hearing in December 2019, and despite the fact that the Court has made clear that it has not yet determined whether the Court lacks jurisdiction in the case or whether the application is inadmissible for the reasons given by Myanmar

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19 Especially CR 2019/19, pp. 41-46, paras. 3-26 (Staker).

20 Especially CR 2019/19, p. 46, para. 23 (Staker).

in this respect,[21] the Memorial of The Gambia quite surprisingly says absolutely nothing about this matter.

37. In the generality of cases brought before the Court, it is of course normally undisputed that the applicant is a State, such that it is unnecessary for the application or the pleadings to deal in detail with the question of whether this fundamental jurisdictional requirement is met.[22] In the present case, however, The Gambia has been well aware, at the very latest since the hearing in December 2019, that in this case there is a very significant contested issue in this respect.

38. The Court has affirmed that it "must […] always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*".[23] In the *Fisheries Jurisdiction* case, the Court said that:

> the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it […], this has no relevance for the establishment of the Court's jurisdiction, which is a "question of law to be resolved in the light of the relevant facts" […] [T]here is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments

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21 See paragraph 6 above.

22 See, for instance, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 279, p. 299, para. 46: "It is the view of the Court that 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. Only if the answer to that question is in the affirmative will the Court have to deal with the issues relating to the conditions laid down in Articles 36 and 37 of the Statute of the Court … *There is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute*. However, the objection was raised by certain Respondents … that Serbia and Montenegro did not meet, at the time of the filing of its Application on 29 April 1999, the conditions set down in Article 35 of the Statute." (Emphasis added.) See, to the same effect, *Legality of Use of Force (Serbia and Montenegro* v. *Canada), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 429, pp. 448-449, para. 45; *Legality of Use of Force (Serbia and Montenegro* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 575, p. 594, para. 45; *Legality of Use of Force (Serbia and Montenegro* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 720, pp. 739-740, para. 44; *Legality of Use of Force (Serbia and Montenegro* v. *Italy), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 865, p. 885, para. 45; *Legality of Use of Force (Serbia and Montenegro* v. *Netherlands), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 1011, pp. 1030-1031, para. 45; *Legality of Use of Force (Serbia and Montenegro* v. *Portugal), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 1160, p. 1179, para. 45; *Legality of Use of Force (Serbia and Montenegro* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 1307, p. 1326, para. 44.

23 *Appeal relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 46, p. 52, para. 13; *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*, p. 43, p. 91, para. 118; *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, p. 118, para. 40.

> advanced by the Parties, "whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it"'.[24]

39. Furthermore, this passage in the *Fisheries Jurisdiction* case was concerned with an issue relating to the interpretation and application of a reservation contained in one of the parties' declarations under Article 36, paragraph 2, of the Statute. It was not concerned with the existence of a fact material to one of the fundamental requirements for jurisdiction contained in the text of the Statute of itself. That case can in this respect be contrasted with the *Nuclear Arms and Disarmament* cases. In the latter cases, there was an issue as to the existence of a dispute between the parties at the time of the filing of the applications by the Marshall Islands, which *was* one of the fundamental requirements for jurisdiction contained in the text of the Statute itself. The Court affirmed in those cases that "While it is a legal matter for the Court to determine whether it has jurisdiction, it remains for the Applicant to demonstrate the facts underlying its case that a dispute exists".[25]

40. In relation to the requirement of the existence of a dispute, the Court has furthermore held that "The Court's determination of the existence of a dispute is a matter of substance, and not a question of form or procedure",[26] that "Whether a dispute exists is a matter for objective determination by the Court which must turn on an examination

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24 *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, p. 450, paras. 36-37.

25 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, pp. 851-852, para. 44, also separate opinion of Judge Owada, p. 879, para. 8 ("In making this objective determination, the Court has always been led to consider whether the party claiming the existence of a dispute (*i.e*., the applicant) has established by credible evidence that its claim is positively opposed by the other party (*i.e*., the respondent)"). To similar effect, see *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*, p. 255, p. 272, para. 41; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 569, para. 41.

26 E.g., *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*, p. 255, p. 270, para. 35; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 565, para. 32; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 849, para. 38.

of the facts",[27] and that "A mere assertion is not sufficient to prove the existence of a dispute".[28]

41. The approach taken in those cases to determining the existence of a dispute should be followed in relation to the determination of whether or not the applicant in a case is a State. Both the fact of the existence of a dispute, and the fact that the applicant in the case is a State, are facts that must be established in order to satisfy fundamental jurisdictional requirements imposed in *every* case by the very terms of the Court's Statute.

42. Thus, the question whether the applicant in the case is a State must be a matter of substance, and not a question of form or procedure. That is to say, the Court must determine who *in substance* is the real applicant in the case. Furthermore, this question must be a matter for objective determination by the Court, which must turn on an examination of the relevant facts. Additionally, it remains for the applicant to provide evidence to demonstrate the facts underlying the contention that the real applicant in the case is a State.

43. This means that in any case where the identity of the real applicant is in issue, the Court must look beyond the narrow question of who, as a matter of form and procedure, is named in the application as the applicant or is appearing in oral proceedings before the Court.[29] Just as a mere assertion by an applicant that a dispute exists between it and the respondent will not suffice to establish the existence of a dispute, the mere assertion by a State formally named as applicant in the application that it is the real applicant in the case will not suffice to establish that this is indeed the

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[27] E.g., *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*, p. 255, p. 270, para 36; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 567, para. 36; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 849, para. 38.

[28] E.g., *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 832, p. 874, para. 138, quoting *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

[29] Thus, in *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*, p. 43, p. 73, para. 67, the Court said at the outset of its judgment that "The Court has first to consider a question concerning the identification of the Respondent Party before it in these proceedings".

case. If in fact, upon examination of the evidence and the substance of the matter, it transpires that the real applicant in the case is an international organization, and that the State named in the application is merely acting on its behalf, as its *de facto* or *de jure* organ or agent, or merely as its proxy *in fact*, then the Court will lack jurisdiction by virtue of Article 34, paragraph 1, and Article 36, paragraph 1, of the Statute.

44. A determination that the named applicant State is, in substance, not the real applicant will be a simple and straightforward matter in circumstances where both the real applicant, and the State named in the application as the applicant, declare openly and expressly that the latter is bringing the proceedings on behalf of the former. A determination of who is the real applicant may be more complex in other cases, where there is no such overt acknowledgement. In cases of the latter kind, the Court is required to undertake a consideration of the evidence and circumstances as a whole. Relevant evidence might relate to matters such as who actually took the decision to bring the proceedings, who has ultimate authority to determine what claims are made in the application and how the proceedings are conducted, and who is funding the proceedings.

45. The present case is of the former kind. It is simple and straightforward. Both the OIC and The Gambia have on multiple occasions acknowledged that The Gambia brings these proceedings on behalf of the OIC, having been expressly tasked by the OIC to do so. Other OIC Members States have confirmed this, and other States, the international media, non-governmental organizations, and others, openly refer to this precise fact. In such circumstances, it is clear that the OIC is the real applicant in this case, even without any closer examination of the facts and evidence. However, if such a closer examination were to be undertaken, this will confirm the fact that the OIC is indeed the real applicant in the current proceedings.

46. Where consideration of the substance of the matter leads to the conclusion that the real applicant in the case is not the State formally named as applicant in the application, then the jurisdiction of the Court must fall to be determined on the basis of the status of the true applicant.

47. Thus, if the applicant named in the application is State A, but the Court finds that in substance the real applicant is State B, then the question of the jurisdiction of the Court

falls to be determined on the basis that the applicant State is State B. In such a case, if the sole basis of jurisdiction invoked in the application is the compromissory clause in a treaty to which State A and the respondent State are parties, but to which State B is not, then the Court will have no jurisdiction in the case. However, if State B is also a party to that treaty without any relevant reservation, and if all jurisdictional requirements are otherwise met in relation to State B, and if the Court is satisfied that State A has been duly authorized to bring the case on behalf of State B, then the Court might well have jurisdiction, notwithstanding that proceedings are brought in the name of State A on behalf of State B.

48. On the other hand, if the applicant named in the application is State A, but the Court finds that in substance the real applicant is an international organization, or a non-governmental organization, or a corporation or other entity, then the Court will inevitably lack jurisdiction in the case. This is because only States may be parties in cases before the Court in accordance with Article 34 of the Court's Statute.

49. Myanmar accordingly submits that in the present case, because the real applicant is the OIC, an international organization, the Court lacks jurisdiction.

50. Myanmar submits in the alternative that even if it were the case (*sed quod non*) that the *jurisdiction* of the Court falls to be determined solely by reference to who is named as applicant in the application instituting proceedings, an application would nonetheless 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 in the case. As a matter of general principle, even if the Court has jurisdiction in a case, it should decline to exercise that jurisdiction if the effect of doing so would in substance lead to a circumvention of the limitations on the Court's jurisdiction. The function of the Court is to decide legal disputes between States entitled to appear before it. If, in substance, an exercise of jurisdiction would lead the Court to decide a dispute brought by a State or entity not entitled to appear before it, then a refusal by the Court to exercise that jurisdiction would be necessary to safeguard the Court's judicial function.

51. Furthermore, it could additionally amount to an abuse of process for a State or entity which cannot itself bring a case before this Court to circumvent the limits of the

Court's jurisdiction by using a nominal applicant State to bring proceedings on its behalf, and could amount to an abuse of process on the part of the nominal applicant State to seek to facilitate this.

52. It may well be that there are proponents of the view that the jurisdiction of the Court should be expanded, to enable contentious cases to be brought by international organizations, or even by non-governmental organizations, and other entities such as private corporations. However, it is clear that any steps in this direction could be achieved only by amendments to the Court's Statute. Unless and until any relevant amendment is made to the Statute, and none appears likely in the foreseeable future, it remains the duty of the Court to give effect to the existing provisions of the Statute concerning its jurisdiction which, as the Court has consistently emphasized, are based on the consent of the States Parties thereto.

53. It is unnecessary to speculate as to the wide range of potential abuses that might be practised if the possibility of bringing cases before the Court via the use of "proxy" applicant States was open to other States, international organizations, non-governmental organizations, corporations and other entities. Such a possibility would for instance raise the prospect of corporations with their own commercial agendas simply paying a willing State to be named as applicant in a case brought before the Court, in which the corporation and its legal advisors would be given the liberty by the government of the applicant State to conduct the entire proceedings as they please. It would also raise the prospect of a State with no particular interest in the subject matter of a case agreeing to be the nominal applicant in proceedings before the Court on behalf of another State or entity, in return for that other State's or entity's support in relation to a completely unrelated matter. Such possibilities would run completely counter to what States Parties to the Statute of the Court have consented to, which is that the Court's function is to decide real disputes that exist between the actual parties to the case, in circumstances where the Court has jurisdiction over those parties in relation to the subject matter of that dispute.[30]

[30] See, for instance *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6, pp. 22-25, paras. 39-46, in which the Court, referring to earlier case law, affirmed that in determining whether a dispute was of a kind that falls within the terms of a particular compromissory clause, it is required to determine the "source or real cause" of the dispute.

54. In cases before the Court involving the use of a "proxy" State as the nominal applicant, it is likely in practice to be impossible for the respondent State or the Court to know exactly what communications and dealings have taken place between the nominal applicant State and the real applicant. The confidentiality of the dealings between the two in relation to the matter is likely to be closely guarded. However, the jurisdiction of the Court (or alternatively, admissibility of the application) should not turn on the nature of the precise dealings between the two, or the exact motivations of the proxy State for agreeing to bring the proceedings. Rather, in *any case* in which it is established that the State named in the application instituting proceedings is not the real applicant in the case, as a matter of principle, the jurisdiction of the Court, or alternatively the admissibility of the application, must be determined by reference to the identity of the real applicant.

55. In the present case, as is demonstrated below, the public record makes it absolutely clear that the real applicant in this case is the OIC, and that The Gambia brings these proceedings as the OIC's organ, agent or proxy.

56. The arguments in relation to this preliminary objection are structured as follows. Paragraphs 57-68 below set out relevant background information on the OIC. Paragraphs 69-137 below then set out the events relevant to this preliminary objection. In the light of these matters, paragraphs 138-161 demonstrate that the OIC is indeed the real applicant in this case. Paragraphs 162-185 below accordingly elaborate in further detail the reasons why the Court consequentially lacks jurisdiction in this case. Paragraphs 186-206 below then deal with the alternative reasons why, in the circumstances, the application of The Gambia is inadmissible.

B. The Organisation of Islamic Cooperation

57. The OIC is an international organization, formerly known as the Organization of the Islamic Conference. It was established by the Charter of the Islamic Conference,[31] which entered into force on 28 February 1973 (the "**IC Charter**").[32] The IC Charter

[31] Done at Jeddah on 4 March 1972, *UNTS*, vol. 914, p. 103, POM, Annex 5.

[32] *Ibid*., p. 111, footnote 1.

was replaced by the Charter of the Organization of the Islamic Conference (the "**OIC Charter**"), done at Dakar on 14 March 2008,[33] which entered into force on 2 April 2017 in accordance with Article XI of the IC Charter.[34]

58. The text of the OIC Charter, as amended by three subsequent amendments, appears *inter alia* on the OIC website.[35] One of these subsequent amendments changed the name of the organization to its current name. The other two are not material to the present case.

59. According to the OIC's website, it presently has 57 Member States.[36,37] The Gambia is a Member State. Other Member States include Bangladesh, Indonesia, Malaysia, the Maldives, Nigeria, Pakistan, Turkey and Saudi Arabia.

60. The objectives of the OIC are set out in Article 1 of the OIC Charter, which states in part as follows:

> The objectives of the Organisation of Islamic Cooperation shall be:
>
> […]
>
> 16. To safeguard the rights, dignity and religious and cultural identity of Muslim communities and minorities in non-Member States;
>
> 17. To promote and defend unified position on issues of common interest in the international fora; […]

61. Article 29, paragraph 1, of the OIC Charter further provides that "The budget of the General Secretariat and Subsidiary Organs shall be borne by Member States proportionate to their national incomes". Article 29, paragraph 2, stipulates that:

> The Organisation may, with the approval of the Islamic Summit or the Council of Foreign Ministers, establish special funds and

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33 POM, Annex 12.

34 *Ibid.*, p. 1.

35 POM, Annex 13.

36 POM, Annex 90.

37 Article 3, paragraph 1, of the OIC Charter provides that "The Organisation is made up of 57 States member of the Organisation of Islamic Cooperation and other States which may accede to this Charter in accordance with Article 3 paragraph 2": POM, Annex 13.

> endowments (waqfs) on voluntary basis as contributed by Member States, individuals and Organisations. These funds and endowments shall be subjected to the Organisation's financial system and shall be audited by the Finance Control Organ annually.

62. Article 5 of the OIC Charter lists the organs of the OIC. The first two listed are the Islamic Summit and the Council of Foreign Ministers.

63. The Islamic Summit is dealt with in Articles 6 to 9 of the OIC Charter. Article 6 provides that the "Islamic Summit is composed of Kings and Heads of State and Government of Member States and is the supreme authority of the Organisation". Article 7 provides that:

> The Islamic Summit shall deliberate, take policy decisions and provide guidance on all issues pertaining to the realization of the objectives as provided for in the Charter and consider other issues of concern to the Member States and the Ummah.

64. The Council of Foreign Ministers is dealt with in Article 10 of the OIC Charter. Article 10, paragraph 1, provides that the Council of Foreign Ministers shall be convened once a year in one of the Member States. Article 10, paragraph 4, provides that:

> The Council of Foreign Ministers shall consider the means for the implementation of the general policy of the Organisation by:
>
> a. Adopting decisions and resolutions on matters of common interest in the implementation of the objectives and the general policy of the Organisation;
>
> b. Reviewing progress of the implementation of the decisions and resolutions adopted at the previous Summits and Councils of Foreign Ministers;
>
> c. Considering and approving the programme, budget and other financial and administrative reports of the General Secretariat and Subsidiary Organs;
>
> d. Considering any issue affecting one or more Member States whenever a request to that effect by the Member State concerned is made with a view to taking appropriate measures in that respect;
>
> e. Recommending to establish any new organ or committee;
>
> f. Electing the Secretary General and appointing the Assistant Secretaries General in accordance with Articles 16 and 18 of the Charter respectively;

g. Considering any other issue it deems fit.

65. Article 16 provides that "The General Secretariat shall comprise a Secretary-General, who shall be the Chief Administrative Officer of the Organisation and such staff as the Organisation requires". Article 17 provides that:

> The Secretary General shall assume the following responsibilities:
>
> […]
>
> b. Follow-up the implementation of decisions, resolutions and recommendations of the Islamic Summits, and Councils of Foreign Ministers and other Ministerial meetings;
>
> c. Provide the Member States with working papers and memoranda, in implementation of the decisions, resolutions and recommendations of the Islamic Summits and the Councils of Foreign Ministers;
>
> d. Coordinate and harmonize, the work of the relevant Organs of the Organisation;
>
> e. Prepare the programme and the budget of the General Secretariat;
>
> f. Promote communication among Member States and facilitate consultations and exchange of views as well as the dissemination of information that could be of importance to Member States;
>
> g. Perform such other functions as are entrusted to him by the Islamic Summit or the Council of Foreign Ministers; […]

66. Article 22 stipulates that:

> The Organisation may establish Subsidiary Organs, Specialized Institutions and grant affiliated status, after approval of the Council of Foreign Ministers, in accordance with the Charter.

67. Article 23 specifies that:

> Subsidiary organs are established within the framework of the Organisation in accordance with the decisions taken by the Islamic Summit or Council of Foreign Ministers and their budgets shall be approved by the Council of Foreign Minister.

68. Of the 57 Member States of the OIC, 13 are not parties to the Genocide Convention (Indonesia, Brunei-Darussalam, Chad, Djibouti, Suriname, Sierra Leone, Somalia, Oman, Guyana, Qatar, Cameroon, Mauritania and Niger), an additional five are parties

but have made reservations to Article IX of the Convention to the effect that their consent to the bringing of proceedings before this Court is required in each individual case (Bahrain, Bangladesh, Malaysia, Morocco and Yemen), and a further two have made reservations to the effect that they do not accept the jurisdiction of the Court pursuant to Article IX at all (United Arab Emirates and Algeria).[38]

C. Events relevant to this case

69. The forty-fifth session of the Council of Foreign Ministers of the OIC was held in Dhaka, Bangladesh, on 5 and 6 May 2018.

70. Already several weeks beforehand, it had been announced by the Foreign Minister of Bangladesh that at this session, the "Rohingya problem in its humanitarian and human rights aspects is going to get prominence", and that there would be "a separate sideline session on the humanitarian challenges of the Muslim world with special focus on the Rohingyas on 6 May 2018".[39]

71. At this session, the OIC Council of Foreign Ministers adopted OIC Res. No. 59/45-POL.[40] This resolution provides for the establishment of a new OIC Ad Hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas (the "**OIC Ad Hoc Committee**"). The operative paragraphs of the resolution state as follows:

> The OIC member states decide to:
>
> 1. Establish a 10-member ad hoc Ministerial Committee on Accountability for human rights violations against the Rohingya (MCCAR) including the OIC Secretariat, to be chaired by the Gambia;

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38 MG, vol. II, Annex 2.

39 Bangladesh, Ministry of Foreign Affairs, "Statement by H.E. Mr. Md Shahriar Alam, MP, Hon'ble State Minister for Foreign Affairs of Bangladesh at BIISS-organised seminar at BICC on the theme- "Upcoming 45th Council of Foreign Ministers (CFM) of OIC, Dhaka: Revisiting A Shared Journey; 10: 10 AM", updated 29 March 2018, POM, Annex 108. See also, for instance, United News of Bangladesh (Bangladesh), "PM to open OIC-CFM Saturday; Rohingya issue on focus", 2 May 2018, POM, Annex 141.

40 OIC Res. No. 59/45-POL, On The Establishment of an OIC Ad Hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas, May 2018, POM, Annex 91.

2. The ad hoc committee will,

   a. Engage to ensure accountability and justice for gross violations of international human rights and humanitarian laws and principles;

   b. Assist in information gathering and evidence collection for accountability purposes

   c. Mobilize and coordinate international political support for accountability for the Human Rights Violations against the Rohingys in Myanmar

   d. Collaborate with the international bodies, such as, office of the United Nations High Commissioner for Human Rights, United Nations Security Council, and other international and regional mechanisms.

72. The full membership of the OIC Ad Hoc Committee appears not to have been made public. However, it appears that in addition to The Gambia and the OIC Secretariat, its members include Bangladesh and Malaysia,[41] two States that have made reservations to Article IX of the Genocide Convention (see paragraph 68 above).

73. At that same session of the OIC Council of Foreign Ministers in May 2018, the Foreign Ministers and Heads of Delegations of Member States of the OIC adopted the "Dhaka Declaration".[42] This document includes the statement that:

> We welcome the resolution adopted on the situation of the Rohingya community of Myanmar and in this regard, agree to address the accountability issue for the violations of human rights against the Rohingyas in Myanmar through formation of an ad hoc ministerial committee, to be chaired by Gambia […][43]

74. Subsequently, on 25 September 2018, the President of The Gambia said in a statement at the UN General Assembly that:

> As the upcoming Chair of the next OIC summit, The Gambia has undertaken, through a Resolution, to champion an accountability

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41 The resolution itself indicates that two of its members are The Gambia and the OIC Secretariat. Press releases issued by the Embassy of Bangladesh in The Hague and by the Malaysian Ministry of Foreign Affairs indicate that those States are also members. See Embassy of Bangladesh, The Hague, Press Release, "Bangladesh supports OIC backed initiative by The Gambia in the International Court of Justice (ICJ)", 12 November 2019 (final paragraph), POM, Annex 112, and paragraph 117 below.

42 MG, vol. VII, Annex 203.

43 *Ibid*., para. 17.

> mechanism that would ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book.[44]

75. According to a 22 January 2019 press release issued by the OIC,[45] a coordination meeting for the Members of the OIC Ad Hoc Committee was convened on the sidelines of the Senior Officials Meeting Preparatory to the forty-sixth session of the OIC Council of Foreign Ministers. The press release indicates that the meeting, chaired by The Gambia, discussed the preparations and agenda of the inaugural session of the OIC Ad Hoc Committee due to be held in Banjul, The Gambia, on 10 February 2019.

76. On 10 February 2019, the OIC Ad Hoc Committee held its inaugural meeting in The Gambia. According to a report in an online newspaper in The Gambia:

> The Organisation for Islamic Cooperation (OIC) Ad Hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingya ended Sunday its meeting in The Gambia with a renewed commitment to apply more pressure on Myanmar as the Muslim minority continues to face persecution.
>
> "The OIC must not leave it to others alone to demand accountability for crimes committed against fellow Muslims, especially when the affected Muslim community constitutes a minority in a State as the Rohingyas are in Myanmar," said The Gambia's Justice Minister Aboubacarr Tambadou in a statement delivered during the inaugural meeting of the OIC Ad Hoc Ministerial Committee held at Labranda Coral Beach Resort & Spa in Brufut. […]
>
> Tambadou added that the Rohingya crisis provides *the OIC* with a unique opportunity to assert its leadership role in matters affecting Muslim minority communities across the globe.
>
> These minority groups, he argued, deserve the collective voice, support and solidarity of the OIC. He then added: "*The OIC* must therefore speak for them. When international crimes are committed against them, it must be the *responsibility of the OIC to lead international calls for accountability*. […]
>
> The meeting, which was attended by a panel of experts, adopted a series of measures that would be tabled before the Council of

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44 UN General Assembly, 73rd Session, 7th Plenary Meeting, Address by Mr. Adama Barrow, President of the Republic of the Gambia, UN doc. A/73/PV.7 (25 September 2018), p. 6, MG, vol. III, Annex 41.

45 OIC, Press Release, "OIC Convenes Coordination Meeting for Ministerial Committee on Accountability for Human Rights Violations against the Rohingya", 22 January 2019, POM, Annex 92.

> Foreign Ministers in March this year in Abu Dhabi, United Arab Emirates.[46]

77. Details of the "series of measures" adopted at that meeting of the OIC Ad Hoc Committee, for tabling before the next session of the OIC Council of Foreign Ministers, have not been made public. However, as explained below, other documents indicate that it involved the bringing of proceedings before this Court.[47] This statement made in the media in The Gambia by its Justice Minister in February 2019 already indicated that this was an initiative of the OIC.

78. The forty-sixth session of the Council of Foreign Ministers of the OIC was then held in Abu Dhabi on 1 and 2 March 2019. At that session, a resolution was adopted in terms almost identical to the 2018 OIC resolution referred to in paragraph 71 above ("OIC Res. No. 60/46-POL").[48]

79. At that same session, the Council of Foreign Ministers of the OIC also adopted a further resolution ("OIC Res. No. 61/46-POL").[49] A preambular paragraph to this resolution read as follows:

> *Welcoming* the inaugural meeting of the OIC Ad Hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingya, held in Banjul, Republic of the Gambia, on 10 February 2019, and *welcoming also* the Ad Hoc Committee's plan of action as reflected in the report of the inaugural meeting.

80. The operative paragraphs of this resolution stated:

> The OIC Member States decide to:
>
> 1. Endorse the Ad Hoc Committee's plan of action to engage in international legal measures to fulfill the Ad Hoc Committee's mandate;

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46 Kairo News (The Gambia), "OIC Piles Pressure on Myanmar", 11 February 2019 (emphasis added), POM, Annex 143. See also Freedom Newspaper (The Gambia), "OIC Pushes for Increased Pressure on Myanmar", 10 February 2019, POM, Annex 142.

47 See paragraphs 81-84 below.

48 OIC Res. No. 60/46-POL, On The Establishment of an OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas, March 2019, POM, Annex 93.

49 OIC Res. No. 61/46-POL, The Work of the OIC *Ad hoc* Ministerial Committee on Accountability for Human Rights Violations Against the Rohingya, March 2019, POM, Annex 94.

> 2. Call upon member states to contribute voluntarily to the budget of the plan of action and to assist the General Secretariat to allocate other resources needed to implement the plan of action.
>
> 3. Decide to remain seized of this matter.[50]

81. The OIC Ad Hoc Committee's "plan of action" referred to in this resolution has not been made public. However, the adoption of this second OIC resolution in 2019 is described in two press releases issued by the Ministry of Foreign Affairs of Bangladesh. The first, dated 1 March 2019, states:

> At the 46th session of the OIC Council of Foreign Ministers today in Abu Dhabi, Bangladesh Foreign Minister Dr. A K Abdul Momen, MP called for *collective action* to ensure accountability and justice to the Rohingyas and their immediate repatriation to their homeland in the Rakhine state of Myanmar. He was referring to *the OIC's decision to pursue the legal path to justice through the International Court of Justice* (ICJ) – as was decided in the Banjul meeting of the OIC Ministerial Committee early last month this year.[51]

82. This press release contains no relevant reference to The Gambia, other than to state that the February 2019 meeting of the OIC Ad Hoc Committee had been held in The Gambia.[52]

83. The second press release of the Ministry of Foreign Affairs of Bangladesh, dated 4 March 2019, states:

> OIC, in a major diplomatic breakthrough, unanimously adopted a resolution to move at the International Court of Justice (ICJ) for establishing the legal rights of the Rohingyas and addressing

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50 The same session of the OIC Council of Foreign Ministers also adopted OIC Res. No. 4/46-MM, On The Situation of the Muslim Community in Myanmar, MG, vol. VII, Annex 204, which stated (at p. 24, para. 34) that the Council "**Calls upon** Members of the OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingya to carry out the tasks of ensuring accountability and justice for gross violations of international human rights and humanitarian laws and principles; Assisting in information gathering and evidence collection for accountability purposes; Mobilizing and coordinating international political support for accountability for the Human Rights Violations against the Rohingya in Myanmar".

51 Bangladesh, Ministry of Foreign Affairs, Press Release, "Foreign Minister calls for fighting international terror and repatriation of the Rohingya to their homeland in Myanmar", 1 March 2019, updated 3 March 2019 (emphasis added), POM, Annex 109.

52 The only other reference in this press release to The Gambia is in the final sentence, which, dealing with unrelated matters, states that "The Foreign Minister also met his counterparts from the Maldives, Indonesia, the Gambia, Malaysia and several other key Ministers on the sidelines of the CFM and discussed issues related to cooperation in Blue Economy, production, finance and trade".

> the question of accountability and justice. The resolution to pursue a legal recourse through the ICJ came after a long series of negotiations to seek accountability for crimes committed against humanity and gross violation of human rights in the case of the Rohingyas in Myanmar.
>
> The Gambia led the process with a ten-member high-powered ministerial committee. The Committee's first meeting was co-chaired by the Gambia in Banjul last month on the 10th of February. It recommended taking legal steps for establishing legal rights on the principles of international law – specifically the Genocide Convention and other Human Rights and Humanitarian Law principles.
>
> This unanimous measure sets a precedent for [*the*] *OIC in pursuing the legal path to justice* to address crimes committed against humanity and for establishing the legal rights of the Rohingya population to their rightful homeland in the Rakhine state of Myanmar.
>
> The Committee's decision was endorsed in a full-fledged resolution and adopted in the final session of the 46th Council of Foreign Ministers in Abu Dhabi on the last day of the Council meeting. Bangladesh Foreign Minister Dr. A K Abdul Momen led a high-powered delegation to the Council and to the negotiations in the Special Committee in this regard.[53]

84. The *OIC Journal* also published an article following this session of the OIC Council of Foreign Ministers which stated that the OIC Ad Hoc Committee had decided by consensus at its inaugural meeting on 10 February 2019 "that *the Ad Hoc Committee's [sic] would pursue legal action against Myanmar before the International Court of Justice*", and that "This course of action was subsequently approved by the 46th Session OIC Council of Foreign Ministers […] with the adoption of Resolution No. 61/46".[54]

85. Several observations can be made at this stage.

86. First, it is apparent from these documents that the proposal to bring a case before this Court was formulated by the OIC Ad Hoc Committee at its inaugural meeting on 10 February 2019, and that this proposal was endorsed by the OIC Council of Foreign Ministers in March 2019 in Resolution No. 61/46.

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53 Bangladesh, Ministry of Foreign Affairs, Press Release, "OIC Okays Legal Action Against Myanmar at the International Court of Justice (ICJ) in Abu Dhabi", 4 March 2019 (emphasis added), POM, Annex 110.

54 OIC, "Ad Hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingya Meets in Gambia", *OIC Journal*, No. 42, January-April 2019, p. 24 (emphasis added), POM, Annex 95.

87. Secondly, it is obvious that if it had been The Gambia that had wanted to bring a case before this Court against Myanmar, it would not have needed the approval or the endorsement of the OIC to do so. Nor would it have been necessary within the OIC to have a "long series of negotiations", leading to "a major diplomatic breakthrough", or for the OIC to adopt a formal resolution endorsing a plan of action *of the OIC Ad Hoc Committee*. Once it is established that the plan of action of the OIC Ad Hoc Committee involved bringing these proceedings against Myanmar before this Court, it is evident that the negotiations, diplomatic breakthrough and formal OIC resolution were necessary because *the OIC itself* proposed to bring the case. Thus, the press releases of the Ministry of Foreign Affairs of Bangladesh indicate that the OIC Ad Hoc Committee "recommended" bringing a case before this Court, and that the OIC Council of Foreign Ministers "endorsed" this. These press releases refer to "collective action" which "sets a precedent *for the OIC* in pursuing the legal path to justice".[55] According to the earlier February 2019 statement of The Gambia's Minister for Justice,[56] "the Rohingya crisis provides *the OIC* with a unique opportunity to assert its leadership role".[57] The article in the *OIC Journal* states that *the OIC Ad Hoc Committee* would pursue legal action before the Court. Operative paragraph 1 of OIC Res. No. 61/46-POL makes clear that the taking of the agreed "international legal measures" would "fulfill the Ad Hoc Committee's mandate".

88. A further 30 May 2019 press release issued by the Ministry of Foreign Affairs of Bangladesh states that:

> He [the Foreign Minister of Bangladesh] appreciated *the Gambia led initiative* of taking legal recourse to establish Rohingya rights and address their justice question at the International Court of Justice against Myanmar. [58]

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55 Emphasis added.

56 See paragraph 76 above.

57 Emphasis added.

58 Bangladesh, Ministry of Foreign Affairs, Press Release, "Foreign Minister highlights the need for solidarity among the member states of OIC", 30 May 2019 (emphasis added), POM, Annex 111.

89. Tellingly, this press release, once again, does not speak of *The Gambia* bringing a case before this Court, but rather speaks of an initiative to bring a case before this Court, and says only that this initiative is being *led* by The Gambia.

90. Subsequently, on 31 May 2019, the fourteenth Islamic Summit Conference was held in Makkah (Mecca), Saudi Arabia. The Final Communiqué of that Islamic Summit Conference states at paragraph 47:

> The Conference affirmed its support for the ad hoc ministerial committee on human rights violations against the Rohingyas in Myanmar, using all international legal instruments to hold accountable the perpetrators of crimes against the Rohingya. In this connection, the Conference urged upon *the ad hoc Ministerial Committee* led by the Gambia to take immediate measures to launch the case at the International Court of Justice *on behalf of the OIC*.[59]

91. The French version of this document states:

> La Conférence a confirmé son soutien au Comité ministériel ad hoc chargé d'examiner les violations des droits humains perpétrées contre les musulmans Rohingyas au Myanmar en recourant aux instruments juridiques internationaux pour amener les auteurs des crimes commis contre les Rohingyas à rendre compte de leurs actes. À cet égard, la Conférence a exhorté *le Comité ministériel ad hoc* dirigé par la Gambie à prendre des mesures immédiates pour engager la procédure nécessaire devant la Cour internationale de Justice *au nom de l'OCI*.[60]

92. This Final Communiqué could not be clearer. In it, the Islamic Summit, an organ and the supreme authority of the OIC,[61] requests the OIC Ad Hoc Committee, another OIC organ, "to take immediate measures to launch the case at the International Court of Justice on behalf of the OIC". It states unequivocally that measures to launch the case before this Court are to be taken *by the OIC Ad Hoc Committee*, and that the OIC Ad Hoc Committee is to do so *on behalf of the OIC*. The Gambia is referred to here only in its capacity as the leader of the OIC Ad Hoc Committee.

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[59] Final Communiqué of the 14th Islamic Summit Conference, 31 May 2019, pp. 10-11, para. 47, MG, vol. VII, Annex 205 (emphasis added), referred to in AG, fn. 31 and accompanying text.

[60] *Ibid*., French version, POM, Annex 96.

[61] See paragraph 63 above.

93. This Final Communiqué is referred to in a 3 June 2019 press release of the Office of the President of The Gambia, which states that:

> The government of The Gambia has been tasked by the Organization of Islamic Cooperation to use all international legal instruments to hold accountable the perpetrator of crimes against the Rohingyas in Myanmar.
>
> The 2019 Makkah Summit asked The Gambia *to lead a strong ad hoc Ministerial Committee to take immediate measures* to launch the case at the International Court of Justice *on behalf of the OIC*.[62]

94. This statement of the Office of the President of The Gambia is equally clear. Measures to launch the case before this Court were to be taken by the OIC Ad Hoc Committee on behalf of the OIC. As leader of the OIC Ad Hoc Committee, The Gambia had been "tasked" by the OIC to take the necessary action.

95. A press release of The Gambia's State House on 6 July 2019 then announces the conclusions of a Cabinet meeting in The Gambia held on 4 July 2019 in the following terms:

> The Hon Attorney General and Minister of Justice presented a paper on the OIC proposal for The Gambia to lead the international legal action against Myanmar at the International Court of Justice. […]
>
> Cabinet has approved the proposal of the OIC for The Gambia to lead the international legal action against Myanmar at the International Court of Justice (ICJ). Cabinet also approved the appointment of the Hon Attorney General and Minster of Justice to represent The Gambia throughout the proceedings at the ICJ.[63]

96. Thus, the Government of The Gambia itself announced that the proceedings before this Court were being brought on the proposal of the OIC, and that the role of The Gambia pursuant to this OIC proposal was to "lead" the action. The Government of The Gambia also announced that it "approved" the OIC proposal. In short, the press release is confirmation by the Office of the President of The Gambia that The Gambia

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62 The Gambia, Office of the President, Press Release, "OIC tasks The Gambia to lead ICJ case against Myanmar", 3 June 2019 (emphasis added), POM, Annex 119.

63 The Gambia, Office of the President, Press Release, "Cabinet approves transformation of GTTI into University of Science, Technology and Engineering", 6 July 2019, POM, Annex 120. See also, for instance, Panapress (Senegal), "Gambian gov't approves OIC proposal to lead legal action against Myanmar at ICJ", 6 July 2019, POM, Annex 144.

is bringing these proceedings before this Court not only on behalf of, but at the behest of, the OIC.

97. This perception was shared within the United Nations. On 10 July 2019, at the forty-first session of the Human Rights Council, the Special Rapporteur on the situation of human rights in Myanmar stated that:

> I welcome the decision by *the Organisation of Islamic Cooperation to pursue a case at the International Court of Justice* under the Genocide Convention.[64]

98. Significantly, no mention at all is made of The Gambia in this statement. This statement of the Special Rapporteur is evidence that outside the OIC itself, it was understood internationally that the proposed proceedings were to be brought by the OIC.

99. A report of the OIC Ad Hoc Committee dated 25 September 2019[65] then says as follows:

> 4. The Meeting called upon all Member States to support the work of the Ad Hoc Ministerial Committee to pursue justice and accountability for the Rohingya people;
>
> 5. The Meeting reiterated that the decision to pursue a legal case in the International Court of Justice (ICJ) was endorsed by Resolutions at the 46th CFM in Abu Dhabi and by the Final Declaration of the 14th OIC Heads of State Summit in Makkah Al Mukarramah; […]
>
> 7. The Meeting was briefed by The Gambia on the legal case to be presented to the International Court of Justice (ICJ) in line with Council of Foreign Ministers and Summit decisions;
>
> 8. The Meeting acknowledged The Gambia's prerogative to select a legal firm to pursue the case in the ICJ and took note of The Gambia's choice of the legal firm;
>
> 9. The Meeting acknowledged the substantial costs required to proceed with the legal case and called upon all OIC Member States to provide assistance on a voluntary basis, in

64 UN Office of the High Commissioner for Human Rights, Oral Update to 41st Session of the Human Rights Council by the Special Rapporteur on the situation of human rights in Myanmar [10 July 2019] (emphasis added), POM, Annex 80.

65 OIC, Report of the Ad Hoc Ministerial Committee on Human Rights Violations Against the Rohingya, OIC/ACM/AD-HOC ACCOUNTABILITY/REPORT-2019/FINAL, 25 September 2019, POM, Annex 97.

accordance with the principles of burden-sharing and shared responsibility, and in the spirit of Islamic solidarity;

10. The Meeting invited the Chair of the Ad Hoc Ministerial Committee and the OIC Secretary General to coordinate contacts with Member States and other international partners for raising funds for the legal case at the ICJ and to supervise those funds and any disbursements thereof.

11. The Meeting requested the Chair of the Ad Hoc Ministerial Committee to provide comprehensive briefing, including on the financial and legal process, to the Committee and submit a comprehensive report to the next meeting of the Council of Foreign Ministers;

12. The Meeting recommended adding an item on pledges for the legal case undertaken by The Gambia to the agenda of the 47th session of the Council of Foreign Ministers.

13. The Meeting also requested the Islamic Development Bank (IsDB) and the Islamic Solidarity Fund (ISF) to provide necessary assistance to Ad Hoc Committee in pursuing its mandate and with the legal case;

100. This document makes clear that these proceedings before the Court are funded by contributions from OIC Member States[66] (as was already envisaged by paragraph 2 of OIC Res. No. 61/46-POL),[67] that supervision of the funds is entrusted to the Chair of the OIC Ad Hoc Committee and the OIC Secretary-General,[68] and that assistance was also requested from the Islamic Development Bank and the Islamic Solidarity Fund.[69] Paragraph 8 of this document is also noteworthy, in its acknowledgement of the right of The Gambia to select the law firm to pursue the case. If The Gambia were the real applicant in this case, its prerogative to make its own choice of legal representatives would be so evident as to require no mention. This paragraph indicates that in the context of this OIC initiative, The Gambia needed to be authorized by the OIC to make that choice, the authorization being given via this decision of the OIC Ad Hoc Committee.

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66 *Ibid*., paras. 9-12.

67 See paragraphs 79 and 80 above.

68 OIC, Report of the Ad Hoc Ministerial Committee on Human Rights Violations Against the Rohingya, OIC/ACM/AD-HOC ACCOUNTABILITY/REPORT-2019/FINAL, 25 September 2019, para. 10, POM, Annex 97.

69 *Ibid*., para. 13.

101. A media article dated 25 September 2019 then states that the Prime Minister of Malaysia, in the context of this OIC meeting:

> praised the Organisation of Islamic Conference (OIC) for attempting to seek legal redress for the stateless Rohingya through the International Court of Justice, saying that other countries should support the OIC […][70]

102. This article makes no mention of The Gambia.

103. On 26 September 2019, The Gambia's Vice-President made a statement in the UN General Assembly, in which she said:

> The Gambia is ready to lead concerted efforts to take the Rohingya issue to the International Court of Justice *on behalf of the Organization of Islamic Cooperation*, and we call on all stakeholders to support that process.[71]

104. This statement by the Vice President of The Gambia, legally binding upon The Gambia, again confirms that the proceedings before this Court are brought on behalf of the OIC, and that The Gambia's role is merely to *lead* that OIC initiative under the supervision of the OIC.

105. According to media reports, at an event in The Hague on 20 October 2019, The Gambia's then Attorney-General and Minister of Justice, Mr. Abubacarr Marie Tambadou, announced that he had instructed lawyers for the case on 4 October 2019.[72] On 11 October 2019, only seven days later, the Permanent Mission of The Gambia to the United Nations sent a note verbale to the Permanent Mission of Myanmar to the United Nations stating that The Gambia "understands" Myanmar to be in ongoing breach of its obligations "under the [Genocide] Convention and under customary

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[70] South China Morning Post (China), "Mahathir blasts Myanmar and United Nations over Rohingya 'genocide'", 25 September 2019, POM, Annex 146. See also New Straits Times (Malaysia), "Dr M slams UN, Myanmar govt over Rohingya crisis", 25 September 2019, POM, Annex 145: "He [the Prime Minister of Malaysia] commended the Organisation of Islamic Conference's (OIC) effort to bring the matter to the International Court of Justice, and hopes that other countries would support OIC to ensure the perpetrators do not get away with the heinous crimes they have committed".

[71] A/74/PV.8 p. 31, columns 1-2, MG, vol. III, Annex 51 (emphasis added), referred to in AG, fn. 36 and accompanying text.

[72] United News of Bangladesh (Bangladesh), "Genocide: Gambia to file case against Myanmar at ICJ", 20 October 2019, POM, Annex 147.

international law".[73] On 11 November 2019, The Gambia then filed with the Registry of the Court the Application instituting proceedings in the present case.

106. Most significantly, on 11 November 2019, the day that the application was filed with the Court, Foley Hoag LLP, the law firm representing The Gambia in these proceedings, posted a press release on its website, stating that:

> The Gambia, *acting on behalf of the 57 Member States of the Organization of Islamic Cooperation*, today filed a historic lawsuit in the International Court of Justice, in The Hague, seeking to hold Myanmar accountable under international law for State-sponsored genocide against its minority Muslim population, known as the Rohingya. […]
>
> The suit has been *fully endorsed by the OIC*, an intergovernmental organization composed of States with large or majority Muslim populations. The *OIC appointed The Gambia*, an OIC member, to bring the case *on its behalf*.[74]

107. This press release thus states not once, but *twice*, that these proceedings are brought by The Gambia *on behalf of the OIC*. It further states that The Gambia was "appointed" by the OIC to bring this case on the OIC's behalf.

108. This press release of Foley Hoag was disseminated in full text by Business Wire,[75] from which it was further disseminated by other news services including Associated Press[76] and Bloomberg.[77] Business Wire also issued French, Spanish, German, Dutch and Italian versions of this Foley Hoag press release.[78]

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73 That note verbale, at OG, Annex 1, is reproduced for convenience at POM, Annex 121.

74 Foley Hoag LLP, "Foley Hoag Leads The Gambia's Legal Team in Historic Case to Stop Myanmar's Genocide Against the Rohingya", 11 November 2019, POM, Annex 132 (emphasis added).

75 Business Wire, "Foley Hoag Leads The Gambia's Legal Team in Historic Case to Stop Myanmar's Genocide Against the Rohingya", 11 November 2019, POM, Annex 133. (Business Wire is a company that disseminates full-text press releases from companies and organizations to news media, financial markets and other audiences.)

76 Associated Press, "Foley Hoag Leads The Gambia's Legal Team in Historic Case to Stop Myanmar's Genocide Against the Rohingya", 11 November 2019, POM, Annex 139.

77 Bloomberg, "Foley Hoag Leads The Gambia's Legal Team in Historic Case to Stop Myanmar's Genocide Against the Rohingya", 11 November 2019, POM, Annex 140.

78 The French version states that "L'OCI a nommé la Gambie pour porter l'affaire en son nom": POM, Annex 134. The other language versions are at POM, Annexes 135, 136, 137 and 138.

109. It is utterly inconceivable that Foley Hoag would have issued a press release in these terms without express instructions from their client. The statement in that press release could not have been clearer. The Gambia had been *appointed* by the OIC to bring this case *on its behalf*. Thus, at the exact moment that these proceedings were commenced, the message that was broadcast to the world by the legal representatives of the applicant, and then published in six languages, was that the case was brought *on behalf of the OIC*, by the OIC's *appointee*.

110. On the same day, the Foreign Minister of Bangladesh was quoted as stating that "[t]he Organization of Islamic Cooperation (OIC) states have taken a stand against the crimes. Gambia has proceeded the lawsuit *on behalf of the OIC* and we appreciate it".[79] On 17 November 2019, the Foreign Minister of Bangladesh said in a further speech that:

> We are also encouraged by the recent submission of case by Gambia to the International Court of Justice *on behalf of OIC group* under the Genocide Convention 1948.[80]

111. On 24 November 2019, the OIC itself issued a press release stating that:

> The case was filed by the Republic of The Gambia, *as Chair of the OIC Ad Hoc Ministerial Committee* on Accountability for Human Rights Violations Against the Rohingya, for violations by Myanmar of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.
>
> […]
>
> The Gambia, *as Chair of this Committee* was *tasked* with submitting the case to the ICJ, *following a decision by the OIC Heads of State*, during the 14th Islamic Summit Conference, 31 May 2019 in Makkah AlMukarramah.[81]

112. This press release makes clear once more that The Gambia, in its capacity as chair of the OIC Ad Hoc Committee, has been tasked by the OIC to bring these proceedings

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79 Anadolu Agency (Turkey), "Gambia files Rohingya genocide case against Myanmar", 11 November 2019, POM, Annex 149 (emphasis added).

80 Bangladesh, Ministry of Foreign Affairs, "Opening Remarks by Hon'ble Foreign Minister at the Inaugural Session of the 6th International Conference on Bangladesh Genocide and Justice", updated 17 November 2019, POM, Annex 113 (emphasis added).

81 OIC, Press Release, "OIC Welcomes first hearing of Legal Case on accountability for crimes against Rohingya", 24 November 2019, POM, Annex 98 (emphasis added).

on behalf of the OIC. The French version of the press release is even clearer in this respect, stating that:

> La République de Gambie, *en sa qualité de président du Comité ministériel spécial de l'OCI* sur la responsabilité en matière de violations des droits de l'homme contre les Rohingya, *a porté plainte* pour violation par le Myanmar de la Convention de 1948 pour la prévention et la répression du crime de génocide.
>
> […]
>
> La Gambie, *en tant que présidente de ce comité, avait pour tâche de soumettre l'affaire à la CIJ,* à la suite d'une décision de la Chefs d'Etat de l'OCI, lors de la 14ème Conférence au sommet islamique, le 31 mai 2019 à Makkah Al-Mukarramah.[82]

113. An article in a Bangladesh newspaper dated 26 November 2019 reports that an official of the Ministry of Foreign Affairs of Bangladesh had stated that "a genocide case was filed against Myanmar by the OIC".[83]

114. An article dated 4 December 2019 then reports the following question and answer being given in an interview with the Foreign Minister of Malaysia:

> *Do you support Gambia bringing a case against Myanmar at the International Court of Justice?*
>
> Indirectly, we are supporting the Gambia initiative, because we are a member of the OIC, and this is a decision that was made through the OIC […] I know that Gambia cannot do it alone, in terms of resources. The OIC secretariat will have to decide as to how member countries play a role.[84]

115. On 29 December 2019, the OIC issued a further press release, stating that:

> It is to be recalled that the Republic of The Gambia, *as Chair of the OIC Ad Hoc Ministerial Committee* on Accountability for Human Rights Violations against the Rohingya, has filed a legal case in the International Court of Justice against Myanmar for

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82 OIC, Press Release, "L'OCI se félicite de la première audience de l'affaire judiciaire sur la responsabilité pour les crimes contre Rohingya", 24 November 2019, POM, Annex 99 (emphasis added).

83 Bangladesh Post (Bangladesh), "Myanmar under global pressure", 26 November 2019, POM, Annex 153.

84 The Interpreter, "In conversation: Malaysia's Foreign Minister on great power rivalry", 4 December 2019, POM, Annex 155 (italics in the original).

> violating its obligations under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[85]

116. An OIC press release dated 23 January 2020,[86] the day that the Court issued its order on provisional measures in this case, refers again to the case being brought "by The Gambia, as Chair of the OIC Ad Hoc Ministerial Committee on Human Rights Violations Against the Rohingya".

117. A press release issued that same day by the Ministry of Foreign Affairs of Malaysia confirms that[87] "On behalf of the OIC, The Gambia, in its capacity as Chair of the aforementioned [OIC Ad Hoc] Committee, brought the case before the ICJ". This is of some significance, given that the press release also indicates that Malaysia was one of the members of the OIC Ad Hoc Committee.

118. A report of United News of Bangladesh dated 11 February 2020[88] indicates that the OIC was to hold a pledging conference during the upcoming forty-seventh session of the Council of Foreign Ministers, then scheduled to be held in Niger on 3 and 4 April 2020, to mobilize resources for the case.

119. A media item dated 1 March 2020 reports the Permanent Representative of Saudi Arabia to the United Nations as saying:

> The ICJ [provisional measures] decision was the result of the efforts exerted by the OIC members states in New York and the Contact Group on Rohingya Muslims of Myanmar headed by the Kingdom [of Saudi Arabia] […][89]

120. A press release issued by the Ministry of Foreign Affairs of the Maldives dated 11 March 2020 says:

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85 OIC, Press Release, "OIC General Secretariat Welcomes UNGA Resolution Condemning Abuses against Rohingya", 29 December 2019, POM, Annex 100 (emphasis added).

86 OIC, Press Release, "OIC welcomes ICJ decision ordering Myanmar to stop genocide against Rohingya", 23 January 2020, POM, Annex 101.

87 Malaysia, Ministry of Foreign Affairs, Press Release, "Order by the International Court of Justice (ICJ) on The Gambia's Request for the Indication of Provisional Measures", 23 January 2020, POM, Annex 125.

88 United News of Bangladesh (Bangladesh), "ICJ case against Myanmar: OIC to convene pledging conference", 11 February 2020, POM, Annex 163.

89 Arab News (Saudi Arabia), "OIC contact group discusses Rohingya protection with UN chief", 1 March 2020, POM, Annex 164.

> In 2019, during the OIC's Council of Foreign Ministers meeting held in Abu Dhabi, United Arab Emirates, *the OIC adopted a unanimous resolution to file a case at the ICJ* to restore the human rights of all Rohingya people. In 2019, during the 14th Islamic Summit held in Makkah, Saudi Arabia, the Heads of States of the OIC endorsed the Final Communique of the Summit *which gave authority to The Gambia, on behalf of the OIC, to pursue the case at the ICJ* with a view to restoring the basic human rights of the Rohingya people, and to hold the perpetrators accountable.[90]

121. This press release thus indicates that the OIC gave *authority* to The Gambia to bring this case on behalf of the OIC.

122. In a July 2020 speech, the Foreign Minister of Bangladesh said that:

> We would also like to highlight the issues of justice and accountability and enlighten the youth about the exemplary role played by OIC in lodging the case against Myanmar in the International Court of Justice (ICJ).[91]

123. At the beginning of that speech, opening salutations are addressed *inter alia* to the Prime Minister of Bangladesh, the OIC Secretary-General, and the Justice Minister and Attorney-General of The Gambia, Mr. Jallow, indicating that all of these were personally present at the occasion of the giving of this speech by the Foreign Minister of Bangladesh.[92] Given that this is the case, it is especially significant that the speech makes no mention of the role of The Gambia in these proceedings before the Court, but speaks only of "the exemplary role played by OIC in lodging the case".

124. In a press release dated 30 September 2020, the OIC said:

> The OIC Ad Hoc Ministerial Committee on Accountability for Human Rights Violations against the Rohingya held a consultative meeting at the level of Permanent Representatives in Riyadh on 30 September 2020.

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90 Maldives, Ministry of Foreign Affairs, Press Release, "Organization of Islamic Cooperation welcomes decision of the Government of Maldives to file a declaration of intervention in the International Court of Justice, in support of the Rohingya people", 11 March 2020, updated 25 June 2020 (emphasis added), POM, Annex 126.

91 Bangladesh, Ministry of Foreign Affairs, "Speech of Hon'ble Foreign Minister on the Inauguration Ceremony of the OIC Youth Capital – Dhaka 2020", updated 28 July 2020, POM, Annex 113.

92 According to OIC Youth Capital, "'Dhaka OIC Youth Capital 2020' Has Officially Launched", 28 July 2020, POM, Annex 174, this was a virtual ceremony, and the inauguration program was attended by the Prime Minister and Foreign Minister of Bangladesh, the Secretary-General of the OIC, and the Justice Minister and Attorney-General of The Gambia, Mr. Jallow.

> During the meeting, the Secretary-General of the Organisation of Islamic Cooperation (OIC), Dr. Yousef A. Al-Othaimeen, reviewed the practical positive steps taken by the OIC to sensitize the international community of the plight of the Rohingya and the OIC's strong commitment to the principles of justice and accountability for human rights violations committed against the Rohingya, particularly within the framework of the legal case filed with the International Court of Justice (ICJ) against Myanmar.
>
> The Secretary-General also commended the states that made financial contributions to support the costs of the case, thanking them for their prompt response. He further urged the other Member States to support this case for human rights, which was applauded and welcomed by the international community. During the meeting, the participants exchanged views on the development of the case and ways to support it.[93]

125. Of significance is that there is once again no mention of The Gambia in this press release, which presents the proceedings before this Court solely as being an initiative of the OIC.

126. Tweets by the OIC (using the handle @OIC_OCI) on the same day state that:

> During the meeting, the Secretary-General, Dr. Yousef Al-Othaimeen, reviewed the positive & tangible steps taken by the organization to raise awareness of the international community about the plight of the Rohingya, especially by instituting a case against Myanmar at the ICJ.[94]

127. A further press release of the OIC dated 7 October 2020[95] announces that the OIC Secretary-General had urged Member States to support the fund set up by the OIC General Secretariat to support the proceedings before this Court, and that a financial grant to this fund had been made by the Islamic Solidarity Fund, which was deposited in the OIC account in response to the Secretary-General's appeal. Again, significantly, this press release makes no mention at all of The Gambia.

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93 OIC, Press Release, "OIC Ad Hoc Ministerial Committee on Accountability for Human Rights Violations against Rohingya holds consultative meeting in Riyadh", 30 September 2020, POM, Annex 102.

94 POM, Annex 103.

95 OIC, Press Release, "OIC Secretary General Thanks the ISF for its Support in Financing the Rohingya Case at the ICJ", 7 October 2020, POM, Annex 104.

128. A statement on the OIC Facebook account dated 19 October 2020[96] indicates that the OIC Ad Hoc Committee was to hold a virtual meeting the next day. Further relevant details are not given, although it is noted that the meeting was to be held three days before the Memorial of The Gambia was filed.

129. A press release issued on 26 November 2020 by Oicgambia Secretariat, an organization under the purview of the Office of the President of The Gambia,[97] states that the matters to be discussed at the forty-seventh session of the OIC Council of Foreign Ministers to be held in Niger on 27 and 28 November 2020 would include "the Gambia-backed Rohingya case at the International Court of Justice".[98] It is noteworthy that this press release speaks not of a case *brought* by The Gambia, but of a case "backed" by The Gambia.

130. At this forty-seventh session, the OIC Council of Foreign Ministers adopted OIC Res. No. 59/47-POL,[99] which contained a preambular paragraph:

> *Commending* the *Ad Hoc Ministerial Committee*, Chaired by The Gambia to pursue the case of genocide and human rights violations against the Rohingya at the International Court of Justice

and an operative paragraph stating that the OIC:

> *Continue* to support *the Ad Hoc Committee's plan of action* to engage in international legal measures including at the ICJ *to fulfill the Ad Hoc Committee's mandate*[100]

as well as a further operative paragraph stating that *the OIC Ad Hoc Committee* will continue to:

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96 POM, Annex 105.

97 The website of this organization states that "The Oicgambia Secretariat was established in May 2018 to lead the government of The Gambia's efforts to host the 14th Summit of the Heads of State and Government of the Organization of Islamic Cooperation (OIC) in The Gambia in May 2019. However, due to time constraints, the 2019 Gambia summit was postponed to April 2022. The Secretariat is a charitable organization under the purview of the Office of the President.": see POM, Annex 123.

98 POM, Annex 122.

99 OIC Res. No. 59/47-POL, On the Work of the OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas, November 2020, POM, Annex 106.

100 *Ibid*., para. 2.

> a. Engage to ensure accountability and justice for gross violations of international human rights and humanitarian laws and principles, […]
>
> e. Follow up the case at the ICJ in support of The Gambia till a final verdict is issued
>
> f. Follow up ICJ's notification of its order of provisional Measures to the UN Security Council Pursuant to Article 41 (2) of the Statute of the ICJ […][101]

131. This resolution thus confirms again that these proceedings have been brought, and continue to be conducted, by the OIC Ad Hoc Committee.

132. This same resolution also contains calls for OIC Member States to contribute to the account set up by the OIC Secretariat to receive contributions to support the proceedings before this Court, and invites the OIC Secretary-General to arrange pledging sessions of OIC Member States.[102]

133. At the same session, the OIC Council of Foreign Minister also adopted OIC Res. No. 4/47-MM,[103] which states amongst other matters that the OIC Council of Foreign Ministers:

> 37. *Reiterates* its support for The Gambia, *as Chair of the Ad hoc Ministerial Committee* on Accountability for Human Rights Violations Against the Rohingya *for the legal case* in the International Court of Justice (ICJ) against Myanmar for genocide actions on the Rohingya minority.
>
> 38. *Commends* the Gambia, *Chair of the OIC Ad Hoc Ministerial Committee* for initiating a legal case at the International Court of Justice (ICJ) *on behalf of the OIC* to end the culture of impunity by bringing the perpetrators to justice for gross violations of international human rights and humanitarian laws and principles.[104]

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101 *Ibid*., para. 7.

102 *Ibid*., paras. 3-5.

103 OIC Res. No. 4/47-MM, On the Situation of the Muslim Community in Myanmar, November 2020, POM, Annex 107.

104 Emphasis added.

134. This resolution thus reaffirms yet again that the proceedings before the Court are brought by The Gambia "as Chair of the Ad Hoc Ministerial Committee", and are brought "on behalf of the OIC".

135. According to a 30 November 2020 item on the official Twitter account of the Attorney General's Chambers and Ministry of Justice of The Gambia, the Minister of Justice of The Gambia, Mr. Dawda Jallow, when updating the OIC Council of Foreign Ministers on these proceedings on 27 November 2020, stated that the case before this Court is "among the noblest initiatives ever of the Islamic Organisation".[105]

136. An article of the Bangladesh national news agency, BSS (Bangladesh Sangbad Sangstha), dated 28 November 2020, reported that at this forty-seventh session of the OIC Council of Foreign Ministers, Bangladesh announced that it had donated 500,000 United States dollars ("**USD**") to the OIC for financing the legal costs in this case.[106] According to this report, The Gambia stated that it needs approximately USD 5 million to fund the case, that The Gambia was calling on all OIC States to make donations, and that Saudi Arabia, Turkey and Nigeria had also made donations. According to the report, the Justice Minister of The Gambia stated that "unfortunately" the law firm representing The Gambia was yet to receive any significant payment for its legal services rendered since September 2019, that the law firm had recently been paid USD 300,000, and that this was less than 10 per cent of the amount owed to it. This suggests that The Gambia is not paying any of the legal fees itself, which are paid from the OIC fund as, when and to the extent that donations are made by OIC Member States to the OIC.

137. According to a subsequent article of BSS dated 6 December 2020,[107] to that date, the OIC fund for financing these proceedings had drawn contributions totalling USD 1.2 million. Bangladesh was the largest donor, having donated USD 500,000. Other donors were Saudi Arabia (USD 300,000), Turkey, Nigeria and Malaysia (who had donated USD 100,000 each), and the Islamic Solidarity Fund (which had donated USD

105 POM, Annex 124.

106 Bangladesh Sangbad Sangstha (BSS) (Bangladesh), "Bangladesh disburses USD 500,000 to OIC over Rohingya genocide case", 28 November 2020, POM, Annex 167.

107 Bangladesh Sangbad Sangstha (BSS) (Bangladesh), "OIC draws US$ 1.2 million for Gambia to run Rohingya genocide case", 6 December 2020, POM, Annex 168.

100,000). The Gambia said that it urgently needed USD 5 million to pay its lawyers. The eventual legal costs to the end of the proceedings were expected to be over USD 10 million. This article confirms that the largest contributor to the financial costs of these proceedings by far is Bangladesh, and appears to confirm that The Gambia itself intends to bear none of the costs.

D. The real applicant in these proceedings is in fact the OIC

138. The above documents, which are all official documents issued by the OIC, or by OIC Member States, or are media reports of statements made by officials of the OIC or of OIC Member States, present a clear picture: The Gambia brings these proceedings on behalf of and at the behest of the OIC, and The Gambia has been "appointed" or "tasked" by the OIC to do so in its capacity as chair of the OIC Ad Hoc Committee.

139. These documents include a clear statement made by The Gambia's legal representatives in these proceedings, confirming this to be the case. In this press release, The Gambia's legal representatives state not once, but twice, that the proceedings are brought by The Gambia on behalf of the OIC, and state that the OIC has *appointed* The Gambia, an OIC member, to bring the case on the OIC's behalf (see paragraphs 106 to 109 above). The Islamic Summit, the supreme authority of the OIC, in its Final Communiqué of the fourteenth Islamic Summit Conference, called upon *the OIC Ad Hoc Committee* to take immediate measures to launch this case before the Court *on behalf of the OIC*. Press releases of the Office of the President of The Gambia, and of the OIC itself, confirm that The Gambia has been *tasked* by the OIC to bring these proceedings on its behalf (see paragraphs 93, 94, 111 and 112 above), and that The Gambia is acting in its capacity as chair of the OIC Ad Hoc Committee (see paragraphs 111, 112, 115, 116, 117, 130, 133 and 134 above).

140. The documents referred to above are sufficient to establish clearly that, as a matter of fact and substance, the real applicant in these proceedings is the OIC.

141. It is therefore unnecessary to look more closely at the evidence and the circumstances in order to determine the identity of the true applicant. However, any more detailed

consideration of the evidence would in fact only confirm that the true applicant is the OIC.

142. First, the evidence confirms that the OIC organs were responsible for the actual decision to bring this case before the Court. The evidence indicates that this is not a case of The Gambia deciding first to bring proceedings before the Court, and then asking the OIC for support to assist it in doing so. Nor is this even a case of The Gambia approaching the OIC to say that it was thinking of bringing proceedings before this Court, and asking the OIC whether it would provide support in the event that the Gambia were to do so. Rather, what the evidence shows is the following. A proposal for the OIC Ad Hoc Committee to bring proceedings before this Court was recommended by the OIC Ad Hoc Committee in February 2019, endorsed by the OIC Council of Foreign Ministers in March 2019, and approved by the Islamic Summit in May 2019. The Gambia itself then only subsequently approved this OIC proposal at a meeting of the Cabinet of The Gambia on 4 July 2019. The decisions of these OIC organs were not decisions to the effect that OIC Member States should support The Gambia in The Gambia's bringing of its own case before the Court. Rather, these decisions of these OIC organs were to the effect that *proceedings should be brought* before the Court *on behalf of the OIC*, by the OIC Ad Hoc Committee, or by The Gambia as chair of the OIC Ad Hoc Committee.

143. Furthermore, since the decision to bring these proceedings was taken by the OIC, the OIC Ad Hoc Committee has remained actively involved. At a meeting on 25 September 2019, The Gambia briefed the OIC Ad Hoc Committee on the case, and the Ad Hoc Committee requested the Chair of the OIC Ad Hoc Committee "to provide comprehensive briefing […] and submit a comprehensive report to the next meeting of the Council of Foreign Ministers". As noted in paragraphs 99 and 100 above, at that meeting, the OIC Ad Hoc Committee also authorized The Gambia to choose the law firm to represent the applicant in these proceedings. The OIC Ad Hoc Committee then met again, on 20 October 2020, just days before the Memorial of The Gambia was filed.

144. Secondly, the evidence also demonstrates that the applicant's legal costs in these proceedings are being funded entirely by the OIC, from a special OIC fund established for this purpose, which is financed by donations of OIC member States. The evidence

is that the donors to this fund so far have been Bangladesh, Saudi Arabia, Nigeria, Malaysia and Turkey, and the Islamic Solidarity Fund.[108] There is no indication that anything at all has been paid towards the proceedings by The Gambia itself, or that The Gambia has any intention of doing so. Indeed, the website of Human Rights Watch indicates that in an interview, counsel with that organization gave the following answer to the following question:

> Q. Some people say that with all Gambia's economic and political problems, why do we need to spend our energies on this?
>
> A. First of all, the Organization of Islamic Cooperation is paying all the fees, so this doesn't cost The Gambia anything. Indeed, the goodwill and positive publicity that The Gambia is garnering all around the world with this move will certainly comeback to benefit the people of The Gambia, in reputation and recognition.[109]

145. In any event, even if The Gambia were contributing part of the legal costs itself, that would not change the fact that the real applicant in the case is the OIC. Indeed, even if The Gambia were paying *all* of the costs itself, that would not of itself necessarily mean that the real applicant is not the OIC. However, the fact that *none* of the legal costs are being paid by The Gambia, and that *all* of the legal costs are being paid by the OIC from a specially established OIC fund, is certainly a consideration relevant to confirming that the real applicant is the OIC and not The Gambia.

146. The 25 September 2019 report of the OIC Ad Hoc Committee[110] suggests that the OIC special fund financing this case is jointly administered by the Chair of the OIC Ad Hoc Committee and the OIC Secretary-General, while OIC Res. No. 59/47-POL refers to "the setting up of an Account by the OIC Secretariat".[111] While precise details are not known, the available evidence thus suggests that The Gambia is not in control of the funds that have been donated for purposes of financing the applicant's case in these proceedings. Control over the funds is exercised jointly by the chair of the OIC Ad

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108 See paragraphs 136 and 137 above.

109 Human Rights Watch, "What Makes Gambia a Good Champion Of The Cause of The Rohingyas, Interview with Reed Brody", 16 December 2019, POM, Annex 171.

110 See paragraph 99 above.

111 OIC Res. No. 59/47-POL, On the Work of the OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas, November 2020, operative para. 4, POM, Annex 106.

Hoc Committee and the OIC Secretary-General, and by virtue of Article 29 of the OIC Charter (see paragraph 61 above), these funds are presumably subject to the OIC financial system and to audit by the OIC Finance Control Organ. Furthermore, such control or influence over these funds that The Gambia may have is not enjoyed by The Gambia directly, but rather exists only by virtue of The Gambia's current status as chair of the OIC Ad Hoc Committee, which may be brought to an end by a decision of the OIC at any moment.

147. Thirdly, in determining who is the real applicant in these proceedings, a consideration which of itself may not be conclusive, but which is certainly relevant, is that at the provisional measures hearing before the Court on 10-12 December 2019, the official representation of The Gambia included three high-ranking officials of the OIC. These were the OIC's Assistant Secretary-General for Political Affairs, the OIC Director of Legal Affairs, and the Adviser to the OIC Secretary-General. It is questionable how likely it would be for three such high-ranking officials of an international organization to be part of a State's official representation before the Court throughout a three-day hearing, if the international organization's only role was to provide financial assistance or other support.

148. Fourthly, it is noteworthy that various statements have been made by Government Ministers of other OIC Member States, and press releases have been issued by Governments of other OIC Member States, and even by the OIC itself, that refer to the OIC initiative of bringing these proceedings before the Court without mentioning The Gambia at all (see paragraphs 81, 82, 97, 98, 100, 101, 102, 122, 123, 124, 125 and 127 above).

149. Fifthly, it is noted that the fact that these proceedings are brought by The Gambia *on behalf of the OIC* has also been widely reported in the media in different countries and

regions,[112] on websites of governments[113] and NGOs,[114] and even on the website of the United Nations.[115] It is noteworthy that a report published in September 2019 by Fortify Rights states that:

> The Organization of Islamic Cooperation (OIC), through the Government of the Gambia, intends to bring a case regarding the crime of genocide against Rohingya to the International Court of Justice (ICJ) […][116]

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112 Aljazeera (Qatar), "Gambia files Rohingya genocide case against Myanmar at UN court", 11 November 2019 ("The Gambia filed the case on behalf of the Organisation of Islamic Cooperation"), POM, Annex 148; Anadolu Agency (Turkey), "Gambia files Rohingya genocide case against Myanmar", 11 November 2019 ("Gambia has proceeded the lawsuit on behalf of the OIC and we appreciate it," [Bangladesh Foreign Minister] Momen told Anadolu Agency"), POM, Annex 149; Deutsche Welle (Germany), "Gambia files genocide case against Myanmar", 11 November 2019 ("The country filed the case on behalf of the Organization of Islamic Cooperation"), POM, Annex 150; Jakarta Post (Indonesia), "RI defends approach to Rohingya problem", 19 November 2019 ("… bringing the country [The Gambia] to the International Court of Justice (ICJ) on behalf of the Organisation of Islamic Cooperation (OIC)"), POM, Annex 152; Liberté (Algeria), "Les états de l'OCI saisissent la Cour internationale de justice", 1 December 2019 ("Les 57 états membres de l'Organisation de la coopération islamique (OCI) ont mandaté, hier la Gambie pour entamer une action judiciaire devant la Cour internationale de justice (CIJ) contre la Birmanie"), POM, Annex 154; Bangkok Post (Thailand), "Myanmar in the dock", 9 December 2019 ("… accusations of genocide brought against [Myanmar] by The Gambia, on behalf of the 57-member Organisation of Islamic Cooperation (OIC)"), POM, Annex 156; Courrier international (France), "Aung San Suu Kyi va défendre la Birmanie, accusée du génocide des Rohingyas", 9 December 2019 ("La Gambie … agit au nom de l'Organisation de la coopération islamique (OCI)"), POM, Annex 157; Egypt Today (Egypt), "Nobel 'peace laureate' defends genocide against Rohingya Muslims", 11 December 2019 ("Gambia filed the case on behalf of the 57-nation Organization of Islamic Cooperation"), POM, Annex 158; Sydney Morning Herald (Australia), "'She won't be spared': Rohingya refugees reject Aung San Suu Kyi's genocide denial", 12 December 2019 ("A legal team from Gambia, acting on behalf of the 57-country Organisation of Islamic Cooperation"), POM, Annex 159; New Straits Times (Malaysia), "NST Leader: Hallmarks of genocide", 12 September 2020 ("a case brought by The Gambia on behalf of the 57-member Organisation of Islamic Cooperation"), POM, Annex 166.

113 For instance, United Kingdom, House of Commons, "Myanmar: January 2020 update", Briefing Paper, No. 8443, 7 January 2020, p. 9 ("In November 2019 The Gambia brought a case to the ICJ against Myanmar on behalf of the Organisation of Islamic Cooperation (OIC)"), POM, Annex 129; Canada, Global Affairs Canada, Minister of Foreign Affairs – Transition book, November 2019 ("… Gambia on behalf of the Organization for Islamic Cooperation (OIC) is expected to file, on November 11, a case against Myanmar at the International Court of Justice (ICJ) …"), POM, Annex 117.

114 International Crisis Group, "Myanmar at the International Court of Justice", 10 December 2019 ("The Gambia … brought this case on behalf of the 57-member Organisation of Islamic Cooperation"), POM, Annex 170; Alison Smith and Francesca Basso (No Peace Without Justice), "Justice for the Rohingya: What has happened and what comes next", *Coalition for the International Criminal Court*, 13 February 2020 ("In November 2019, The Gambia took on the Rohingya case on behalf of a larger collective of States, the Organization of Islamic Cooperation (OIC)"), POM, Annex 173.

115 UN News, "Top UN court orders Myanmar to protect Rohingya from genocide", 23 January 2020 ("The case against Myanmar was brought to the ICJ in November by The Gambia, on behalf of the Organization of Islamic Cooperation (OIC)"), POM, Annex 88; ONU Info, "La CIJ ordonne au Myanmar de prendre des mesures d'urgence pour protéger les Rohingya", 23 January 2020 ("La Gambie, qui a déposé sa requête au nom de l'Organisation de la coopération islamique (OCI)"), POM, Annex 89.

116 Fortify Rights, "Tools of Genocide": National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar, September 2019, POM, Annex 169.

150. This emphasizes that the proceedings are brought *by the OIC*, and that The Gambia is a mere *vehicle through which* the OIC does so.

151. Indeed, an article published in the *Daily Sun* in Bangladesh states that:

> The country's [Bangladesh's] biggest diplomatic success of the year [2019] was convincing Organisation of Islamic Cooperation (OIC) to take Myanmar to International Court of Justice (ICJ) through Gambia for violating the Genocide Convention 1948.[117]

152. At the hearing on 12 December 2019, counsel for The Gambia contended that it was The Gambia which proposed the adoption of OIC Resolution No. 59/45, and that this was simply a case of The Gambia seeking the support of other OIC Member States.[118] In its Provisional Measures Order, the Court also said that:

> the fact that The Gambia may have sought and obtained the support of other States or international organizations in its endeavour to seise the Court does not preclude the existence between the Parties of a dispute relating to the Genocide Convention.[119]

153. However, for the reasons above, even if it were the case that it was The Gambia which proposed the adoption of OIC Resolution No. 59/45 (as to which, see below), it is not the case that The Gambia was simply seeking the support of other OIC Member States. The resolutions and decisions of the OIC referred to above do *not* provide for the giving of support to The Gambia to enable The Gambia to bring its own case before the Court, but rather provide for the bringing of proceedings before the Court *on behalf of the OIC*. The evidence is that the decision to bring proceedings on behalf of the OIC was taken only after lengthy negotiations leading to a "diplomatic breakthrough".

154. Indeed, OIC Resolution No. 59/45 itself, which The Gambia claims to have introduced, does not provide for OIC Member States to give support to The Gambia to enable The Gambia to bring a case before the Court. On the contrary, that resolution provided for the establishment of a 10-member OIC Ad Hoc Committee, and set out the activities which *that committee* was to undertake (see paragraph 71 above).

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117 Daily Sun (Bangladesh), "Challenges Ahead For Bangladesh", 3 January 2020, POM, Annex 161.

118 CR 2019/20, p. 23, para. 3 (d'Argent).

119 Provisional Measures Order, para 25.

155. Thus, even if it were the case that it was The Gambia that proposed the adoption of OIC Resolution No. 59/45, that proposal was for the OIC to establish an OIC committee to take action, not a proposal for the OIC to support action to be taken by The Gambia.

156. Furthermore, and in any event, there is insufficient evidence before the Court to reach any conclusion as to exactly which OIC member States made which proposals, and what course the negotiations took internally within the OIC. These details as far as Myanmar is aware have never been made public. However, what is clear is the outcome. Ultimately, what the OIC decided was to establish the OIC Ad Hoc Committee, and to task the chair of that committee, *in its capacity as such*, to bring proceedings before this Court *on behalf of the OIC*. This is the situation that the Court must address when determining who is the real applicant in these proceedings, and what the real dispute before the Court is. It is immaterial for this purpose whether this is the same situation that The Gambia initially proposed, or whether The Gambia originally made a different proposal that was modified in the course of the "long series of negotiations" at the OIC, or whether or not it was even The Gambia that made the initial proposal to the OIC.[120]

157. As noted above, the 11 November 2019 press release of Foley Hoag states that The Gambia was "appointed" by the OIC to bring these proceedings. Certain reports in the media and on other websites similarly refer to The Gambia being "chosen" for this purpose. For instance, on 11 November 2019, the *New York Times* reported:

> Gambia, a small West African country with a largely Muslim population, was chosen to file the suit on behalf of the 57-nation

[120] The evidence in this respect is unclear. One commentator states for instance: "As I understand it, this Organization for Islamic Cooperation was talking about one of their member-states bringing a case for quite a while. The interest there is that the Rohingya are a Muslim minority in a Buddhist state. Gambia ended up being the state that took up that challenge". See Vox, "The top UN court ordered Myanmar to protect the Rohingya. An expert explains what it means", 24 January 2020, POM, Annex 162. In an interview on the Human Rights Watch website, the associate director of that organisation's international justice programme answers a question as follows: "*You needed to find a country to bring the case before the ICJ. How did that work?* When we first started raising this, at the UN in New York and in Canada and with other countries that had spoken out on genocide against the Rohingya, they said, what a creative, interesting idea—it's not going to happen. We reached out to countries that had ratified the Genocide Convention in Europe, Africa, Asia and the Americas. Then, out of nowhere, the West African nation of Gambia made public their intention to move ahead. I wish we could claim credit!". See Human Rights Watch, "Interview: Landmark World Court Order Protects Rohingya from Genocide", 27 January 2020, POM, Annex 172.

> Organization of Islamic Cooperation, which is also paying for the team of top international law experts handling the case.[121]

158. A 13 December 2019 article in the *Dhaka Tribune* further states as follows:

> Now, a question is popping up in the minds of many people: Why did The Gambia file the case, not Bangladesh, as it is directly most affected by the atrocities against the Rohingya?
>
> There are, apparently, two main reasons.
>
> Bangladesh wanted to avoid a direct confrontation with Myanmar by filing the case, as it is bilaterally engaged with Myanmar in relation to the repatriation of hundreds of thousands of Rohingya sheltered in Cox's Bazar.
>
> Dhaka and Naypyitaw also signed some bilateral instruments to repatriate the displaced people. Myanmar is reluctant to begin the repatriation anyway. The filing of the case by Bangladesh would have allowed Myanmar the opportunity to further dilly dally the repatriation process.
>
> Bangladeshi and foreign diplomats have observed that Dhaka has done the right thing by not filing the case.
>
> The Gambia was chosen to file the case as it is the chair of the Organisation of Islamic Cooperation's (OIC) ad hoc ministerial committee on accountability for human rights violations against the Rohingya that was established at the 45th OIC council of foreign ministers meeting in Dhaka over May 5-6, 2018.
>
> As the case was filed on behalf of the OIC, it will have the backing of the 57-member organization of the Muslim majority countries to make the case stronger. Furthermore, the OIC is funding the case.[122]

159. According to another website:

> Gambia's unlikely intervention came about through a series of circumstances. The Organisation of Islamic Cooperation (OIC) had been looking for a way to stand up for the Rohingyas and sponsored Gambia out of its 57 members to lead on the case. "Gambia was seen as the right country to do it. It was important

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121 New York Times (United States), "Myanmar Genocide Lawsuit Is Filed at United Nations Court", 11 November 2019, POM, Annex 151.

122 Dhaka Tribune (Bangladesh), "Why didn't Bangladesh lodge the case with the ICJ?", 13 December 2019, POM, Annex 160.

> that it was a democratic country with relatively clean hands," says Reed Brody, legal counsel for Human Rights Watch.[123]

160. These items are consistent with the fact that it was the OIC that made a conscious decision as to which of the OIC Member States should be tasked with bringing these proceedings on behalf of the OIC.

161. As has been argued above, in view of the express acknowledgement by the OIC and The Gambia that the latter brings these proceedings on behalf of the OIC, it is unnecessary to consider in detail all of the evidence of the surrounding facts and circumstances. To the extent that these are considered, they confirm the position that the real applicant in the case is the OIC. Furthermore, for the reasons set out above, there is no burden of proof on Myanmar to show exactly what arrangements have been agreed between the OIC and The Gambia (see paragraph 54 above). On the contrary, it remains for The Gambia as the applicant to demonstrate the facts underlying its case that it is the real applicant in these proceedings (paragraphs 39 to 42 above). The Gambia has not demonstrated these facts. Indeed, as has been mentioned, its Memorial does not even address the issue.

E. The Court accordingly lacks jurisdiction

162. As argued above, the Court's determination of who is the real applicant in the proceedings is a matter of substance, and not a question of form or procedure. The fundamental jurisdictional requirement that the applicant must be a State is in this respect analogous to the fundamental jurisdictional requirement that there be a dispute between the parties at the time of filing of the application.

163. It is clear why the identification of the real applicant in the case must be a matter of substance, rather than a matter of form or procedure.

164. First, if the matter were one of mere form or procedure, the fundamental jurisdictional requirement that the applicant must be a State would be wide open to circumvention. Any international organization (or other entity) seeking to bring proceedings before

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123 Equal Times, "Gambia's genocide case against Myanmar shows that smaller countries can also help balance the scales of international justice", 27 March 2020, POM, Annex 165.

the Court through the device of using a State as the nominal applicant in the case is hardly likely to identify the real applicant in the application itself. If the matter were one of form or procedure, or if it were to be determined solely by reference to who is named as the applicant in the application, the contentious jurisdiction of the Court would in practice be opened up to international organizations, as well as to non-governmental organizations, commercial corporations and other entities, provided that they could find a State willing to act as the nominal applicant in the case, and further provided that they took care not to disclose in the application who the real applicant is. An interpretation of Article 34, paragraph 1, of the Statute that permitted this would clearly deprive that provision of its intended effect.

165. Secondly, if the applicant State is in reality bringing the application on behalf of an international organization, or other entity, it would be pointless to suggest that the international organization or other entity can only be regarded as the real applicant in the case if it has validly conferred legal authority on the applicant State to bring the proceedings on its behalf. This is because an international organization or other entity can never be a legally valid party to a case before the Court, and therefore can never validly confer authority on a State to bring proceedings before this Court on its behalf. To put it simply, an applicant State may be able *in fact* to bring proceedings before this Court on behalf of an international organization, but cannot do so *in law*. The question whether the real applicant in the case is the State named in the application or an international organization must therefore necessarily be a question *of fact* and not a question *of law*.

166. For this reason, the question of whether the OIC is the real applicant in these proceedings does not require a consideration of whether the OIC has validly and lawfully conferred authority and power on The Gambia to act on behalf of the OIC in these proceedings. The only issue that falls to be addressed is whether *in fact* The Gambia brings these proceedings on behalf of the OIC, and whether *in fact* the real applicant is the OIC.

167. This is consistent with the approach taken by the International Law Commission ("**ILC**") in Article 7 of its 2011 Draft Articles on the Responsibility of International

Organizations (the "**2011 ILC Draft Articles**"),[124] which deals with situation where "an organ of a State […] is placed at the disposal of another international organization".[125] That provision, which was referred to at the hearing on 12 December 2019 by counsel for The Gambia,[126] is not in fact pertinent to the present case, for reasons given below. However, it is nonetheless relevant to note that the ILC's commentary to draft Article 7 indicates that even under this provision, "effective control over" an organ of a State for purposes of this provision is "based […] on the *factual* control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal".[127]

168. Such a degree of factual control exists in this case. The decision to undertake a particular activity (the bringing of proceedings before this Court) is a decision that has been taken by the OIC, by two of its principal organs, one of which is its supreme authority. The Gambia has been "appointed" and "tasked" by the OIC to carry out this activity on behalf of the OIC. In carrying out this task on behalf of the OIC, The Gambia reports to an OIC Ad Hoc Committee, which in turn reports to the OIC Council of Foreign Ministers. The Gambia's role in this activity is being funded by the OIC, from a special OIC fund that The Gambia does not control.

169. In any event, while the question is one of *fact*, there is also no obvious basis for suggesting that the OIC has not validly conferred legal authority on The Gambia to bring these proceedings on its behalf, if one disregards the point that it is legally impossible validly to confer on a State the authority to bring a case before the Court on behalf of an international organization.

170. While it is clear that many organs of many international organizations consist of a number of member States (such as the UN General Assembly, Security Council, or

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124 ILC, Draft articles on the responsibility of international organizations, adopted by the International Law Commission at its sixty-third session, *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, pp. 46-105, extract at POM, Annex 71.

125 Article 7 of those ILC Draft Articles (POM, Annex 71) provides that "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct".

126 CR 2019/20, pp. 23-24, para. 6 (d'Argent).

127 *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, p. 57, POM, Annex 71.

Economic and Social Council ("**ECOSOC**")), there is no reason in principle why it would not also be possible for the constituent documents of an international organization to provide that one of its organs shall consist of a single member State only (whether that State is appointed to be that organ indefinitely, or for a fixed period). Where a single State constitutes an organ of an international organization, acts of the State in question when acting in the capacity of that organ of that international organization will be acts of that organ of that international organization.

171. This is consistent with Article 2 *(c)* of the 2011 ILC Draft Articles,[128] which provides that:

> "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization.

172. Similarly, there is nothing in principle to prevent an international organization from conferring on one of its member States the authority to act as the agent of the international organization in relation to a specific transaction or matter.

173. This is in turn consistent with Article 2 *(d)* of the 2011 ILC Draft Articles, which provides that:

> "agent of an international organization" means an official or other person or entity other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

174. As noted above, at the hearing on 12 December 2019, counsel for The Gambia referred to Article 7 of these Draft Articles, which provides that:

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

175. However, this particular provision is not material to the present case.

176. First, this is not a case of an *organ of* The Gambia (its Minister for Justice and Agent of The Gambia in these proceedings) being placed at the disposal of the OIC. Rather

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128 *Ibid*., p. 40.

it is *The Gambia itself*, a State, that is bringing these proceedings before the Court on behalf of the OIC. It is The Gambia itself that is the nominal applicant State in these proceedings. It is The Gambia itself that is a party to the Statute of the Court, that is a Contracting Party to the Genocide Convention, that is an OIC member State, and that is chair of the OIC Ad Hoc Committee. It may be that The Gambia, as a State, can only act via its own organs and agents. However, The Gambia has not placed any of its organs or agents at the disposal of the OIC. Rather, The Gambia itself, as a State, has been tasked by the OIC with bringing these proceedings on behalf of the OIC. Article 7 of the of the 2011 ILC Draft Articles simply does not deal with this situation.

177. Secondly, and in any event, Article 7 is not the only means by which conduct of State organs may be attributable to an international organization. If the rules of an international organization make a particular organ of a particular State an organ of the international organization itself for certain purposes, then that State organ when acting as such would be an organ of the international organization in accordance with Article 2 *(c)* of those Draft Articles, and that conduct would be considered conduct of the international organization in accordance with Article 6, paragraph 1, which provides that:

> The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

178. In this situation, there would be no need to refer to Article 7 to determine whether that conduct of the State organ in question is attributable to the international organization.

179. Article 7 of the Draft Articles is a provision that is *additional* to the other Draft Articles. It provides that the conduct of an organ of a State may be attributable to an international organization in certain circumstances, even where that organ of that State is not an organ of the international organization within the meaning of Article 2 *(c)*, and is not an agent of the international organization in accordance with the meaning of Article 2 *(d)*. Article 7 is not intended to read down or limit the effect of other provisions of the Draft Articles.

180. Thirdly, the 2011 ILC Draft Articles are concerned with questions of the *responsibility* of international organizations. In the present case, no issue of the responsibility of the

OIC arises. The Court is not called upon to decide whether conduct of The Gambia before the Court in these proceedings engages the responsibility of the OIC. Indeed, Myanmar accepts that any judgment or order that the Court might issue in these proceedings would *not* be binding on the OIC because judgments and orders are binding only on the parties, and the OIC is incapable of being a party to these proceedings. As the Court is presently concerned with the question whether the OIC is in substance the real applicant in these proceedings, and not with the question of whether the OIC is responsible for acts of The Gambia, the 2011 ILC Draft Articles are wholly irrelevant to these proceedings.

181. If it were necessary to establish that The Gambia is duly authorized by the OIC to bring these proceedings on its behalf, that requirement would be satisfied in the present case. The bringing of these proceedings by the OIC (apart from the fact that the OIC is incapable of being a party to proceedings before the Court) would appear to fall within the general objectives of the OIC in Article 1, paragraph 16, of the OIC Charter. The establishment of the OIC Ad Hoc Committee appears to be an exercise of the power to establish subsidiary organs conferred by Articles 22 and 23 of the OIC Charter, having been approved by both the OIC Council of Foreign Ministers and then endorsed by the Islamic Summit, the latter being the supreme authority of the OIC. The bringing of these proceedings before the Court by the OIC Ad Hoc Committee on behalf of the OIC has been expressly authorized by the Islamic Summit. The special fund established by the OIC to finance these proceedings appears to be an exercise of the power in Article 29, paragraph 2, of the OIC Charter.

182. However, ultimately it does not matter whether the Islamic Summit and the OIC Council of Foreign Ministers acted in accordance with the requirements of the OIC Charter when establishing the OIC Ad Hoc Committee, approving its plan of action, and conferring on The Gambia the function of bringing these proceedings on behalf of the OIC. Whether or not the requirements of the OIC Charter have been fully complied with, it remains the case that as a matter of *fact and substance*, the OIC has appointed The Gambia to bring the case on its behalf, and The Gambia acted on the OIC's behalf when it filed the application in this case.

183. In this particular case, that factual situation could not be clearer. Official resolutions and other documents issued by the OIC, statements made by The Gambia's Minister

of Justice and Office of the President, and a press release issued by The Gambia's legal representatives in these proceedings, all expressly acknowledge this to be the case. Whether The Gambia is legally acting as an organ of the OIC, or legally acting as an agent of the OIC, or whether The Gambia is in law neither an organ nor an agent of the OIC, as a matter of *fact* and of *substance*, The Gambia is bringing these proceedings on behalf of the OIC. The Gambia *in fact* acts as a nominal or "proxy" applicant State to enable these proceedings to be brought by the OIC, given that the OIC itself as an international organization is incapable of being a party to cases before the Court.

184. There can thus be no question but that the real applicant in these proceedings is the OIC.

185. The Court accordingly lacks jurisdiction, first because the OIC is not capable of being a party to proceedings before the Court (Article 34, paragraph 1, of the Statute), and additionally because the OIC is not a party to the Genocide Convention such that the compromissory clause in Article IX does not apply to confer jurisdiction on the Court in this case.

F. Alternatively, the application of The Gambia is inadmissible

186. Even if, contrary to the submissions above, it were the case that the Court is not deprived of jurisdiction by virtue of the fact that the real applicant in the case is an international organization (*sed quod non*), the application of The Gambia would in the circumstances of this case be inadmissible.

187. It is unnecessary to repeat all of the arguments above. Myanmar submits that the same arguments, if they do not deprive the Court of jurisdiction, would result in rendering the application inadmissible. The reasons have already been given in paragraph 50 above. If, in substance, an exercise of jurisdiction would lead the Court to decide a dispute brought by a State or entity not entitled to appear before it, then a refusal by the Court to exercise that jurisdiction would be necessary to safeguard the Court's judicial function. A use of the Court's procedures in a way that does not formally deprive the Court of jurisdiction, but which would in substance, if not in law, result in

an exercise of jurisdiction that would be contrary to the intentions of the Statute, and outside the intended consent given by States when becoming parties to the Statute and the Genocide Convention, should not be permitted by the Court. Put simply, a claim or application should not be admissible if it amounts in practice to a direct circumvention of an express limitation on the Court's jurisdiction, even if the Court formally would have jurisdiction to deal with it.

188. This conclusion follows from considerations of judicial propriety, the integrity of the Court as an institution, and the principle that the jurisdiction of the Court ultimately rests always on the consent of the parties.

189. This conclusion is independent of any consideration of principles of abuse of process. Nevertheless, a consideration of those principles would also lead to the conclusion that using the Court's procedures in a way that circumvents express limitations on its jurisdiction can amount to an abuse of process, either generally, on in the circumstances of particular cases.

190. The Court's established case law indicates that 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, and that there has to be clear evidence that the applicant's conduct amounts to an abuse of process.[129]

191. In this case, the conduct of The Gambia is clear: it has brought these proceedings on behalf of the OIC, an international organization, in its capacity as chair of an OIC Ad Hoc Committee.

192. Abuse of process (or abuse of procedure) has been defined by one commentator as follows:

> In a synthetic definition, it can be said that abuse of procedure consists in the use of procedural instruments and entitlements with a fraudulent, malevolent, dilatory, vexatious, or frivolous intent, with the aim to harm another or to secure an undue advantage to oneself, with the intent to deprive the proceedings (or some other related proceedings) of their proper object and

[129] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 7, pp. 42-43, para. 113; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 292, p. 336, para. 150.

> purpose or outcome, or with the intent to use the proceedings for aims alien to the ones for which the procedural rights at stake have been granted (*e.g.*, pure propaganda).[130]

193. The proper purpose of proceedings in the contentious jurisdiction of the Court is to settle disputes between *States*, and furthermore, to settle disputes between the States who are the actual parties to the case before the Court. That has not been the purpose of the proceedings brought in the present case. The Gambia and the OIC use the proceedings for aims alien to the ones for which the procedural rights at stake have been granted, namely for the aim of enabling an international organization to be a party to proceedings before the Court. Any dispute in this case, if one existed at all (*sed quod non*) would be between the OIC and Myanmar. However, that dispute could not be one under the Genocide Convention (to which the OIC cannot be a party), nor could that dispute be settled by the Court due to the terms of Article 34 of the Statute. Furthermore, The Gambia has used the procedures of the Court in a way that deprives the proceedings of their proper outcome. Had the OIC been named as the applicant in the proceedings, the proper outcome would have been that the Registrar of the Court would have sent a standard letter to the OIC referring the OIC to Article 34 of the Statute,[131] and the application would not have even been transmitted to Myanmar by the Registrar.

194. Thus, the bringing of proceedings by The Gambia on behalf of the OIC, in an attempted circumvention of the requirement in Article 34, paragraph 1, of the Statute, in and of itself, can be characterised as an abuse of process.

195. Other circumstances further contribute to the abusive nature of the proceedings in this particular instance.

196. As is apparent from the exposition of the facts above, the proposal to bring a case against Myanmar was formulated by the OIC Ad Hoc Committee at its inaugural meeting on 10 February 2019, and that proposal was approved by the OIC Council of Foreign Ministers at its forty-sixth session on 1 and 2 March 2019.

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130 R. Kolb, "General Principles of Procedural Law", in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (third edn., 2019), pp. 998-999, POM, Annex 25.

131 P. Dupuy and C. Hoss, "Article 34", in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (third edn., 2019), pp. 668-669, POM, Annex 22.

197. This means that the decision to bring a case against Myanmar before this Court had been taken by the OIC even before there was even arguably any dispute between The Gambia and Myanmar.

198. Of the 14 events said by The Gambia to evidence the existence of a dispute between The Gambia and Myanmar,[132] the only ones that had already occurred at the time that the decision was taken by the OIC on 1 and 2 March 2019 to bring these proceedings were the first four (the adoption of the Dhaka Declaration in May 2018, the issuing of a press statement by Myanmar on 9 May 2018, the submission of the first report of the FFM (Independent International Fact-Finding Mission on Myanmar) on 12 September 2018, and the making of a statement by the President of The Gambia in the UN General Assembly on 25 September 2018). For the reasons given in paragraphs 578 to 624 below, none of these four events could on any view conceivably be sufficient to establish the existence of a dispute between The Gambia and Myanmar as at 1-2 March 2019, when the decision was taken by the OIC to bring these proceedings. It is abusive to take a firm decision to bring proceedings before this Court before a dispute even exists, and then only subsequently to seek to establish the existence of a dispute for that very purpose.

199. This abusiveness is compounded by other circumstances of this case. The decision to bring proceedings before the Court was taken in March 2019. Despite this, Myanmar was not notified thereafter by the OIC or The Gambia either of the fact that the OIC and The Gambia intended to bring these proceedings, or that the OIC and The Gambia had reached a firm decision to contend specifically that Myanmar is in breach of the Genocide Convention. It was only some seven and a half months after the decision to bring these proceedings had already been taken that The Gambia sent Myanmar the 11 October 2019 note verbale stating that The Gambia "understands" Myanmar to be in ongoing breach of its obligations under the Genocide Convention and under customary international law.[133] Even then, the note verbale did not state that The Gambia intended to bring a case before the Court, despite the fact that a decision to do so had been taken months earlier.

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132 See paragraph 578 below.

133 POM, Annex 121.

200. The Gambia could have sought to spend that seven and a half months presenting its position to Myanmar and seeking to negotiate with Myanmar in relation to the matter. It did not do so. Prior to the note verbale sent by The Gambia to Myanmar on 11 October 2019, none of the subsequent events relied on by The Gambia as establishing the existence of a dispute between The Gambia and Myanmar[134] involved direct communications of any kind whatsoever between these two States, and none of those subsequent events contained accusations by The Gambia that Myanmar was in breach of its obligations under the Genocide Convention.

201. Despite not raising the matter with Myanmar for some seven and a half months, The Gambia then filed the Application instituting these proceedings exactly one month after sending Myanmar the note verbale of 11 October 2019. In the application, The Gambia spoke of the "extreme urgency" of the situation,[135] without disclosing that the decision to bring the proceedings had in fact already been taken by the OIC some eight and a half months earlier, and that it had been under consideration within the OIC for even longer.

202. The Gambia then claims that its 11 October 2019 note verbale called for a response by Myanmar within a month, notwithstanding that the note verbale gave no time limit for an expected response, notwithstanding that it was a very short two-page document that The Gambia itself had taken over seven months to write, and notwithstanding that this document contained the most broad and sweeping unparticularised claim that stated no more than that The Gambia considered the reports of the FFM to be "well supported by the evidence" and that The Gambia was "disturbed by Myanmar's absolute denial of those findings and its refusal to acknowledge and remedy its responsibility for the ongoing genocide".

203. There was absolutely no way that Myanmar could have given consideration to all of the details of the FFM reports referred to in the note verbale, and to all of the evidence referred to in the FFM report which Myanmar did not even have, and to give a considered reply thereto within a month (see further paragraphs 686 to 719 below). It is clear that The Gambia was in fact not expecting a considered response to the note

134 That is, events (5) to (14) referred to in paragraph 578 below.

135 AG, paras. 113, 131, 132.

verbale, and that The Gambia deliberately sent it very shortly before filing its Application instituting proceedings, as a pretext for claiming that a dispute existed at the time of filing the application.

204. The Gambia, instead of presenting any position to Myanmar that The Gambia considered Myanmar to be in breach of the Genocide Convention, thus spent the eight months following the March 2019 decision to bring these proceedings engaging with other OIC member States, to organise the bringing of proceedings before this Court. It was only after Foley Hoag had actually been engaged by The Gambia and instructed to bring the proceedings that the note verbale was even sent to Myanmar.

205. This is thus not a case where an applicant State has filed an application instituting proceedings, seeking the judicial settlement of a legal dispute that has arisen between that State and the respondent State. Rather, the OIC decided in March 2019 to bring these proceedings, and The Gambia agreed to act in its capacity as chair of an OIC Ad Hoc Committee to give effect to that OIC initiative, even though no dispute between The Gambia and Myanmar existed at the time. And it was only then that The Gambia took steps to provide the appearance of a dispute having arisen between it and Myanmar under the Genocide Convention.

206. For these reasons, the bringing of these proceedings does also constitute an abuse of process on the part of The Gambia. The application is accordingly also inadmissible on that basis.

G. Conclusion

207. Article 34, paragraph 1, of the Statute of the Court states that "Only States may be parties in cases before the Court". It is a fundamental requirement for the existence of the Court's jurisdiction in a case that the applicant be a *State*. Whether the applicant is a State is a matter for objective determination by the Court, which must turn on an examination of the facts. The Court's determination is a matter of substance, and not a question of form or procedure. A mere assertion is not sufficient to prove that the applicant is indeed a State. It is for the applicant to demonstrate the facts underlying its case that the real applicant is a State. (See paragraphs 38 to 43 above).

208. In the present case, The Gambia has been aware at the very latest since December 2019 of Myanmar's position that the real applicant in this case is the OIC. Despite this, The Gambia has not in its Memorial demonstrated the facts underlying its case that the real applicant is The Gambia and not the OIC. The material before the Court demonstrates that both the OIC and The Gambia have expressly acknowledged that The Gambia brings these proceedings on behalf of the OIC, having been tasked by the OIC to do so, and this fact is openly referred to by other States, the international media, non-governmental organizations, and others. In the circumstances, no closer examination of the facts and circumstances is required in order to determine that the OIC is in substance the real applicant. In any event, even if a closer examination were undertaken, the material before the Court would merely confirm the fact that the OIC is indeed the real applicant. The Court accordingly lacks jurisdiction.

209. Alternatively, even if (*sed quod non*) the Court had jurisdiction, the application would be inadmissible as it amounts in practice to a direct circumvention of an express limitation on the Court's jurisdiction. This would be so, whether or not the application amounted to an abuse of process, although in the circumstances of the present case, the application can also be characterized as an abuse of process.

II. SECOND PRELIMINARY OBJECTION: The application is inadmissible, as The Gambia lacks standing to bring this case before the Court under Article IX of the Genocide Convention

A. Introduction

210. In its Application instituting proceedings, The Gambia says nothing about its standing to bring a case against Myanmar under Article IX of the Genocide Convention. In its Memorial, it devotes a bare three pages to this issue.[136]

211. This is despite the fact that the present case is fundamentally different both to previous cases dealt with by the Court under the Genocide Convention, as well as to the *Obligation to Prosecute or Extradite* case.[137]

212. In contrast to the cases previously brought under Article IX of the Genocide Convention, in particular the *Trial of Pakistani Prisoners of War* case,[138] the *Bosnian Genocide* case,[139] the *Croatia Genocide* case,[140] and the *Armed Activities on the Territory of the Congo (New Application: 2002)* case,[141] in the present case The Gambia, unlike the applicant States in those earlier cases, has no link whatsoever to the facts of the case. Nor is there any territorial connection between The Gambia and the alleged violations of the Genocide Convention for which Myanmar purportedly bears responsibility, nor are there any other relevant links between either the alleged offenders or the victims of the purported Convention violations on the one hand, and The Gambia on the other.

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136 MG, vol. I, pp. 40-43.

137 *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

138 *Trial of Pakistani Prisoners of War, Interim Protection, Order of 13 July 1973, I.C.J. Reports 1973*, p. 328.

139 *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*, p. 43.

140 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3.

141 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 2006*, p. 32.

213. As to the case previously brought under Article 30 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "**Convention Against Torture**"),[142] namely the *Obligation to Prosecute or Extradite* case,[143] there are also relevant differences to the present case. The applicant State in that case, Belgium, had a relevant link to the facts of the case in that at least some of the alleged victims were residing in Belgium and possessed its nationality. Furthermore, as will subsequently be shown, the Convention Against Torture, unlike the Genocide Convention, is characterized by an underlying *aut dedere aut judicare* principle that specifically confers rights on otherwise non-injured States.

214. In other words, what The Gambia has now put before the Court for the first time ever is a naked form of *actio popularis*. Not only does the applicant State have no relevant link to the facts of the case, but Bangladesh, a State which most obviously is a specially-affected State, could not have instituted these proceedings without the consent of Myanmar because of a reservation that it has made to Article IX of the Genocide Convention.

215. It is against this background that Myanmar will demonstrate that The Gambia lacks standing to bring this case before the Court. In doing so, Myanmar will first show that the Genocide Convention, and notably its Article IX, does not grant non-injured Contracting States standing to claim alleged violations of the Convention. The arguments as to this limb of this second preliminary objection will be first devoted to demonstrating the crucial distinction between the right to invoke State responsibility under general international law and standing before the Court (see paragraphs 217 to 221 below). It will then specifically show that Article IX of the Genocide Convention, given the Court's jurisprudence on the matter so far (see paragraphs 222 to 259 below), as well as the content, structure and drafting history of the Genocide Convention (see paragraphs 260 to 295 below), does not provide for the possibility of an *actio popularis*. Finally, it will also be shown that this result is confirmed by a comparison with the law of State responsibility (see paragraphs 296 to 309 below).

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142 POM, Annex 9.

143 *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

216. In the alternative, Myanmar will establish that a non-injured Contracting Party to the Genocide Convention (such as in this case The Gambia) may not bring a case against another Contracting Party, where a third Contracting Party that *is* specially affected by the alleged Convention violations (in this case Bangladesh) could not itself have brought such a claim due to its reservation to the compromissory clause in Article IX of the Convention (see paragraphs 310 to 350 below).

B. Distinguishing the right to invoke State responsibility from standing before the Court

217. It is well-recognized in the Court's jurisprudence that for a State to be able to bring a case before the Court, that State must have a protected legal interest to do so. As Judge Jessup put it, "there is no generally established '*actio popularis*' in international law".[144] The burden is thus on The Gambia to show not only that the Genocide Convention provides for such right as a matter of principle, but that this principle also applies in the specific circumstances of this very case. Yet, as Myanmar will proceed to demonstrate, The Gambia cannot rely on such a right, at least not in the specific circumstances of the case at hand.

218. At the outset, it is however crucial to highlight the distinction between the right to invoke another State's responsibility on the one hand, and, on the other hand, the fundamentally different question whether a State has standing to bring a claim before this Court. The former is dealt with *inter alia* in Article 48 of the International Law Commission's Draft Articles on State Responsibility.[145] However, 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 alleged violations of that Convention as a matter of customary international law, this would not determine the fundamentally different question as to whether such an obligation could be *enforced* by bringing a case before the Court, that is to say, the question whether third, non-injured Contracting Parties have *standing* before this Court.

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144 *South West Africa, Second Phase, Dissenting Opinion of Judge Jessup, I.C.J. Reports 1966,* p. 387.

145 ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), pp. 126-128, MG, vol. II, Annex 15.

219. This has been confirmed by the Court in the *East Timor* case,[146] where the Court expressly held that the *erga omnes* character of a norm does not exempt an applicant State from fulfilling otherwise applicable jurisdictional preconditions for the bringing of a case before the Court.

220. Hence, even if one were to accept *arguendo* the existence of obligations *erga omnes* arising under general international law or the existence of *obligations erga omnes partes* arising under the Genocide Convention, this would not of itself lead to the recognition of an *actio popularis* under the Convention.

221. On the contrary, as will be shown, State practice and *opinio juris* as highlighted in cases brought before the Court, as well as in the Court's jurisprudence itself, confirm that there needs to be at least some form of a "connecting" factor in order for a State to have standing before the Court to enforce obligations which are of an *erga omnes partes* character. Or, to put it otherwise, it will be shown that only States that are specially affected by an alleged breach of a treaty containing obligations *erga omnes partes* have standing to bring a claim before the Court.

C. Article IX of the Genocide Convention does not provide for the possibility of an *actio popularis*

1. Relevant jurisprudence of the Court

a. Advisory Opinion on Reservations to the Genocide Convention

222. It does not need mentioning that it was in the Court's 1951 advisory opinion on reservations to the Genocide Convention that the Court found that there was a universal condemnation of genocide.[147] Yet, given the very subject-matter of the request for an advisory opinion that was then before the Court, there was no need for the Court to even consider the issue of whether individual non-injured States were

146 *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995,* p. 90, 102, para. 29.

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

entitled to *invoke the responsibility* of other Contracting Parties for alleged failure to comply with their obligations under the Genocide Convention.

223. Even less did the Court, contrary to what The Gambia seems to imply in its Memorial,[148] take any position in its advisory opinion on the different question of whether non-injured States, such as The Gambia in this case, would have *standing* before the Court to enforce such obligations in a contentious case. Rather, the very fact that the Court then envisaged the possibility of entering reservations to the Genocide Convention, reservations to its Article IX having been the most common ones at the time, indicates that it was the Court's position that it is compatible with that treaty's object and purpose to even preclude *injured* States from bringing cases before the Court.

b. *Barcelona Traction* case

224. It also does not need mentioning that it was in the *Barcelona Traction* case that the Court dealt for the first time in a contentious case with the issue of *erga omnes* obligations and possible legal consequences flowing therefrom. Nothing in the Court's *obiter dictum* in that case however sustains The Gambia's claim to have standing in the case at hand.

225. Apart from anything else, the Court in this *dictum* only dealt with obligations "of a State towards the international community as a whole",[149] that is to say, with obligations *erga omnes* as such. The Court did not say anything about obligations *erga omnes partes*. In that case, the Court stated that the prohibition of genocide had "entered into the body of general international law".[150] If anything, the Court thereby only found that it is in situations where a State is claiming violations of the *customary law prohibition of genocide* that the underlying obligation would exist vis-à-vis the international community at large. Yet, the Court has, time and again, been very careful

148 MG, vol. I, p. 42, para. 2.25.

149 *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970,* p. 32, para. 33.

150 *Ibid.* p. 32, para. 34, quoting *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951,* p. 23.

to distinguish between violations of the prohibition of genocide that exists under customary international law on the one hand, and violations of the Genocide Convention on the other. Notably, the Court's jurisprudence confirms that in a case brought before it under Article IX of the Convention, the Court is *not* in a position to consider alleged violations of the customary-law based prohibition of genocide,[151] and it goes without saying that the same principle upheld by the Court must then also apply as far as the issue of standing is concerned.

226. Hence, even if one were to assume that a non-injured State could, in the light of the Court's *Barcelona Traction dictum*, have standing to bring a case before the Court against another State for claimed violations of the *customary law prohibition of genocide* under Article 36, paragraph 2, of the Court's Statute, *quod non*, this would still not mean that the same non-injured State could then also bring a case under Article IX of the Genocide Convention for alleged *treaty violations* of that Convention.

227. This important distinction between possible obligations *erga omnes* on the one hand, and obligations *erga omnes partes* on the other, is also reflected in Article 48 of the 2001 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "**ILC Draft Articles on State Responsibility**"). The respective subparagraphs *(a)* and *(b)* of Article 48, paragraph 1, draw a careful distinction between a situation where the obligation allegedly breached is owed to a group of States including the non-injured State invoking responsibility (lit. a), and a situation where the obligation is owed to the international community as a whole (lit. b). In the former case, the obligation is established for the protection of the collective interest of the group, that is to say, it is an obligation *erga omnes partes*. In the latter case, the obligation is owed to the international community as a whole, that is to say, it is an obligation *erga omnes*. The *Barcelona Traction dictum* dealt with the latter situation. However, the Court is now facing a situation which, if anything, would be a situation of the former kind on which the Court did not take a position back in 1970. Hence, even if the *Barcelona Traction dictum* were interpreted as addressing not only the

[151] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 47, para. 88; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America). Merits, Judgment, I.C.J. Reports 1986*, p. 96, para. 179.

existence of obligations *erga omnes*, but also the issue of standing in proceedings before the Court to enforce *erga omnes* obligations, that *dictum* would still not be pertinent to the issue of The Gambia's claim to standing in the present case.

228. Furthermore, and even more importantly, even if one were to assume *arguendo* that the *Barcelona Traction dictum* does indeed address obligations *erga omnes partes*, *quod non*, the *dictum* does *not* address the issue as to whether or not States that are not specially-affected States could *vindicate* either obligations *erga omnes* or obligations *erga omnes partes*, either by way of bringing a case before the Court, or by way of countermeasures. In fact, the *Barcelona Traction dictum* does not provide that the violation of obligations *erga omnes* in general, or even less the violation of certain specific treaty-based obligations, would support proceedings in the nature of an *actio popularis* by a non-injured State. As Australia had put it in the *East Timor* case:

> The Court [in *Barcelona Traction*] did not say that every obligation *erga omnes* would support proceedings in the nature of an *actio popularis*.[152]

229. This result is confirmed by the fact that in the *Barcelona Traction* case, it was only Judge Ammoun who reflected on this issue in his separate opinion,[153] a fact which makes the silence of the judgment itself and of the vast majority of the other Judges on this point even more significant and telling.

230. Indeed, years later, the Court was even warned, among others by Judge Castro, that the *Barcelona Traction obiter dictum* should be taken "*cum grano salis*" (with a grain of salt) and must not be understood as enabling an *actio popularis*. Rather, he considered that any applicant had to demonstrate that a *right of its own* had been violated.[154]

231. Finally, when the Court came to revise its Rules of Court extensively, leading to the 1978 version, the Court did not introduce any new provision which would have

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152 *East Timor (Portugal* v. *Australia), Counter-Memorial of the Government of Australia, 1 June 1992*, p. 119, para. 262.

153 *Barcelona Traction, Light and Power Company, Limited, Separate Opinion of Judge Ammoun, I.C.J. Reports 1970*, pp. 325-327.

154 *Nuclear Tests (Australia* v. *France), Dissenting Opinion of Judge de Castro, I.C.J. Reports 1974*, p. 387.

accommodated the concept of the possibility of an *actio popularis* being brought before the Court.[155]

c. *Nuclear Tests* cases

232. In the same vein, when New Zealand and Australia respectively brought the *Nuclear Tests* cases, they did so as States that were specially affected by France's nuclear tests in their region and the nuclear fallout they produced on their territories.[156] These were not cases of *actio popularis*, invoking a breach of *erga omnes* obligations by France, by States who were not specially affected.

d. Cases brought under Article IX of the Genocide Convention

233. The cases that have been brought before the Court on the basis of Article IX of the Genocide Convention point in the same direction. Not only was it a specially-affected State that brought each of these cases on the basis of Article IX, but in none of these cases did the parties, nor indeed the Court, ever allude to the possibility that any State, even a non-injured State, could have brought these very cases in any event by way of an *actio popularis*.

234. The first of these cases, the *Trial of Pakistani Prisoners of War* case,[157] self-evidently dealt with alleged violations, by India, of the Genocide Convention in relation to the treatment of *nationals of the applicant State*, and thus did not involve any form of *actio popularis*.

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155 M. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, vol. III (2016), p. 1205, POM, Annex 29.

156 *Nuclear Tests (Australia* v. *France), Memorial on Jurisdiction and Admissibility submitted by the Government of Australia*, 23 November 1973, p. 335 et seq., paras. 451-461; *Nuclear Tests (New Zealand* v. *France), Memorial on Jurisdiction and Admissibility submitted by the Government of New Zealand*, 29 October 1973, pp. 208-209, paras. 203-205.

157 *Cf.*: *Trial of Pakistani Prisoners of War (Pakistan* v. *India), Application instituting proceedings*, 11 May 1973.

235. The same holds true for the *Bosnian Genocide* case, where the applicant State specifically asked the Court to request the respondent State to cease and desist from committing acts of genocide "against the People and State of Bosnia and Herzegovina".[158] While the Court noted the *erga omnes* character of the obligations contained in the Genocide Convention,[159] it again did not take any stance on the right of third, non-injured States to bring a case under the Convention. In other words, the issue of the standing of non-injured States was neither argued by the parties, nor was there a need for the Court to address the matter.

236. Quite to the contrary, Judge Oda stressed in his declaration attached to the 1996 judgment on jurisdiction and admissibility in the *Bosnian Genocide* case that the legal obligations arising under the Genocide Convention are:

> borne in a general manner *erga omnes* by the Contracting Parties in their relations with all the other Contracting Parties to the Convention - or, even, with the international community as a whole – but are *not* obligations in relation to any specific and particular signatory Contracting Party.[160]

237. This approach is also consistent with the view of the late Robert Ago, who also took the position that it is the international community at large rather than non-injured States individually that is the bearer of a right of reaction when it comes to violations of the Genocide Convention[161] – a view later reflected in and confirmed by the reformulation of draft Article 54 of the ILC Draft Articles on State Responsibility which will be further discussed below.[162]

238. Furthermore, in the *Croatia Genocide* case, as well as in the various *Legality of Use of Force* cases, where again Article IX of the Genocide Convention was used as a

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158 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Application instituting proceedings,* 20 March 1993, para. 133.

159 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Preliminary Objections, Judgment, I.C.J. Reports 1996,* p. 616, para. 31.

160 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, Declaration of Judge Oda, I.C.J. Reports 1996,* p. 626, para. 4.

161 R. Ago, "Obligations *Erga Omnes* and the International Community", in J.H.H. Weiler *et al.* (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989), p. 238, POM, Annex 18.

162 See paragraphs 296 to 309 below.

jurisdictional basis, Croatia and the Federal Republic of Yugoslavia, as the respective applicant States, brought the cases exclusively as injured States in relation to acts of genocide allegedly committed against their respective populations.[163] They did so without even alluding in any manner whatsoever to the concept of standing of non-injured States, and without any suggestion that the possibility of such standing was inherent in the violation of obligations of an *erga omnes partes* character.

239. The same holds true for the case brought by the Democratic Republic of the Congo against Rwanda, in which the former again unequivocally stated that it brought its case *to protect its own population* rather than by way of acting in the interest of the international community,[164] that is to say, once again acted as an injured State only.

e. *Obligation to Prosecute or Extradite* case

240. Finally, the Court's judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, on which The Gambia attempts to rely,[165] also does not constitute a precedent for a pure *actio popularis* brought under the Genocide Convention. Two aspects need to be noted in this respect.

241. First of all, Belgium *did* consider itself to be an injured or specially-affected State. Secondly, and even more importantly, that case was brought under the Convention Against Torture, a treaty which contains obligations that are critically different to those contained in the Genocide Convention. This holds true, in particular, for those obligations the violation of which by Senegal Belgium was invoking.

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163 See *e.g. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Application instituting proceedings,* 2 July 1999, p. 2; *Legality of Use of Force (Yugoslavia* v. *United Kingdom of Great Britain and Northern Ireland), Application instituting proceedings,* 29 April 1999, p. 3 et seq.; *Legality of Use of Force (Yugoslavia* v. *Canada), Application instituting proceedings,* 29 April 1999, p. 3 et seq.

164 In its application the DRC accordingly stated that by its application "… la République Démocratique du Congo entend qu'il soit mis fin au plus tôt à ces actes de violations graves des droits de l'homme *à l'égard de ses populations* …" (emphasis added); see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Application instituting proceedings,* 28 May 2002, p. 1.

165 AG, p. 42, para. 124; MG, vol. I, p. 40, para. 2.24.

242. As to the first point, Belgium had made it unequivocally clear that it:

> is not only a "State other than an injured State", but has also the right to invoke the responsibility of Senegal as an "injured State" under Article 42 (b) (i) of the Articles on State Responsibility […][166]

since Belgium considered itself to be "affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed".[167]

243. Indeed, Belgium was in a particular position as compared to all other States Parties to Convention Against Torture because, in this particular case, it had availed itself of the specific right under Article 5 of the Convention Against Torture[168] to exercise jurisdiction and to request extradition. This was formally acknowledged by the Court when it stated that:

> Belgium based its claims not only on its status as a party to the Convention but also on the existence of a *special interest* that would distinguish Belgium from the other parties to the Convention and give it a specific entitlement […][169]

244. Aside from this, the *aut dedere aut judicare* obligation contained in Article 7, paragraph 1, of the Convention Against Torture[170] is closely linked to the right of the other States Parties to that Convention, after extradition, to exercise criminal jurisdiction over the person concerned. As the Court confirmed:

> if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention [against Torture], it can relieve itself of its obligation to prosecute by acceding to that request.[171]

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166 Sir Michael Wood acting as Counsel and Advocate for Belgium in the case concerning the *Questions relating to the Obligation to Prosecute and to Extradite (Belgium* v. *Senegal), Verbatim Record of Public Sitting of 19 March 2012*, CR 2012/6, p. 54, para. 60.

167 *Ibid*.

168 POM, Annex 9.

169 *Questions relating to the Obligation to Prosecute and to Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 449, para. 66 (emphasis added).

170 POM, Annex 9.

171 *Questions relating to the Obligation to Prosecute and to Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, para. 95.

245. Furthermore, the Convention Against Torture, unlike the Genocide Convention, embodies the principle of universal jurisdiction. As the Court put it in 2012:

> The Convention against Torture thus brings together 150 States which have committed themselves to prosecuting suspects in particular *on the basis of universal jurisdiction*.[172]

246. It is this treaty-specific fact, namely that all States Parties to the Convention Against Torture have a legally protected interest arising under the treaty either themselves to prosecute persons responsible for torture, or to have them prosecuted on the same basis of universal jurisdiction by any other State Party regardless of any nationality link between the prosecuting State, the alleged offender, the purported victims of the treaty violations or the place where the alleged treaty violation occurred, which significantly distinguishes the Convention Against Torture from the Genocide Convention. It was precisely this specific element that in the specific circumstances of that case justified the finding that Belgium had standing to raise violations of the Convention Against Torture without the Court first being required to make a positive finding as to the status of Belgium as a specially-affected State under the Convention Against Torture.

247. This finding by the Court in this case is therefore fully in line with what has previously been stated by an eminent scholar writing on the interest to sue under international law, namely that:

> the right to bring an action in the public interest does not ensue from general international law; such a right must have been agreed upon – expressly or impliedly – between the States concerned in a treaty or on an ad hoc basis.[173]

248. In sharp contrast to the Convention Against Torture, however, Article VI of the Genocide Convention only provides, as confirmed by the Court's jurisprudence, for an obligation to exercise *territorial* jurisdiction. As the Court put it unequivocally in the *Bosnian Genocide* case, "Article VI only obliges the Contracting Parties to institute and exercise *territorial criminal jurisdiction*"[174] rather than universal jurisdiction.

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172 *Ibid.*, para. 75 (emphasis added).

173 P. van Dijk, *Judicial Review of Governmental Action and the Requirement of an Interest to Sue* (1980), POM, Annex 20.

174 *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*, p. 226, para. 442 (emphasis added).

Accordingly, the Genocide Convention, unlike the Convention Against Torture, from its inception did not envisage any form of enforcement by the Contracting Parties, other than by those on whose territory the acts in question were committed. Unlike the Convention Against Torture, the Genocide Convention therefore does not contain an implied agreement to accept the standing of a non-injured State to bring cases before the Court. Moreover, Myanmar has entered a reservation to Article VI of the Genocide Convention, to which The Gambia has not objected, to the effect that Article VI cannot be interpreted:

> as giving foreign Courts and tribunals jurisdiction over any cases of genocide […] committed within the […] territory" of Myanmar.[175]

249. Accordingly, Myanmar has made clear from the moment of its accession its understanding that the Genocide Convention does not confer on other Contracting Parties the ability to enforce the prohibition of acts of genocide arising under the Convention when committed on the territory of Myanmar – a position that was not challenged by The Gambia when it itself acceded to the Genocide Convention.

250. These same considerations as to the specific characteristics of the Convention Against Torture, which then trigger the treaty-specific ability even of non-injured States to bring cases before the Court under that treaty's compromissory clause, apply *mutatis mutandis* to Article 6, paragraph 2, of the Convention Against Torture.[176] This provision contains an obligation to open an investigation which constitutes a preliminary step in the process towards a possible criminal investigation and eventual prosecution for acts of torture. It is only the non-fulfilment of this obligation which then triggers the right of all other States Parties to the Convention Against Torture to request extradition.

251. Accordingly, it was these specific features of the Convention Against Torture that led the Court in this case to make a positive finding as to Belgium's standing – treaty-specific features of the Convention Against Torture that are not found in the Genocide Convention. Thus, even if one were to assume that the obligations under the

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175 UN Secretary General, *Depositary Notification of 29 March 1956*, CN.25.1956, MG, vol. II, Annex 5.

176 POM, Annex 9.

Convention Against Torture otherwise possess an *erga omnes partes* character, the absence of the same critical features in the Genocide Convention means that the decision in the *Obligation to Prosecute or Extradite* case is not of direct relevance to the present case.

252. Furthermore, even leaving aside these specific differences between the two conventions, it has to be noted that the Genocide Convention was drafted and adopted almost 40 years prior to the Convention Against Torture. Can it really be assumed that the drafters of the Genocide Convention wanted, as early as 1948, not only to provide in the Convention for obligations *erga omnes partes*, but also to invest all Contracting Parties with unlimited standing? Can it really be assumed that in 1948 they would have wanted to do so without introducing any form of jurisdictional filter found in similar treaties, thereby providing for the possibility of bringing an *actio popularis*? Can the drafters of the Genocide Convention have really intended this in 1948, when the first ever reference to an *actio popularis* in the case law of this Court was in the *South West Africa* cases in 1966, in which the Court said[177] that "although a right of this kind [an *actio popularis*] may be known to certain municipal systems of law, it is not known to international law as it stands at present"?

253. Thus, although there was considerable confusion among the drafters as to the scope of the Genocide Convention's compromissory clause,[178] it cannot be seriously argued that as early as 1948 the drafters intended to provide for a possibility for any Contracting Party, even a State not specially affected by an alleged violation of the Convention, to bring proceedings before the Court against any other Contracting Party. It certainly cannot be assumed that they considered that this possibility was provided for in the text that they adopted, which contained no provision even hinting at its existence, much less expressly providing for it. In that regard it must also be noted that in the meantime no consensus has been expressed by the Contracting Parties to the Genocide Convention within the meaning of Article 31, paragraph 3 *(a)* and *(b)* of the Vienna Convention on the Law of Treaties[179] to the effect that the Convention

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177 *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966,* p. 47, para. 88.

178 *Cf. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, Declaration of Judge Oda, I.C.J. Reports 1996,* p. 628, para. 5.

179 POM, Annex 4.

would embrace the concept of an *actio popularis*. Rather to the contrary, as shown above, in those situations where cases were brought before the Court under Article IX of the Genocide Convention, they were always brought by specially-affected Contracting Parties.

254. Besides, where States have been willing to accept the possibility of some form of *actio popularis* being brought under a treaty's compromissory clause, as in the case of the Convention Against Torture, the compromissory clause has contained stricter requirements for the bringing of a case before the Court than those found in Article IX of the Genocide Convention.

255. In fact, in the case of the Convention Against Torture, the compromissory clause in its Article 30, paragraph 1,[180] provides that a State Party to that Convention can refer a dispute concerning the interpretation or application of that Convention to the Court only if the dispute cannot first be settled by negotiation, and only after the dispute has then been submitted to arbitration and the parties have been unable to agree on the organization of the arbitration.

256. In the case of the 2019 ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity,[181] the compromissory clause in its Article 15 only permits a State to submit a dispute concerning the interpretation or application of those Draft Articles to the Court if the dispute cannot be settled by negotiation, and only then if none of the parties has instead opted for the dispute to be settled by arbitration.

257. In the case of the International Convention on the Suppression and Punishment of the Crime of Apartheid, the compromissory clause in its Article XII[182] provides for a joint seisin of the Court by both parties to the dispute only, and, as in the case Article 15 of the ILC Draft Convention on Prevention and Punishment of Crimes Against Humanity, subjects the possibility of submitting a dispute to the Court to an exception where the parties have agreed to some other form of settlement.[183]

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180 POM, Annex 9.

181 POM, Annex 81.

182 POM, Annex 6.

183 POM, Annex 81.

258. In contrast, the Genocide Convention does not contain any of those additional safeguards which aim at precluding a proliferation of disputes being brought before the Court by States parties that do not have a genuine specific legal interest of their own, which distinguishes their legal position from that of all other States parties.

259. In this context it is particularly worth noting that in its 1951 Advisory Opinion on *Reservations to the Genocide Convention*, the Court observed that the intention of the drafters of the Genocide Convention had been that the Convention should be ratified by as many States as possible.[184] Had the drafters at that time considered that the text of Article IX of that Convention, as finally adopted, might one day be understood as allowing for an *actio popularis*, it is reasonable to assume that they would have not adopted the compromissory clause in that form since the aim of achieving universal participation would have thereby been made significantly more difficult, if not impossible.

2. The content, structure and drafting history of the Genocide Convention all exclude the possibility of an actio popularis

a. Content and structure of the Genocide Convention and its Article IX

260. At the outset, it is noted that the Genocide Convention does not contain any kind of reference to the possibility of a non-injured State bringing a case before the Court, that is to say, there is no indication in the text of the Convention itself that would specifically contemplate such a possibility.

261. Furthermore, Article IX of the Genocide Convention is more limited as compared to other compromissory clauses such as, *inter alia*, Article 30 of the Convention Against Torture. This also confirms that the compromissory clause in the Genocide Convention does not contemplate the possibility of an *actio popularis*.

184 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951,* p. 24.

262. In particular, Article 30 of the Convention Against Torture,[185] like Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination,[186] Article 29 of the Convention on the Elimination of All Forms of Discrimination against Women,[187] Article 92 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,[188] as well as Article 42 of the International Convention for the Protection of All Persons from Enforced Disappearance,[189] all refer to the possibility of "*all* disputes" ("*tout* différend", "*toda* controversia" and "Любой спор" in the respective French, Spanish and Russian versions) arising under those respective treaties being brought before the Court.

263. In using the comprehensive term "all disputes" or "tout différend", those other compromissory clauses might thereby possibly envisage that even disputes as to the interpretation or application of the respective treaty arising between a State party allegedly committing a treaty violation on the one hand, and a non-injured or not-specially-affected State party on the other, could be brought before the Court.

264. In contrast thereto, Article IX of the Genocide Convention does not contemplate that "*all* disputes" or "*any* disputes" arising under that treaty can be brought before the Court. Instead, Article IX of the Genocide Convention refers only to "disputes" between the Contracting Parties. The same holds true for the French and Spanish versions of the Genocide Convention. The French version refers to "les différends" rather than to "des différends" or "tout différend". The Spanish version refers to "las controversias" rather than to "toda controversia". This omission of the word "any"/"tout"/"toda" cannot be ignored.

265. Furthermore, within the text of Article IX of the Genocide Convention, very shortly after the reference to "disputes" or "les différends", there is in fact a usage of the word "any" in the English version, and corresponding expressions in the other language versions. The English version goes on to speak of "*any* of the other acts enumerated

185 POM, Annex 9.

186 POM, Annex 3.

187 POM, Annex 7.

188 POM, Annex 10.

189 POM, Annex 11.

in article III".[190] The French version correspondingly proceeds to refer to "*quelconque* des autres actes énumérés à l'article III". The Spanish version uses the expression "*cualquiera* de los otros actos enumerados en el artículo III".[191] This confirms that the text of Article IX of the Genocide Convention itself draws a distinction between, on the one hand, a reference to the entire spectrum of occurrences of something ("any", "tout" or "toda"), and a reference that is only to specific kinds of occurrences of something (for example, "Disputes *between the contracting parties*").

266. Similarly, and in the specific context of disputes arising under the Genocide Convention, the very last part of Article IX refers to "*any* of the parties to the dispute" being able to request that a dispute be submitted to the Court. In other words, Article IX of the Genocide Convention thus foresees that not *any* dispute may be brought before the Court, but that once a relevant dispute has arisen, *any party* to *that dispute* may then unilaterally request that such dispute be submitted to the Court. Otherwise, the text of Article IX of the Genocide Convention would, just like Article 30 of the Convention Against Torture, have also used the term "any" in relation to the "dispute" that can be brought before the Court, and not just in relation to the parties to the dispute.

267. This result is further confirmed by a juxtaposition of Article IX of the Genocide Convention with its Article VIII. As will be demonstrated later in relation to Myanmar's third preliminary objection, Article VIII of the Genocide Convention (*inter alia*) governs the seisin of the Court, and if nothing else, it is Myanmar's reservation to Article VIII that precludes non-injured States from bringing a case against Myanmar relating to the interpretation or application of the Genocide Convention.

268. The Gambia claims that Article VIII of the Genocide Convention solely "applies to a procedure that is separate and distinct from adjudication",[192] and that Article IX constitutes the only provision of the Convention governing the seisin of the Court.[193]

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190 Emphasis added.

191 Emphasis added.

192 MG, vol. I, p. 31, para. 2.5.

193 *Ibid.*

However, even if it were to be assumed, merely *arguendo* and for the time being only, that Article VIII of the Genocide Convention does only govern the seisin of organs of the United Nations other than the Court, then Article VIII, even on The Gambia's own understanding of that provision, makes it clear that the seisin of the political organs can be effected, as Article VIII puts it, by "*[a]ny* Contracting Party", "*[t]oute* Partie Contractante" or "*[t]oda* Parte contratante"[194] to the Convention, regardless of whether that Contracting Party is an injured or a non-injured State, that is, regardless of whether it is specially affected by the alleged treaty violation or not.

269. Therefore, on any view, the expression "*any* Contracting Party" as it appears in Article VIII of the Genocide Convention can be contrasted with the expression "*the* Contracting Parties" which is used in Article IX. According to The Gambia's own position, *any* Contracting Party would be entitled to seise competent organs of the United Nations other than the Court pursuant to Article VIII, whereas pursuant to Article IX, the only parties entitled to request that a dispute be submitted to the Court would be "*the* Contracting Parties". The different expressions "*any* Contracting Party" and "*the* Contracting Parties" must be intended to have different meanings. Therefore, even if one were to accept The Gambia's contention that Article VIII "opens the door for a […] (non-judicial) '*actio popularis*'",[195] Article IX, given its divergent wording, would close the door to a *judicial actio popularis*.

270. The drafting process leading to the adoption of Article VIII of the Genocide Convention further confirms that the involvement of the *political* organs of the United Nations was intended to be as broad as possible in order to allow for an effective prevention and suppression of genocidal acts.

271. In fact, the first draft of the Secretariat already provided that under what was to become Article VIII of the Genocide Convention, the organs of the United Nations could be called upon in cases of alleged acts of genocide taking place "in any part of the world".[196] While the wording of the subsequent draft prepared by the Ad Hoc

194 Emphasis added.

195 B. Schiffbauer in C. Tams *et al*. (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), Art. VIII, p. 278, POM, Annex 28.

196 UNSG, Draft Convention on the Crime of Genocide, UN doc. E/447, 26 June 1947, draft Art. XII, p. 9, POM, Annex 34.

Committee was slightly different, the discussion within the Ad Hoc Committee confirms that the broad concept underlying Article VIII to the Genocide Convention was nevertheless retained. This is confirmed not only by the broad wording then used by the Ad Hoc Committee, which referred to "*any* case of violation of this convention",[197] but also by the fact that the majority of the Committee members considered that *any* party to the Convention, even if it was not a Member of the United Nations, should be enabled by the future Article VIII of the Genocide Convention to call upon the United Nations to take appropriate action.[198]

272. Even draft proposals providing for a more limited personal scope of Article VIII were still driven by the common idea that the best way to prevent and suppress genocide was by *concerted action* by States, be they specially affected or not by the alleged genocidal acts, through the political organs of the United Nations.[199]

273. In other words, there was a clear consensus among States participating in the process of negotiating Article VIII of the Genocide Convention that Article VIII could be triggered by each and every Contracting Party to the Genocide Convention. If those same States, simultaneously also involved in the process of negotiating Article IX, had similarly wanted to also enable *any* Contracting Party to the Genocide Convention, injured or non-injured, to be entitled to bring a case before the Court under Article IX of the Convention, it would have been most natural, if not necessary, to use in Article IX the same "any Contracting Party" formulation already used in Article VIII, or the "any dispute" formulation akin to Article 30 of the Convention Against Torture. Indeed, if that had been the intention, it would have been more natural to align Article IX with Article VIII by for example stating in Article IX that:

> *Any Contracting Party may submit to the International Court of Justice a* dispute relating to the interpretation, application or

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197 UN, Ad Hoc Committee on Genocide, Draft Convention on Prevention and Punishment of the Crime of Genocide, UN doc. E/AC.25/12, 19 May 1948, draft Art. VIII (emphasis added), POM, Annex 42.

198 See discussion and voting in the Ad Hoc Committee on Genocide, UN doc. E/AC.25/SR.20, 4 May 1948, pp. 4-5 and E/AC.25/SR.20/Corr.1, POM, Annex 41.

199 UN, Draft Convention on Genocide, Communications received by the Secretary-General, Communication received from the United States of America, UN doc. A/401/Add.2, 30 September 1947, at pp. 12-13 (comments on draft Art. XII), POM, Annex 35. The Comments of the United States are also contained in: UN, Comments by Governments on the Draft Convention prepared by the Secretariat, Communications from non-governmental organizations, UN doc. E/623, 30 January 1948, in H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. I (2008), p. 549, POM, Annex 37.

> 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.

274. Furthermore, if the intention of Article IX of the Genocide Convention had indeed been, as The Gambia claims, to put in place a system of judicial *actio popularis* akin to the political *actio popularis* enshrined in Article VIII of the Genocide Convention, one would expect to be able to trace a debate relating to Article IX akin to the one referred to above that took place with regard to the broad scope of Article VIII. Yet, there is none. Rather, to the contrary, as will be shown below,[200] the *travaux préparatoires* relating to Article IX confirm that no judicial *actio popularis* was envisaged.

275. The Gambia cannot have it both ways. Either it is Article VIII of the Genocide Convention that governs the seisin of the Court (as Myanmar respectfully submits is the case and will show later in more detail), or it is Article IX. If it is Article VIII, then non-injured States may seise the Court with disputes arising under the Genocide Convention, unless barred by a valid reservation to Article VIII, which is the case here.[201] If it is Article IX, then the clear contrast in wording between Article VIII and Article IX demonstrates that Article IX is not intended to have the same broad scope of allowing an unlimited right for any Contracting Party to seise the Court.

276. This result that Article IX of the Genocide Convention does not provide for the right of non-injured Contracting Parties to bring cases before the Court, based on the actual wording and overall structure of the Convention, is further confirmed by the drafting history of Article IX.

b. Drafting history of Article IX Genocide Convention

277. Apart from the fact that, as will be shown later in relation to Myanmar's third preliminary objection,[202] the drafting history of Article IX of the Genocide Convention

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200 See paragraphs 277 to 295 below.

201 See the third preliminary objection of Myanmar below.

202 See paragraphs 402 to 435 below.

confirms the close interrelationship between Articles VIII and IX of the Convention, the *travaux préparatoires* relating to Article IX of the Convention alone also confirm that Article IX was not meant to provide that "any" dispute could be validly brought before the Court.

278. The first draft of what was to become Article IX of the Genocide Convention (then draft Article XIV) prepared by the Secretary-General had provided that:

> Disputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice.[203]

279. In a communication dated 30 September 1947, the United States then however suggested inserting the words "between *any* of the High Contracting parties"[204] after the word "disputes".[205] The draft compromissory clause, as then proposed by the United States, would accordingly have read as follows:

> Disputes between *any* of the High contracting parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice.[206]

280. During the consideration of what had become in the meantime draft Article X (now Article IX of the Genocide Convention) at the Sixth Committee of the General Assembly, the United Kingdom referred both to draft Article VII (which dealt *inter alia* with the creation of a competent international tribunal to punish persons charged with genocide), and to draft Article X. It suggested replacing the text of draft Article VII by the following:

> Where the act of genocide […] is, or is alleged to be the act of the State or Government itself or of any organ or authority of the State or Government, the matter shall, *at the request of any other party to the present Convention*, be referred to the International

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203 UNSG, Draft Convention on the Crime of Genocide, UN doc. E/447, 26 June 1947, p. 10, draft Article XIV, POM, Annex 34.

204 Emphasis added.

205 UN, Draft Convention on Genocide, Communications received by the Secretary-General, Communication received from the United States of America, UN doc. A/401/Add.2, 30 September 1947, at p. 14 (comments on draft Art. XIV), POM, Annex 35. The Comments of the United States are also contained in: UN, Comments by Governments on the Draft Convention prepared by the Secretariat, Communications from non-governmental organizations, UN doc. E/623, 30 January 1948, in H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires*, vol. I (2008), p. 551, POM, Annex 37.

206 Emphasis added.

> Court of Justice whose decision shall be final and binding. Any acts or measures found by the Court to constitute acts of genocide shall be immediately discontinued or rescinded and if already suspended shall not be resumed or reimposed.[207]

281. This proposal, by referring to the ability of any other of the Contracting Parties to the Genocide Convention to seise the Court, would have indicated clearly the possibility of an *actio popularis*. In addition, for draft Article X the United Kingdom proposed the following text:

> In addition to the cases contemplated by Article VII of the present Convention *all* disputes between the High Contracting Parties relating to the interpretation or application of the Convention shall, at the request of any party to the dispute, be referred to the International Court of Justice.[208]

282. Belgium then submitted a sub-amendment to this British amendment on draft Article VII which read as follows:

> *Any* dispute relating to the fulfilment of the present undertaking or to the direct responsibility of a State for the acts enumerated in Article IV [now Article III of the Genocide Convention] may be referred to the International Court of Justice by any of the Parties to the present Convention. […][209]

283. A few days later, Belgium and the United Kingdom submitted a joint amendment to the draft compromissory clause, which now read as follows:

> *Any* dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in article II and IV, shall be submitted to the International Court of Justice, *at the request of any* of the High Contracting Parties.[210]

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207 UNGA, Sixth Committee, Genocide: Draft Convention and Report of the Economic and Social Council, United Kingdom: Further amendments to the Draft Convention (E/794), Corrigendum, UN doc. A/C.6/236/Corr.1, 19 October 1948 (emphasis added), POM, Annex 46.

208 UNGA, Sixth Committee, Genocide: Draft Convention and Report of the Economic and Social Council, United Kingdom: Further amendments to the Draft Convention (E/794), UN doc. A/C.6/236, 16 October 1948, p. 2 draft Art. X (emphasis added), POM, Annex 45.

209 UNGA, Sixth Committee, Genocide: Draft Convention and Report of the Economic and Social Council, Belgium: Amendment to the United Kingdom Amendments to Articles V and VII (A/C.6/236 & 236 Corr.1), UN doc. A/C.6/252, 6 November 1948 (emphasis added), POM, Annex 47.

210 UNGA, Sixth Committee, Genocide – Draft Convention and Report of the Economic and Social Council, Belgium and United Kingdom: Joint Amendment to article X of the draft Convention (E/794), UN doc. A/C.6/258, 10 November 1948 (emphasis added), POM, Annex 48.

284. It is noteworthy that at this stage draft Article X (now Article IX of the Genocide Convention) still referred both to "*any*" form of dispute arising under the Convention, and to disputes being submitted to the Court at the request of "*any*" of the High Contracting Parties.

285. It was then during the debate on this proposal at the Sixth Committee that India proposed an amendment to this draft article by which the words "at the request of any of the High Contracting Parties"[211] at the end of draft Article X (now Article IX of the Genocide Convention) were substituted by the words "at the request of any of the parties to the dispute".[212]

286. In making this proposal, India stated that the joint Belgian/UK amendment referred to above:

> would make it possible for an unfriendly State to charge, on vague and unsubstantial allegations, that another State was responsible for genocide *within its territory*.[213]

287. During the debate in the Sixth Committee, India's proposal met with approval and the last part of draft Article X (now Article IX of the Genocide Convention) was accordingly changed to its current wording.[214]

288. This confirms that the drafters thought that a claim under draft Article X (now Article IX of the Genocide Convention) could only be brought before the Court by a State that was involved in a genuine dispute that might arise under the future Genocide Convention between a Contracting Party allegedly committing genocide and another Contracting Party specially affected by such alleged treaty violations. At the same time, it was, as just shown, undisputed that *not any* of the High Contracting Parties should be able to seise the Court.

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211 UNGA, Sixth Committee, Hundred and Third Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (12 November 1948), UN doc. A/C.6/SR.103, UN doc. A/C.6/SR.103, pp. 428 fn. 1, 437 Mr. Sundaram (India), POM, Annex 51.

212 *Ibid*., p. 428 fn 1.

213 *Ibid.*, p. 437 et seq. Mr. Sundaram (India) (emphasis added).

214 UNGA, Sixth Committee, Hundred and Fourth Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (13 November 1948), UN doc. A/C.6/SR.104, p. 447, POM, Annex 52.

289. It was in line with this approach that the Drafting Committee then deleted the word "any" at the very beginning of what was to become Article IX of the Genocide Convention,[215] which again confirms the intended limited scope of that provision. This further confirms that Article IX of the Genocide Convention, unlike for instance Article 30 of the Convention Against Torture, was not meant to provide for the right of each and every Contracting Party, be it specially affected by alleged treaty violations or not, to seise the Court with any such claim.

290. Shabtai Rosenne has captured the essence of this debate in the following words:

> The first [aspect] is the refusal of the negotiating States in the General Assembly to accept a compromissory clause which would have allowed, and possibly obliged, any State party to the Convention to institute proceedings, and the decision to limit the right to seise the Court to a State party to a dispute concerning the interpretation, application or fulfilment of the Convention. Without prejudice to Article 63 of the Statute of the International Court of Justice, this shuts out the slight opening that the unamended texts might have given to the idea of an *actio popularis* in relation to the *erga omnes* obligations of the Genocide Convention, initiated by a third State as an original party.[216]

291. This understanding of the Genocide Convention's compromissory clause is also mirrored in an unchallenged statement made by the United States representative in the Sixth Committee of the General Assembly immediately prior to the adoption of the text of the Genocide Convention. He confirmed that "responsibility" within the meaning of Article IX of the Genocide Convention had to be understood as "responsibility to another State for damages inflicted […] to the subjects of the plaintiff State",[217] or that at the least, in order for a Contracting Party to the Genocide

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215 UNGA, Sixth Committee, Genocide: Draft Convention and Report of the Economic and Social Council (E/794), Draft resolutions proposed by the Drafting Committee, UN doc. A/C.6/289, 23 November 1948, p. 3, POM, Annex 55.

216 S. Rosenne, "War Crimes and State Responsibility", *Israel Yearbook on Human Rights*, vol. 24 (1994), POM, Annex 27.

217 UNGA, Sixth Committee, Hundred and Thirty-Third Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (2 December 1948), UN doc. A/C.6/SR.133, p. 704 Mr. Gross (United States), POM, Annex 56.

Convention to be able to bring a case under its Article IX, the respective dispute must be one "concerning the interests of subjects of the plaintiff State".[218]

292. This interpretation of the Genocide Convention's compromissory clause by the United States reflects the drafting history of Article IX, and this interpretation, as just mentioned, met with no objection just before the text of the Convention was about to be adopted by the Sixth Committee of the General Assembly. Just as was the case as far as the interpretation of Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property was concerned, with which the Court had to deal in the case concerning *Jurisdictional Immunities of the State*,[219] no State questioned this interpretation. This interpretation was then also reflected in the recommendation of United States Acting Secretary of State James E. Webb, endorsed by United States President Harry S. Truman, in his message to the United States Senate seeking its advice and consent to enable the United States Government to ratify the Convention. That report of the Acting Secretary of State stated that it was the understanding of the United States Government that:

> article IX shall be understood in the traditional sense of responsibility to another state for *injuries sustained by nationals of the complaining state* in violation of principles of international law, and shall not be understood as meaning that *a state can be held liable in damages for injuries inflicted by it on its own nationals*.[220]

293. This position was then reiterated as late as 1985, when the Committee on Foreign Relations of the United States Senate, in a report which led to the ratification of the Genocide Convention by the United States, provided the following interpretation of Article IX of the Genocide Convention:

> The Court is also directed to hear disputes "relating to the responsibility of a State for genocide or for any other acts enumerated in Article III." This is understood in the traditional sense of *responsibility to another state for injuries sustained by*

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218 *Ibid.*

219 *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, p. 130, para. 69.

220 United States of America, Senate, Report of the Acting Secretary of State, an enclosure to the "Message from the President of the United States", in *The Genocide Convention: Hearings before a Subcommittee of the Committee on Foreign Relations*, Eighty-first Congress, Second Session, 23-25 January and 9 February 1950, p. 5, POM, Annex 130.

> *nationals of the complaining state* in violation of principles of international law.[221]

294. It is evident that this interpretation by the United States is not compatible with the very concept of non-injured Contracting Parties being able to bring an *actio popularis* as The Gambia attempts to do.

295. To conclude, as shown, the drafting history of the Genocide Convention confirms that there is no basis for the recognition of a pure *actio popularis* under that Convention. While every State to which an *erga omnes partes* obligation is owed may have an interest in compliance with that obligation, and may even be entitled to *invoke* the claimed breach in international relations, this is not sufficient when it comes to establishing *standing* to bring a claim before this Court. In fact, allowing a pure *actio popularis* under the Genocide Convention would cause an uncontrollable proliferation of disputes that might, rather than foster peace and security, destabilize international relations.

3. A comparison with the law of State responsibility confirms the exclusion of an actio popularis

296. It is in particular the debate within the ILC and the reactions of States to the work of the ILC concerning what is now Article 54 of the ILC Draft Articles on State Responsibility[222] that further confirms that, absent a specific treaty-based reference in a given treaty, third States not specially affected by an alleged treaty violation are not in a position to remedy such violation of international law, be it by taking counter-measures, be it by bringing a case before the Court under a compromissory clause contained in such treaty.

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221 Report of the Committee on Foreign Relations United State Senate together with Additional and Supplemental Views on The International Convention on the Prevention and Punishment of the Crime of Genocide, Executive O., 81st Congress, 1st session, July 18, 1985, p. 12, POM, Annex 131 (emphasis added).

222 POM, Annex 69.

297. While there is no need to go through the extensive work of the ILC on the issue of State responsibility in detail, it suffices to recall the fate of what was Article 54 in the 2000 version of the ILC's Draft Articles on State responsibility to confirm this.

298. As the Court is fully aware, the very broad draft Article 54 of the 2000 version of the ILC Draft Articles on State Responsibility had provided for a right of *all* States, *including non-injured States*, to take countermeasures in response to an alleged serious breach of an *erga omnes* obligation. This 2000 version had accordingly provided:

> **Article 54**
>
> **Countermeasures by States other than the injured State**
>
> […]
>
> 2. In the cases referred to in article 41, *any State may take countermeasures*, in accordance with the present Chapter in the interest of the beneficiaries of the obligation breached.[223]

299. However, this proposed right of non-injured States to take counter-measures in situations of serious violations of *erga omnes* obligations evoked, as the ILC itself openly acknowledged, strong opposition among many States.[224] The then Special Rapporteur even noted tellingly at that time that what was contained in draft Article 54 (2000) had "no basis in international law".[225] It is exactly for that reason that the current Article 54 of the ILC Draft Articles on State Responsibility, as adopted and of which the General Assembly later took note, does *not* recognize the right of non-injured States to take counter-measures even in a situation where serious violations of international law within the meaning of Article 40 of those Draft Articles are alleged to have been committed. As the Court is fully aware, Article 54 of the ILC Draft Articles on State Responsibility merely provides as follows:

> **Article 54**

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223 ILC, State responsibility, Draft articles provisionally adopted by the Drafting Committee on second reading, UN doc. A/CN.4/L.600, 21 August 2000, p. 15 (emphasis added), POM, Annex 64 (pages 12-14 of this document are at MG, vol. II, Annex 12).

224 ILC, *Report of the International Law Commission on the work of its fifty-second session (2000)*, UN doc. A/CN.4/513, 15 February 2001, paras. 175-177, 181, POM, Annex 65 (pages 15-17 of this document are at MG, vol. II, Annex 16).

225 ILC, Fourth report on State responsibility by Mr. James Crawford, Special Rapporteur, UN doc A/CN.4/517, 2 April 2001, para. 72, POM, Annex 66.

> **Measures taken by States other than an injured State**
>
> This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take *lawful measures* against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.[226]

300. The ILC's commentary accompanying the ILC Draft Articles on State Responsibility confirmed, if there was any need, that "the current state of international law on countermeasures taken in the general or collective interest is uncertain"[227] and that "State practice is sparse and involves a limited number of States"[228] only. Accordingly, the ILC concluded that:

> there appears to be no clearly recognized entitlement of States referred to in article 48 [of the ILC Draft Articles on State Responsibility] to take countermeasures in the collective interest.[229]

301. It follows that even if one were to accept *arguendo* the *erga omnes partes* character of the obligations underlying the Genocide Convention, this might mean that a not-specifically-affected, that is to say, non-injured, Contracting Party would have the right to demand cessation of violations and performance of obligations in the interests of the beneficiaries of the obligation breached, but they would not have the right to take countermeasures. Rather, it would remain the international community at large, through action taken within the framework of international organizations and in particular through the UN Security Council, that is called upon in such a scenario to take appropriate measures.

302. Yet, taking countermeasures in response to violations of obligations *erga omnes partes* on the one hand, and bringing a case before the Court on the other, are simply two ways of vindicating *erga omnes* obligations. Both enforcement mechanisms provided for in international law simply constitute two sides of the same coin. This has been

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226 POM, Annex 69.

227 *Ibid*., p. 139.

228 *Ibid*.

229 *Ibid.*

confirmed in the Court's jurisprudence specifically with regard to Article IX of the Genocide Convention.

> As the Court has put it, bringing a case under Article IX of the Genocide Convention is only one amongst other "particular method[s] of settling a dispute relating to the interpretation, application or fulfilment of the Convention".[230]

303. At the same time, the taking of countermeasures is another way, as Article 49 of the ILC Draft Articles on State Responsibility[231] confirms, to induce a State to comply with its obligations under international law, that is, in the case at hand, to comply with its obligations under the Genocide Convention, and by doing so also to settle a dispute that has arisen under the Genocide Convention.

304. It would accordingly be surprising, to say the least, to now find that the Genocide Convention entitles a non-injured Contracting Party to settle a dispute with respect to a claimed violation of that Convention that it claims has arisen with another Contracting Party by submitting that case to the Court, while not entitling that State at the same time to take countermeasures against the Contracting Party alleged to be in breach of the Convention.

305. Indeed, as indicated above, the ILC found, in the context of countermeasures, that the proposition that an *erga omnes* obligation could be vindicated by a non-injured, not-specially-affected State was not acceptable for the international community at large, and indeed had no basis in international law. That being the case, it is hardly conceivable that this unacceptable proposition could be put into effect by using another method of dispute settlement, given the Court's above-mentioned statement that bringing a case before the Court and taking countermeasures are simply two analogous methods of dispute settlement.

306. In fact, finding an *actio popularis* to be admissible even where no clear text-based indications to that effect may be found in the treaty in question would lead to contradictory results. Certainly, this would mean that a non-injured State could bring a case under Article IX of the Genocide Convention against another Contracting Party

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230 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 2006,* p. 32, para. 67.

231 POM, Annex 69.

to the Genocide Convention. Assuming that the Court then renders a judgment finding that the respondent State is in the process of committing violations of the Genocide Convention, and is continuing to do so, other non-injured States, which find themselves in the same position as the applicant State would still not be entitled to take countermeasures, according to the view of the ILC in its commentary to Article 54 of the ILC Draft Articles on State Responsibility that there does not exist an entitlement of such States to take countermeasures in the collective interest.

307. Conversely, it would have far-reaching effects if the Court were to find that non-injured States have standing to bring claims of alleged treaty violations before the Court even where the relevant treaty contains neither express provisions nor clear text-based indications allowing for this. It would follow that all such non-injured States could then also take countermeasures regardless of whether the relevant treaty contains a compromissory clause or not, and regardless of whether the State taking such countermeasures has itself made a reservation to the treaty excluding the effect of the compromissory clause.

308. Accordingly, and in line with Article 31, paragraph 2 *(c)*, of the Vienna Convention on the Law of Treaties,[232] which requires any treaty interpretation to take place within the framework of other relevant rules of international law, a treaty such as the Genocide Convention lacking any clear indication to that effect, cannot be said to provide for the possibility of an *actio popularis* to be brought by a non-injured State not possessing any link whatsoever to the relevant factual situation.

309. On the whole therefore the 1948 Genocide Convention cannot be said to have provided for the right of non-injured Contracting Parties to bring cases before the Court under its Article IX. Yet, even if the Court were to find otherwise as a matter of principle, the specific circumstances of the case now before the Court would still preclude the Court from finding that The Gambia has standing to bring the case under Article IX.

232 POM, Annex 4.

D. In any event, The Gambia lacks standing since any standing of non-injured Contracting Parties is subsidiary to that of specially-affected Contracting Parties

310. In any event, even if it were now to be assumed, *arguendo*, that Contracting Parties that are not specially affected may have standing to submit a dispute to the Court under Article IX of the Genocide Convention as a matter of principle, such standing would still be subsidiary to, and dependent on, the ability of specially-affected States to bring a case under the same compromissory clause. The effect of this in the specific circumstances of the case now before the Court is that The Gambia lacks standing to bring this case against Myanmar under Article IX of the Genocide Convention.

311. The question of standing of non-injured States cannot be seen in clinical isolation. Rather, it has to be seen in connection with both the conduct and sovereign decisions of States specially affected by the alleged violations of international law, as well as in the context of the limitations on the Court's jurisdiction, which in this case is exclusively based on Article IX of the Genocide Convention.

312. In fact, the most natural State to have brought the present case is Bangladesh. Bangladesh is not only one of the neighbouring countries to Myanmar, but is also the country where a significant number of the displaced persons, said to be victims of the alleged genocide, are currently living.

313. In fact, statements and media reports referred to above in relation to Myanmar's first preliminary objection indicate that Bangladesh has been closely involved in the initiative to bring this case before the Court.[233] Indeed, the FFM (Independent International Fact-Finding Mission on Myanmar) stated in its 2019 report that it:

> welcome[d] the efforts of States, in particular *Bangladesh* and the Gambia […] to […] pursue a case against Myanmar before the International Court of Justice under the Convention on the Prevention and Punishment of the Crime of Genocide.[234]

314. According to press reports in Bangladesh, the Government of that country had already rejected such idea on political grounds, because "Bangladesh wanted to avoid a direct

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233 See in particular paragraphs 69, 70, 72, 81, 82, 83, 136, 137 and 151 below.

234 *Report of the independent international fact-finding mission on Myanmar*, UN doc. A/HRC/42/50, 8 August 2019, para. 107 (emphasis added), MG, vol. III, Annex 47.

confrontation with Myanmar by filing the case"[235] and given that both Governments "also signed some bilateral instruments to repatriate the displaced people".[236] Diplomats of Bangladesh further observed that Bangladesh has done the right thing by not itself filing the case.[237]

315. Bangladesh acceded to the Genocide Convention on 5 October 1998. Even more important for purposes of the Court's jurisdiction, however, is the fact that Bangladesh, when it acceded to the Genocide Convention, entered a reservation as to Article IX of the Convention. This reservation provides that in case of any dispute arising under Article IX, the consent of all parties to the dispute will be required in each case.[238]

316. This means, given that the Court has repeatedly upheld the validity of reservations to Article IX,[239] that the reciprocal application of Bangladesh's reservation would bar Bangladesh from bringing a case under Article IX of the Genocide Convention against Myanmar unless Myanmar were to consent to such exercise of jurisdiction by the Court.

317. The same also holds true for all other neighbouring countries of Myanmar with the exception of Laos. Each of Myanmar's other neighbours is either not a Contracting Party to the Genocide Convention at all (Thailand), or has entered a reservation to Article IX to the effect that the submission of any dispute under that provision to the Court requires the consent of all parties to the dispute (India, Bangladesh), or has entered a reservation to Article IX to the effect that the compromissory clause does not apply to it at all (China). Therefore, none of Myanmar's other neighbouring States (except Laos) could have brought the matter to the Court's attention under Article IX of the Genocide Convention either.

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235 Dhaka Tribune, "Why didn't Bangladesh lodge the case with ICJ?", 13 December 2019, POM, Annex 160.

236 *Ibid*.

237 *Ibid*.

238 The reservation is set out in MG, vol. II, Annex 2, p. 3, column 2.

239 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 2006*, p. 33, para. 69; *Legality of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 924, paras. 24-25; *Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 772, paras. 32-33.

318. The fact that it was The Gambia as a non-injured State that brought the case against Myanmar under Article IX of the Genocide Convention thus has to be seen in light of both the political unwillingness and inability of Bangladesh to bring a case against Myanmar under the Genocide Convention on its own given its Article IX reservation. In other words, in bringing this case, The Gambia is trying to circumvent the otherwise existing limitations on the Court's jurisdiction under Article IX to the Genocide Convention. This patent attempt to circumvent the reciprocal effects of reservations, and to undermine the fundamental principle of consensual jurisdiction, has to be further seen in the context of the general law of State responsibility. In its work on State responsibility, the ILC in fact confirmed that "the implementation of State responsibility is *in the first place* an entitlement of the 'injured State'".[240]

319. The ILC's former Special Rapporteur on the matter accordingly stated in unequivocal terms that even if many States, or indeed all States, share a certain legal concern, when it comes to *reactions* to violations of *erga omnes* or *erga omnes partes* norms, the priority of specially-affected States ought to be recognized.[241]

320. In fact, the ILC itself considered that providing for the right of non-injured States to invoke the responsibility of the responsible State merely constituted a progressive development of international law rather than a codification of the *lex lata*.[242] Moreover, this progressive development, provided for in Article 48, paragraph 2, of the ILC Draft Articles on State Responsibility,[243] was only intended to ensure that where there is no State that is individually injured, some third entity would be able to invoke the responsibility of the violating State in the interest of the beneficiaries of the obligation breached.

321. The ILC wanted thereby to strike a careful balance between the collective interest in upholding community interests on the one hand, and the countervailing interest in not

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240 ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), p. 117 (emphasis added), MG, vol. II, Annex 15.

241 J. Crawford, *State Responsibility: The General Part* (2013), p. 367, POM, Annex 19.

242 *Cf.* ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), p. 127, MG, vol. II, Annex 15.

243 *Ibid.*

encouraging the proliferation of disputes on the other.[244] However, in cases like the present, in which there is a specially-affected State, *i.e.*, Bangladesh, no such balance needs to be achieved and no recourse to Article 48 of the ILC Draft Articles on State Responsibility is necessary, since in such a case the specially-affected State – here Bangladesh – not only has the right to invoke the responsibility of the State that is allegedly in breach of the Convention – here Myanmar – but is also entitled to take appropriate measures to bring to an end those alleged violations of international law.

322. In such a situation it is neither necessary, nor indeed desirable, that each and every one of the other States parties to the relevant treaty should then also be able not only to invoke such responsibility, but also to take steps to vindicate that right. In fact, such steps by third, non-injured States could well be contrary to the position taken by the specially-affected State, and might prove to be counterproductive to the solution of the underlying dispute that exists primarily, if not exclusively, between the injured State party and the State party allegedly violating the rights of this injured State party.

323. Granting non-injured States the freedom to react as they think fit would ignore the overriding right of the specially-affected State to decide whether the violations of its rights should be invoked at all, and if so when, and which steps should ultimately be taken to vindicate that right as would best serve *its* interests. Such a right of non-injured States to override the discretion of the injured State in relation to the matter might easily lead to misuse.

324. The very reluctance, if not clear opposition, of the vast majority of the international community of States *vis-à-vis* the broad 2000 version of draft Article 54 of the ILC Draft Articles on State Responsibility confirms that States were acutely aware of such a danger and that they therefore did not want such a scenario to turn into a rule of customary international law.

325. More specifically, as far as the Genocide Convention with its current 152 Contracting Parties is concerned, accepting such a possibility would mean that each of those 136 Contracting Parties that has not entered any reservation to its Article IX could bring a

[244] ILC, Fourth report on State responsibility by Mr. James Crawford, Special Rapporteur, UN doc A/CN.4/517, 2 April 2001, p. 11, para. 42, POM, Annex 66; J. Crawford, *State Responsibility: The General Part* (2013), p. 367, POM, Annex 19.

case against any of the other 135 Contracting Parties that have not entered such a reservation either. They could do so even where the injured State itself has either indicated that it does not believe violations of the Genocide Convention are taking place, or wishes to settle the dispute in some other manner such as by negotiations. They could even do so where the injured State has itself deliberately decided not to seek recourse to the Court, either because it considers that this would not be the appropriate course even though it could do so, or because it decided to enter a reservation to Article IX when it became a Contracting Party to the Genocide Convention. They could do so even after the injured State has reached an amicable settlement that brings an end to the real dispute, with the result that no dispute arising under the Genocide Convention could ever be settled unless every Contracting Party to the Convention gave agreement to such settlement.

326. This recognition that it is the primary right of an injured Contracting Party to the Genocide Convention to decide for itself if, and how and when, to invoke the responsibility of another State, and that non-injured Contracting Parties have merely a subsidiary right in this respect, is also reflected in Article 45 of the ILC Draft Articles on State Responsibility, which reads as follows:

> **Article 45**
>
> **Loss of the right to invoke responsibility**
>
> The responsibility of a State may not be invoked if:
>
> (a) the injured State has validly waived the claim;
>
> (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.[245]

327. It should be noted at this juncture that proposals[246] were made during the drafting of what was to become Article 45, suggesting that the provision should spell out that an injured State could not waive its claims in the case of an alleged breach of an *erga omnes* obligation, or that such a waiver would not preclude other States from invoking

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245 POM, Annex 69.

246 ILC, *Yearbook of the International Law Commission*, 2001, vol. II, Part One, p. 78 (Netherlands and Republic of Korea), POM, Annex 68; ILC, *Yearbook of the International Law Commission*, 2001, vol. I, p. 115 (Mr. Economides), POM, Annex 67.

the breach of an *erga omnes* obligation. However, none of these proposals garnered sufficient support, and accordingly none of those were included in this provision.

328. While it is true that the ILC's commentary to Article 45 mentions that other States should remain able to "express" their interest if a claim concerning a breach of an *erga omnes* obligation has been waived by the injured State, such "expression" cannot include a formal invocation of that interest in terms of Article 48 of the ILC Draft Articles on State Responsibility, as such a result would clearly contradict Article 48, paragraph 3. In fact, Article 48, paragraph 3,[247] confirms that any invocation of responsibility under Article 48, paragraph 1, is, in the case of an alleged violation of an *erga omnes* or *erga omnes partes* obligation, subject to the requirements of Article 45. Paragraph 3 reads:

> **Article 48**
>
> **Invocation of responsibility**
>
> […]
>
> 3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

329. This confirms that indeed even obligations *erga omnes partes* or *erga omnes* may be validly waived by an injured State, with the ensuing effect that third, non-injured States are then barred from invoking that violation, and even more so are barred from taking steps to vindicate such alleged violations.

330. This view was also clearly expressed by the United Kingdom when commenting on what is now Article 48 of the ILC Draft Articles on State Responsibility:

> If there is an injured State, it can make the claim itself. If it chooses not to claim, the position should be treated as analogous to a waiver under draft article 46 [now Article 45 of the ILC Articles on State Responsibility] and, just as the injured State loses thereby the right to invoke the responsibility of the claim, so should the possibility of the claim being made by others on its behalf be extinguished.[248]

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247 MG, vol. II, Annex 15.

248 ILC, *Yearbook of the International Law Commission*, 2001, vol. II, Part One, p. 81, POM, Annex 68.

331. Myanmar submits that the same must hold true *a fortiori* where the specially-affected State has, by entering a reservation to Article IX of the Genocide Convention, waived its right to *vindicate* the responsibility of the alleged wrongdoing State by bringing the case before the Court.

332. As has been mentioned, Bangladesh as the specially-affected State, unlike Myanmar, made the sovereign decision to enter a reservation to Article IX of the Genocide Convention when it acceded to the Genocide Convention, which Myanmar respects. It is also worth noting that The Gambia has also not objected to Bangladesh's reservation. Bangladesh is thus precluded from invoking the responsibility of Myanmar under the Genocide Convention before the Court in the absence of Myanmar's express consent.

333. Put another way, and to paraphrase Article 45 of the ILC Draft Articles on State Responsibility, Bangladesh has thereby waived the right to invoke Article IX of the Genocide Convention vis-à-vis all other Contracting Parties to the Genocide Convention in relation to violations of that treaty which, as in the case at hand, specially affect Bangladesh, and is barred from doing so without the consent of the State allegedly in breach of the Convention. It follows that other, non-injured Contracting Parties to the Genocide Convention are similarly so barred, even assuming that they would otherwise have both the right to invoke the alleged violations of the Genocide Convention and also standing to do so, *quod non*.

334. This conclusion creates no *lacuna* in the enforcement of the obligations under the Genocide Convention.

335. First of all, Bangladesh could have decided to withdraw its reservation to Article IX of the Genocide Convention when the alleged genocidal acts unfolded in Myanmar and started to affect it. In not choosing this option, Bangladesh deliberately decided that its own interest never to have proceedings brought against it under Article IX of the Genocide Convention without its consent was more important than its potential ability to invoke Myanmar's alleged responsibility under the Genocide Convention before the Court.

336. Additionally, even if Bangladesh did not want to take this step, there would still have been possibilities for it to react to Myanmar's alleged responsibility under the

Genocide Convention other than by bringing proceedings before the Court. Amongst other possibilities, Bangladesh could have resorted to countermeasures, or could have formally seised the political organs of the United Nations with the matter. In that regard it must be noted that both the General Assembly and the Security Council have in the past taken action when faced with alleged violations of the Genocide Convention, including by taking enforcement measures under Chapter VII of the UN Charter, such as economic sanctions, the creation of ad hoc criminal tribunals or referrals to the International Criminal Court. It stands therefore to reason that such action could also have been requested by Bangladesh, possibly leading to similar measures if indeed genocide were to be found to be taking place in Myanmar.

337. Furthermore, if the Court were to embrace the possibility of an *actio popularis* under Article IX of the Genocide Convention, such a development might serve as a disincentive for States to become parties to the Genocide Convention or similar treaties, or at the very least lead to even more States making reservations to Article IX of the Genocide Convention and to compromissory clauses in similar treaties when becoming parties to them.

338. As a matter of fact, powerful States would in particular be encouraged, even more so than today, to make reservations to compromissory clauses on becoming parties to multilateral international conventions, should they decide to become parties at all. In doing so they would thus be shielded against cases being brought against them before the Court under such treaties on the basis of the relevant compromissory clause. At the same time, those powerful States could encourage or provide incentives to other less powerful States depending politically or economically on them, who have not entered such reservations, to bring cases before the Court *de facto* on their behalf.

339. Hence, a powerful State (State A) that has made a reservation to Article IX of the Genocide Convention would be protected against the possibility of having proceedings brought against it before this Court under Article IX of the Genocide Convention, in the event that State A was ever alleged to be in breach of that Convention. This would be so, even if the allegation was made by a State (State B) that was specially affected by the alleged breach, and even if State B itself had made no reservation to Article IX. However, if State A was ever specially affected by an alleged breach of the Genocide Convention by State B, then State A, notwithstanding its own reservation, could still

enlist the assistance of a non-affected Contracting Party that has made no such reservation (State C) to bring proceedings before the Court under Article IX instead of State A. The result would be that no proceedings could be brought before the Court against State A in respect of an alleged breach of the Genocide Convention that specially affects State B, but State A could in practice still achieve the bringing of proceedings against State B in respect of an alleged breach that specially affects State A. The would be contrary to the fundamental principle of reciprocity in international law, in circumstances where State B has become a party to the Genocide Convention in good faith without any reservation to Article IX.

340. Even more importantly, such a step could seriously endanger the equality of the parties in proceedings brought before the Court under Article IX of the Genocide Convention. As the Court's previous experience confirms, cases brought before the Court pursuant to Article IX of the Genocide Convention not infrequently deal with situations of armed conflict and the ensuing cross-boundary movement of persons. This is particularly apparent from the *Bosnian Genocide* case and the *Croatia Genocide* case, which serve as telling examples of the possible wide-reaching effects on the equality of parties of the approach underlying The Gambia's application.

341. If one were to accept *arguendo* for a moment The Gambia's line of argument, and if one were to further assume that Croatia had not been bound by Article IX of the Genocide Convention (either because it was not a party to the Genocide Convention at all, or due to an Article IX reservation) each and every one of the other 135 Contracting Parties to the Genocide Convention not maintaining an Article IX reservation, including The Gambia, could still have brought a case against Serbia for the alleged acts of genocide purportedly committed on Croatian territory for which Serbia was allegedly responsible. At the same time, however, given that Croatia was either not a party to the Genocide Convention or due to the presumed Croatian reservation to Article IX, Serbia would not have been able to bring a counter-claim against Croatia, nor could Serbia have brought a separate distinct case against Croatia for the alleged genocidal acts committed against members of the Serbian ethnic minority living in Croatia during their forced displacement from Croatia. In this hypothetical example, Serbia would have been barred from bringing such a claim against Croatia although those very acts were committed in the close vicinity, and as

part of the very same armed conflict taking place on the territory of Croatia, during which Serbia had allegedly committed genocidal acts.

342. Put another way, The Gambia's approach would mean that the Court might only be able to deal with alleged genocidal acts committed by one side of the same conflict, while alleged genocidal acts of the same nature taking place at the same time and possibly even at the same location would necessarily be outside the Court's purview.

343. This example confirms that the principle underlying Article 45 of the ILC Draft Articles on State Responsibility, barring non-injured States from bringing a claim against a State allegedly violating an *erga omnes partes* rule when a specially-affected State has waived such right, also applies where the specially-affected State has waived its procedural entitlement to bring a case before the Court by entering a reservation to a compromissory clause, as Bangladesh did when it acceded to the Genocide Convention.

344. Finally, accepting the possibility of an *actio popularis* is also not compatible with the principles underlying Articles 59, 60 and 61 of the Court's Statute. Apart from anything else, any judgment rendered in a case brought under Article IX of the Genocide Convention in the form of an *actio popularis* would only bind the non-injured applicant and the respondent State, *i.e.* in the case at hand, The Gambia and Myanmar, and would thus also only acquire the force of *res judicata* between those two States by virtue of Article 60 of the Statute of the Court.

345. Thus, in the present case, if the Court were to find that it has jurisdiction and that The Gambia, despite being a non-injured Contracting Party, has standing *(quod non*), and if the Court were then to decide the case *in favour of Myanmar*, then any of the other 135 remaining non-injured Contracting Parties to the Genocide Convention who have not entered an Article IX reservation would not have to accept the Court's rejection of The Gambia's claims as the judgment would not be binding on them under Article 59 of the Court's Statute. Any other such Contracting Party, not bound by the judgment, including States who have been actively involved in the bringing of the present proceedings, and including those who have actually financed the present proceedings, could thus thereafter bring *mutatis mutandis* the same case before the Court once again and ask the Court to decide the matter again. They could do so even if they relied on

exactly the same evidence as The Gambia. Alternatively, in the new proceedings they might seek to introduce additional evidence, without being limited by the requirements of Article 61 of the Court's Statute.

346. In other words, if The Gambia in such a scenario was unsuccessful in these proceedings, if could under Article 61 of the Statute request a revision of the original judgment on the basis of additional evidence only if such additional evidence had previously been unknown to it, and if its ignorance of that evidence had not been due to negligence. However, if an *actio popularis* was possible, any of the other non-injured Contracting Parties would not be limited in the same manner when bringing a new case against Myanmar. They could thus easily circumvent the carefully tailored limitations inherent in Article 61 of the Statute.

347. Indeed, if the second Contracting Party was then unsuccessful in the second proceedings brought against Myanmar, a third Contracting Party could then bring a third set of proceedings, and so on, until all 135 of the States who are Contracting Parties to the Genocide Convention with no reservation to Article IX had brought such a case, or until the Court finally decided one of the cases in the applicant State's favour. In other words, Myanmar would be at risk not only of double jeopardy, but multiple jeopardy.

348. The Gambia should therefore not be allowed to undermine the general principle of the law of State responsibility according to which it is first and foremost the specially-affected State that has *locus standi* to invoke the responsibility of another State, or to circumvent Bangladesh's Article IX reservation. By *de facto* acting as agent of a group of States, including Bangladesh, which had already decided months before Myanmar had even been made aware of The Gambia's claim to bring the current case, The Gambia has therefore unravelled the delicate balance of which the former ILC Special Rapporteur on State responsibility has spoken, namely the balance between upholding community interests and preventing a proliferation of disputes.

349. For the reasons above, The Gambia does not have standing to bring this case before the Court under Article IX of the Genocide Convention, either because the Genocide Convention does not enshrine the concept of an *actio popularis* at all, or because in the specific circumstances of the case at hand The Gambia is barred from so doing

because Bangladesh, as the State specially affected by the alleged violations of the Genocide Convention, has entered a reservation to Article IX of the Convention.

350. Aside from this, even if one were now to assume *arguendo* that the position were otherwise, *quod non*, The Gambia's right to seise the Court with its case would, as will now be shown in Myanmar's third preliminary objection, nevertheless be barred by virtue of Myanmar's reservation to Article VIII of the Genocide Convention.

III. THIRD PRELIMINARY OBJECTION: The application is inadmissible, as The Gambia cannot validly seise the Court due to Myanmar's reservation to Article VIII of the Genocide Convention

A. Introduction

351. In the arguments above in relation to Myanmar's second preliminary objection, it has been demonstrated that The Gambia lacks standing to bring this case against Myanmar for alleged violations of the Genocide Convention given that The Gambia is a non-injured State that is not specially affected by the alleged breach, and, alternatively, given that Bangladesh, which is the specially-affected State, would be barred from bringing this case due to Bangladesh's own reservation to Article IX of the Genocide Convention.

352. In this third preliminary objection, Myanmar will now demonstrate that even if the Court were to find against Myanmar in relation to the second preliminary objection, *quod non*, The Gambia would still be precluded from bringing this case given the reservation that Myanmar made to Article VIII of the Genocide Convention when it acceded to that Convention. This is due to the fact that a valid seisin of the Court is a mandatory precondition before a case may be brought before the Court under Article IX of the Genocide Convention (see paragraphs 365 to 369 below). This seisin of the Court is governed, as confirmed by its wording (see paragraphs 370 to 401 below), its drafting history (see paragraphs 402 to 435 below), as well by its very object and purpose (see paragraphs 436 to 442 below) by Article VIII of the Convention. It thus follows that Myanmar, by entering a reservation to Article VIII, while accepting Article IX of the Convention as such, has precluded not specially-affected Contracting Parties to the Genocide Convention from bringing a case against Myanmar under the Convention's compromissory clause (see paragraphs 445 to 473 below). This reservation to Article VIII is permissible and valid (see paragraphs 445 to 473 below).

353. Article VIII of the Genocide Convention provides in French as follows:

> Toute Partie contractante peut *saisir les organes compétents de l'Organisation des Nations Unies* afin que ceux-ci prennent, conformément à la Charte des Nations Unies, les mesures qu'ils jugent appropriées pour la prévention et la répression des actes

> de génocide ou de l'un quelconque des autres actes énumérés à l'article III.[249]

354. In English it states that:

> 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.[250]

355. When Myanmar (then Burma) acceded to the Genocide Convention on 14 March 1956, it submitted a reservation to Article VIII in the following terms:

> With reference to article VIII, the Union of Burma makes the reservation that the said article shall not apply to the Union.[251]

356. It is noted at the outset that this third preliminary objection, based on Myanmar's reservation to Article VIII of the Genocide Convention, is advanced in the alternative to the second preliminary objection. That is to say, the Court would not need in the case at hand to decide whether or not as a matter of principle non-injured Contracting Parties such as The Gambia have standing to bring cases under Article IX of the Genocide Convention if it were to uphold this third preliminary objection based on Myanmar's valid reservation to Article VIII of the Convention. Conversely, it would not need to consider this third preliminary objection if it upheld the second preliminary objection.

357. In the event that this third preliminary objection does arise for consideration, Myanmar demonstrates in the arguments below that The Gambia, as a Contracting State to the Genocide Convention that is *not injured* in relation to the breaches of that Convention alleged in its Application, is barred from seising the Court by virtue of Myanmar's reservation to Article VIII.

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249 Emphasis added.

250 Emphasis added.

251 Ratification with Reservation by Burma, *Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide*, C.N.25.1956. of 29 March 1956, MG, vol. II, Annex 5.

358. The arguments below will thus first analyse the scope and relevance of Article VIII of the Genocide Convention, and then, secondly, turn to the legal effect of Myanmar's reservation to that article.

359. The Genocide Convention contains two distinct, yet interrelated, provisions addressing the relationship between the Contracting Parties to the Convention on the one hand, and the organs of the United Nations on the other, namely its Articles VIII and IX.

360. As will be shown, while Article VIII of the Genocide Convention provides for the seisin of organs of the United Nations (including the Court) to prevent and suppress acts of genocide, Article IX of the Convention then provides for the ensuing specific question of the Court's exercise of jurisdiction once it has been validly seised.

B. The Court's position on Article VIII of the Genocide Convention

361. It is noted at the outset that The Gambia is mistaken when it claims that the Court, in its order of 8 April 1993 in the *Bosnian Genocide* case, has already dismissed Article VIII of the Genocide Convention as being relevant to the seisin of the Court, and has already held that the Court's seisin is only governed by Article IX.[252] On the contrary, the Court in that order left it deliberately open whether or not Article VIII of the Genocide Convention is applicable to the Court as one of the "competent organs of the United Nations".[253] Furthermore, in that order the Court only had to deal with, and indeed only dealt with, the sole question whether Article VIII of the Genocide Convention confers on the Court any functions or competence *additional* to those provided for in its Statute.[254]

362. It is also noted that in the Provisional Measures Order in the current case the Court considered that:

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252 MG, p. 31, para. 2.5.

253 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3, p. 23, para. 47.

254 *Ibid.* The Court said in this decision that "… the Court considers Article VIII, *even assuming it to be applicable to the Court as one of the 'competent organs of the United Nations'*, appears not to confer on it any functions or competence additional to those provided for in its Statute …" (emphasis added).

> the terms "competent organs of the United Nations" under Article VIII are broad and may be interpreted as encompassing the Court within their scope of application […][255]

363. It is true that the Court then went on to express the provisional view that it might be only Article IX of the Convention which is relevant to the seisin of the Court in the present case.[256] However, to state the obvious, the Court expressed that view on a *prima facie* basis only, and without prejudging the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application,[257] and indeed without having had the benefit of full written and oral arguments submitted by the parties given the time constraints inherent in proceedings on provisional measures.

364. It is against this background that the interrelationship between Articles VIII and IX of the Genocide Convention, as well as their respective scope, fall to be addressed.

C. Scope of Article VIII of the Genocide Convention

1. Valid seisin of the Court as a necessary precondition for the Court to exercise its jurisdiction under Article IX of the Genocide Convention

365. As the Court confirmed early on in its jurisprudence, the concept of "seisin of the Court" is distinct from the notion of the Court's jurisdiction *ratione materiae*.[258]

366. This distinction between jurisdiction *ratione materiae* and seisin was then even more clearly brought to the fore in the Court's judgment in the *Qatar/Bahrain* case. There, the Court confirmed that:

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255 Provisional Measures Order, para. 35.

256 *Ibid.*

257 *Ibid*., para. 85.

258 See already, *Nottebohm case (Liechtenstein* v. *Guatemala), Preliminary Objection, I.C.J. Reports 1953*, p. 111, p. 122; M. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, vol. III (2016), p. 1182, POM, Annex 29.

> 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 […][259]

or as paraphrased by Judge Shahabuddeen:

> the correct method of seisin is a condition-precedent to the exercise of jurisdiction.[260]

367. Put another way, it is only once the Court is capable of being, and has been, validly seised of a case that the Court may then exercise its contentious jurisdiction.[261] Seisin (and its preconditions) thus constitutes, to use the Court's own words, "a procedural step independent of the basis of jurisdiction invoked"[262] by the applicant.

368. Furthermore, the Court has also confirmed that:

> parties to treaties […] are free to make their consent to the seisin of the Court, and hence the Court's jurisdiction, subject to whatever pre-conditions, consistent with the Statute, as may be agreed between them […][263].

369. It is exactly that situation that the Court is facing in the case at hand. While Article VIII of the Genocide Convention generally provides for the possibility for any Contracting Party to seise the Court in order for the Court to take action for the prevention and suppression of acts of genocide, Myanmar has through its reservation to that provision excluded the ability of non-injured States to so seise the Court.

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259 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, p. 23 para. 43.

260 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, Dissenting Opinion of Judge Shahabuddeen, p. 60.

261 M. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, vol. III (2016), p. 1182, POM, Annex 29.

262 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 23, para. 43; *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment of 18 December 2020*, para. 117.

263 *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the case concerning the Continental Shelf (Tunis* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 216, para. 43.

2. Article VIII of the Genocide Convention governs the seisin of the Court

a. Wording of Article VIII of the Genocide Convention

370. It goes without saying that the interpretation of a given treaty norm, in this case the interpretation of Article VIII of the Genocide Convention, must first and foremost be based upon its actual wording.

371. As already previously mentioned, Article VIII of the Genocide Convention provides that:

> Toute Partie contractante peut *saisir les organes compétents de l'Organisation des Nations Unies* afin que ceux-ci prennent, conformément à la Charte des Nations Unies, les mesures qu'ils jugent appropriées pour la prévention et la répression des actes de génocide ou de l'un quelconque des autres actes énumérés à l'article III.[264]

372. In English it stipulates that:

> 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.[265]

373. Article VIII therefore regulates, subject to any valid reservations thereto, the right of Contracting Parties to the Genocide Convention:

(a) to seise ("*saisir*")

(b) all competent organs of the United Nations

(c) to take action which is within their competences under the Charter of the United Nations

(d) in order to prevent or suppress violations of the Genocide Convention.

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264 Emphasis added.

265 Emphasis added.

374. It will thus be now shown that the Court figures among the "competent organs" of the United Nations within the meaning of Article VIII of the Genocide Convention. Accordingly, Article VIII of the Genocide Convention provides for the possibility for a Contracting State, albeit only as a matter of principle and subject to any valid reservation made by a Contracting Party to that provision, to seise the Court in order for it to take appropriate steps under the Court's Statute for the prevention and suppression of acts of genocide.

375. It is trite that the Court, unlike its predecessor, has been established, as is confirmed in Article 7 of the UN Charter and reiterated in Article 1 of the Court's Statute in unequivocal terms, as one of the organs of the United Nations. As Article 1 of the Statute puts it:

> [t]he International Court of Justice [was] established by the Charter of the United Nations as the principal judicial *organ of the United Nations* […][266]

376. Significantly, the text of Article VIII of the Genocide Convention does not contain any kind of qualifier that would limit its scope to the *political* organs, or to only some *specific* UN organs. Article VIII of the Genocide Convention simply refers to "*the* competent organs" of the United Nations. If given its ordinary meaning, the expression "competent organs" would necessarily cover *all* relevant UN organs in a comprehensive manner. Nothing in the text of the Genocide Convention provides that this expression is to be given a more limited meaning. There is therefore nothing to exclude any category of UN organs from the scope of Article VIII.[267]

377. This alone creates at the very least a presumption that the text of Article VIII, which does not exclusively refer to the *political* organs of the United Nations, and even less to only *some* of its political organs such as the Security Council, was meant to encompass all of its organs, including its principal judicial organ, namely the Court. Otherwise, the actual text of Article VIII of the Genocide Convention would have either specifically identified those UN organs it had exclusively in mind, or would

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266 Emphasis added.

267 See, *mutatis mutandis*, *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*, p. 585, para. 61.

have specifically excluded others. Instead, the drafters opted to use the all-encompassing formulation "the competent organs of the United Nations".

378. This conclusion that the expression "competent organs of the United Nations" in Article VIII is all-encompassing and thus also includes the Court, is further confirmed by the fact that, as the Court has confirmed in its own well-established jurisprudence, there exists no hierarchy between the Court on the one hand, and the political organs of the United Nations on the other.[268] Accordingly, an interpretation of Article VIII of the Genocide Convention according to which that provision regulates simultaneously both the seisin of the Court, as well as that of the political organs of the United Nations, does not run counter to the Court's status as the principal judicial organ of the United Nations. Furthermore, and as is again confirmed by the Court's jurisprudence, the fact that this interpretation of Article VIII of the Genocide Convention thereby leaves open the possibility of a *concurrent* seisin of both the Court and one or more of its political organs is not a reason militating against the acceptance of the correctness of this interpretation. The Court has said in respect of its relationship with the Security Council that there is not

> anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council.[269]

379. Indeed, there have been instances in the past where the main political organs of the United Nations have been seised with situations where simultaneously allegations of acts of genocide were pending before the Court under the Genocide Convention.[270]

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268 *Cf. Competence of the General Assembly for the admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, 8; V. Gowlland-Debbas and M. Forteau, "Article 7, UN Charter", in A. Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice: A Commentary* (third edn., 2019), Art. 7 UN Charter, MN. 22, POM, Annex 24.

269 *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 21 para. 40.

270 For instance, both the Security Council and the General Assembly dealt with the situation in Bosnia and Herzegovina while the case between Bosnia and Herzegovina and the Federal Republic of Yugoslavia—later Serbia and Montenegro—was pending before the Court: UNSC, resolution 819 (1993), UN doc. S/RES/819 (1993), 16 April 1993, POM, Annex 58; UNSC, resolution 838 (1993), UN doc. S/RES/838 (1993), 10 June 1993, POM, Annex 59; UNSC, resolution 1004 (1995), UN doc. S/RES/1004 (1995), 22 July 1995, POM, Annex 61; UNSG, Summary Statement by the Secretary-General on matters of which the Security Council is seized and on the stage reached in their consideration, UN doc. S/1998/44/Add.28, 24 July 1998, p. 4, POM, Annex 63; UNSG, Summary Statement by the Secretary-General on matters of which the Security Council is seized and on the stage reached in their consideration, UN doc. S/2002/30/Add.49, 20 December 2002, p. 3, POM, Annex 70; UNGA, resolution 48/88, The situation in Bosnia and Herzegovina, UN doc. A/RES/48/88, 20 December 1993, POM, Annex 60; UNGA, resolution

380. The conclusion that Article VIII of the Genocide Convention regulates not only recourse to the *political* organs of the United Nations, but also the seisin of the Court, is further confirmed by the fact that Article VIII uses the notion of "competent organs". Notably, the Court's Statute itself uses the term "competence"/ "compétence"/"competencia" in the English, French and Spanish versions of the heading of Chapter 2, as well as in the French and Spanish versions of Article 36, in order to describe the extent of the Court's jurisdiction.

381. Additionally, the expression "take […] action" (in French, "prennent […] les mesures") in Article VIII of the Genocide Convention must be broadly interpreted, to include measures to be taken by the Court in the exercise of its contentious jurisdiction. This is for one because a narrow interpretation of the notion of "action" would, contrary to the Court's own jurisprudence, limit it to "action" to be undertaken by the Security Council within the framework of Chapter VII of the UN Charter.[271]

382. What is more is that the French version of the Court's Statute on at least two occasions, namely in Articles 41 and 49, itself uses exactly the same terminology of "mesures" to be taken by the Court. Hence, the provision in Article VIII of the Genocide Convention that competent UN organs may "pren[dre] […] les mesures" is again in line with the layout of the Court's Statute. The provision that competent organs may "take […] action" found in Article VIII of the Genocide Convention accordingly encompasses action to be taken by the Court in the exercise of its contentious jurisdiction under Article IX of the Genocide Convention.

383. Moreover, given that the Court's Statute forms an integral part of the Charter of the United Nations *as per* Article 92 of the latter, it follows that the reference in Article VIII of the Genocide Convention to measures taken "under the Charter of the

50/193, Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), UN doc. A/RES/50/193, 22 December 1995, POM, Annex 62; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3; *id., Judgment, I.C.J. Reports 2007*, p. 43.

271 See *mutatis mutandis, Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 164-165.

United Nations" encompasses measures to be taken by the Court under the Court's Statute.

384. Both the authentic French and Spanish versions of Article VIII refer to the ability of the Contracting Parties to "saisir" (in French) or "recurrir a" (in Spanish) – *i.e.*, seise – the competent organs of the United Nations with a request. The fact that these are terms typically used in relation to court proceedings generally[272] further confirms that the Court is one of the organs covered by Article VIII, and that Article VIII therefore governs the seisin of the Court.

385. This is further confirmed by the explanations on the respective word's origin and meaning provided by both the Dictionnnaire de l'Académie Française and the Diccionario de la lengua española of the Real Academia Española, which are notably the two official dictionaries of France and Spain respectively. They each state that the term "saisir" (in French) and "recurrir" (in Spanish) is traditionally found and still used in juridical contexts, especially in procedural contexts to describe the process of requesting or approaching a competent judge or Court on the basis of its respective statute.[273]

386. There is no indication, either in the wording of Article VIII, or in its drafting history, that it was meant to depart from that common understanding of the term "saisir" or "recurrir a", as used in the French and the Spanish versions of that provision respectively.

387. This result is also corroborated by the fact that in some other provisions of the UN Charter, where the Court is clearly *not* included within the scope of the provision, the relevant wording, while still using the expression "call upon" in the English language version, does *not* use the term "saisine" or "saisir" in French.[274] *E contrario*, the deliberate use of the term "saisir" in the French version of Article VIII of the Genocide

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272 B. Schiffbauer, "Article VIII", in C. Tams *et al*. (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), Art. VIII, p. 275, MN 13, POM, Annex 28; See also: Real Academia Española, *Diccionario de la lengua española*: "recurrir", POM, Annex 32; *Dictionnaire de L'Académie Française*: "saisir", POM, Annex 31.

273 Real Academia Española, *Diccionario de la lengua española*: "recurrir", POM, Annex 32; *Dictionnaire de L'Académie Française*: "saisir", POM, Annex 31.

274 *Cf.* Articles 33, 40, 41, and 44 of the Charter of the United Nations.

Convention (as opposed for instance to the term "inviter" as used in the French version of Article 33, paragraph 2, of the UN Charter) must be understood as a confirmation that it is indeed also the seisin of the Court that is being regulated by Article VIII of the Genocide Convention. Finally, the last part of Article VIII of the Genocide Convention refers to the purpose of a possible seisin of one of the competent organs of the United Nations, namely for such organ to take action:

> for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III" of the Convention.

388. It is of course the Court, provided it has been validly seised in line with Article VIII of the Genocide Convention, and is also in a position to exercise its jurisdiction on the basis of Article IX, which can make legally binding findings on violations of the Genocide Convention by Contracting Parties, including findings that one has failed to prevent genocide[275] or has failed to punish presumed perpetrators of genocide.[276] These are obviously measures to suppress acts of genocide. What is more is that the adoption of provisional measures by the Court in genocide cases constitutes the example *par excellence* of preventive measures taken to avoid the occurrence of acts of genocide within the meaning of Article VIII of the Genocide Convention.

389. Accordingly, the Court is indeed clearly in a position, as is contemplated by Article VIII of the Genocide Convention, to take action for the "prevention and suppression of acts of genocide". This reinforces not only the argument that Article VIII of the Genocide Convention indeed encompasses the seisin of the Court, but also underlines the close interrelationship that exists between Article VIII of the Genocide Convention on the one hand, and its Article IX on the other.

390. This result, *i.e.* that it is Article VIII of the Genocide Convention, rather than its Article IX, that endows non-injured States with the right to seise the Court with an allegation of a violation of the Genocide Convention, if such right of non-injured States

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275 See *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*, p. 43, 238.

276 *Cf.*: *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*, p. 43.

exists at all in the first place, *quod non*, is further established by a comparison of the wording of Article VIII of the Genocide Convention with that of its Article IX.

b. Wording of Article VIII v. wording of Article IX of the Genocide Convention

391. Article VIII of the Genocide Convention *expressis verbis* provides for the right of *any* Contracting Party ("*[t]oute* Partie contractante") to seise the competent organ of the United Nations with a request to take action under the UN Charter, of which the Court's Statute forms an integral part, for the prevention and suppression of acts of genocide.

392. Article VIII of the Genocide Convention does not, therefore, contain any limitation as to which Contracting Parties may take such a step under that provision. Article VIII may be invoked by a Contracting Party that is an injured State, or by one that is not injured and not specially affected by the claimed violation of the Convention. This right is subject only to any applicable reservation that has been made to Article VIII by a relevant Contracting Party.

393. In contrast thereto, Article IX of the Genocide Convention, which circumscribes the Court's jurisdiction, does *not* contain similarly broad language. In particular, the English language version of Article IX does not contain the word "any". It does not state that "*any*" dispute between "*any*" Contracting Parties may be submitted to the Court. Rather, it states that "disputes" between "*the*" Contracting Parties may be submitted to the Court. Similarly, had the drafters wanted to provide in Article IX that *all* Contracting Parties have the right to seise the Court, it would have been more natural to refer in the French version of Article IX to "*des* différends entre *des* Parties contractantes" ("disputes between contracting parties") rather than "*les* différends entre *les* Parties contractantes".

394. The wording of Article IX of the Genocide Convention thus stands in sharp contrast to that of compromissory clauses such as, for example, Article 33 of the European Convention on Human Rights, which reads:

> *Any* High Contracting Party may refer to the Court *any* alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.[277]

395. This Article 33, negotiated and adopted soon after the Genocide Convention, unlike Article IX of the Genocide Convention, thus explicitly provides for the right of *any* High Contracting Party to bring before the European Court of Human Rights *any* alleged breach of the European Convention on Human Rights by *any* High Contracting Party. Article 33 itself therefore unequivocally provides for the right of all Contracting Parties to the European Convention on Human Rights to seise the European Court of Human Rights even if the applicant State qualifies only as a non-injured State.

396. In clear contrast thereto, the Genocide Convention distinguishes between a broad power to seise the Court contained in Article VIII, which may be exercised by *any* Contracting Party, and a more limited compromissory clause in Article IX, which does not contain a reference to "*any*" State being entitled to invoke the provision, or indeed even to "*any*" dispute arising under the Genocide Convention being capable of being brought before the Court under this compromissory clause.

397. It is also telling that Article 30 of the Convention Against Torture, once again, *unlike* Article IX of the Genocide Convention, is a compromissory clause that expressly applies to "*any*" dispute arising under the Convention Against Torture, and which enables such disputes to be brought before the Court. Hence, just like in the case of the European Convention on Human Rights, there was no need to include in the Convention Against Torture a separate provision akin to Article VIII of the Genocide Convention in order to enable even non-injured Contracting Parties to seise the Court with a dispute arising under the Convention Against Torture.

398. In that regard it is also telling that during the drafting of what was to become Article IX of the Genocide Convention (and which was then still draft Article X), India deliberately and successfully moved to replace the words "at the request of *any* of the High Contracting Parties" (which would have rendered Article IX of the Genocide Convention more akin to Article 30 of the Convention Against Torture or Article 33

[277] POM, Annex 2 (emphasis added).

of the European Convention on Human Rights) with the words "at the request of *any of the parties to the dispute*".[278]

399. Hence, a textual interpretation of Article VIII of the Genocide Convention in line with its ordinary meaning, as well as a comparison of its wording with the wording of Article IX of the Genocide Convention, confirms the result that it is Article VIII of the Genocide Convention rather than its Article IX that regulates, and indeed as a matter of principle also provides for, the ability of Contracting Parties to the Genocide Convention to seise the Court whenever they consider that there is a need for the Court to take appropriate action to prevent and/or to suppress acts of genocide.

400. It is exactly this difference that explains why it is logical that Myanmar, while entering a reservation to Article VIII of the Genocide Convention, did *not* at the same time enter a reservation to Article IX when it acceded to the Genocide Convention. Myanmar's Article VIII reservation has the effect of precluding the seisin of the Court by "any Contracting Party" ("[t]oute Partie contractante"), *i.e.* Contracting Parties to the Genocide Convention that are *not* injured States. It thus has the effect of precluding any form of *actio popularis* by *any* Contracting Party that is not specially affected. On the other hand, Myanmar's Article VIII reservation does not preclude, nor was it meant to ever preclude, the Court from exercising jurisdiction provided it is validly seised by an injured State.

401. This result as to the scope of Article VIII of the Genocide Convention is further confirmed by the drafting history leading to the adoption of that provision.

c. Drafting history of Article VIII of the Genocide Convention

402. General Assembly resolution 96 (I), adopted on 11 December 1946 during the first session of the General Assembly, *inter alia* requested ECOSOC "to undertake the

[278] UNGA, Sixth Committee, Hundred and Third Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (12 November 1948), UN doc. A/C.6/SR.103, p. 428, fn. 1, POM, Annex 51; UNGA, Sixth Committee, Hundred and Fourth Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (13 November 1948), UN doc. A/C.6/SR.104, p. 447, POM, Annex 52.

necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly".[279] Pursuant to that resolution, in June 1947 the UN Secretary-General, pursuant to a subsequent resolution of ECOSOC, produced a "Draft Convention on the Crime of Genocide".[280] This draft[281] already contained both a draft Article XII on the ability of Contracting Parties to seise the organs of the United Nations whenever there were serious reasons for suspecting that acts of genocide were committed, as well as a draft article XIV containing a compromissory clause that was the precursor to the current Article IX of the Genocide Convention.

403. The said draft Article XII specifically stated that:

> Irrespective of any provisions in the foregoing articles, should the crimes as defined in this Convention *be committed in any part of the world*, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes […][282]

404. This confirms the drafter's understanding that it was draft Article XII (*i.e.* now Article VIII of the Genocide Convention) that was specifically meant to regulate the ability of the Contracting Parties to seise organs of the United Nations in relation to genocide allegedly committed "*in any part of the world*".[283] The words "in any part of the world" were not included in the envisaged compromissory clause.

405. Already that first draft of what is now Article VIII of the Genocide Convention therefore, *i.e.* draft Article XII, by explicitly making reference to alleged acts of genocide occurring "in any part of the world", addressed the issue of the possible right of non-injured States to seise any relevant organs of the United Nations in order for

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279 MG, vol. II, Annex 4.

280 ECOSOC, resolution 47 (IV), Crime of genocide, *Resolutions adopted by the Economic and Social Council during its Fourth Session from 28 February to 29 March 1947*, UN doc. E/325, 28 March 1947, pp. 33-34, POM, Annex 33.

281 UNSG, Draft Convention on the Crime of Genocide, UN doc. E/447, 26 June 1947, pp. 9-10, POM, Annex 34.

282 UNSG, Draft Convention on the Crime of Genocide, UN doc. E/447, 26 June 1947, p. 9 (emphasis added), POM, Annex 34.

283 Emphasis added.

them to then take appropriate action to suppress and prevent acts of genocide. What is more, the comment by the Secretary-General to then draft Article XII indicated that the considered position of the Secretary-General was that the proposed provision would broadly cover:

> *any action* by the United Nations intended to prevent or stop these crimes.[284]

406. The words "*any action* by the United Nations" would certainly also encompass action to be taken by the Court, which is one of the organs of the United Nations.

407. This is confirmed by the comment of the Secretary-General with regard to draft Article XIV, *i.e.* the compromissory clause now contained in Article IX of the Genocide Convention. In that comment the Secretary-General specifically justified his selection of the Court as the future forum for the settlement of disputes arising under the future convention on the basis of the fact that the Court did constitute one of the organs of the United Nations.[285] Yet, if the Court was perceived to be an organ of the organization for purposes of draft Article XIV (now Article IX of the Genocide Convention), it must obviously also have been considered to constitute such an organ for the purpose of draft Article XII (now Article VIII Genocide Convention).

408. During the ensuing debate in the Ad Hoc Committee on Genocide, set up by ECOSOC, which had in turn been requested by the General Assembly to continue the work on the draft genocide convention,[286] the Committee adopted a slightly revised text of what was then already draft Article VIII, and which was already *mutatis mutandis* identical to the current Article VIII of the Genocide Convention. It is however particularly noteworthy that within the Ad Hoc Committee a controversial debate did arise as to whether, and if so which, specific UN organs should be mentioned as the organs capable of being seised pursuant to that provision.

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284 UNSG, Draft Convention on the Crime of Genocide, UN doc. E/447, 26 June 1947, p. 46 (emphasis added), POM, Annex 34.

285 UNSG, Draft Convention on the Crime of Genocide, UN doc. E/447, 26 June 1947, p. 51, POM, Annex Annex 34.

286 See UNGA, resolution 180 (II), Draft convention on genocide, UN doc. A/RES/180(II), 21 November 1947, POM, Annex 36.

409. It was the Union of Soviet Socialist Republics (the "**USSR**") that proposed that the Security Council should be the *only* UN organ that should be mentioned in draft Article VIII, and that such seisin of the Security Council should be made compulsory.[287] The USSR was seconded by Poland, which stated that:

> provision had to be made for the intervention of the only organ of the United Nations invested with authority to take decisions, that is, *the Security Council*.[288]

410. In the discussion of the Ad Hoc Committee both aspects of the USSR proposal were however criticized. The obligatory notification of the Security Council was rejected,[289] and it was furthermore held to be better not to mention only one specific organ of the United Nations in draft Article VIII.

411. In particular the representative of the United States:

> favoured a provision allowing cases of genocide to be referred to the *various organs* of the United Nations competent to deal with them.[290]

In the same vein, the Chinese delegate took the position that there could be situations in which it would be more appropriate to refer to other UN organs than the Security Council, and therefore he "preferred a provision similar to article XII of the draft convention prepared by the Secretariat"[291] which had referred to all competent organs of the United Nations. In the next session the Chinese delegate affirmed his opposition to the USSR proposal stating that:

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287 UN, Report of the Ad Hoc Committee on Genocide, 5 April to 10 May 1948, UN doc. E/794, 24 May 1948, p. 34, POM, Annex 43.

288 UN, Ad Hoc Committee on Genocide, Summary Record of the Eighth Meeting (13 April 1948), UN doc. E/AC.25/SR.8, 17 April 1948, p. 18 (emphasis added), POM, Annex 38.

289 UN, Ad Hoc Committee on Genocide, Summary Record of the Ninth Meeting (14 April 1948), UN doc. E/AC.25/SR.9, 21 April 1948, p. 5, POM, Annex 39.

290 UN, Ad Hoc Committee on Genocide, Summary Record of the Eighth Meeting (13 April 1948), UN doc. E/AC.25/SR.8, 17 April 1948, p. 20; emphasis added, POM, Annex 38.

291 UN, Ad Hoc Committee on Genocide, Summary Record of the Eighth Meeting (13 April 1948), UN doc. E/AC.25/SR.8, 17 April 1948, p. 19. (emphasis added), POM, Annex 38.

> states should be given the option […] of having recourse to the *appropriate* organ of the United Nations.[292]

412. In the Ad Hoc Committee it was (the Republic of) China which therefore introduced a proposed draft Article IV (which later, albeit with slight changes, became draft Article VIII). This draft Article IV provided for the possibility to seise *all* relevant organs of the United Nations rather than limiting this possibility to the Security Council. This Chinese proposal accordingly read:

> Any Signatory to this Convention may call upon *any competent organ* of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide.[293]

413. Despite some renewed attempts by the USSR to again limit the scope of the article to the Security Council only, which were however rejected by a vote,[294] *mutatis mutandis* the same text as the previous draft Article IV was then included in the Ad hoc Committee's draft,[295] which thus contained the reference to "*any competent organ* of the United Nations".[296] Article VIII of the Ad hoc Committee's draft accordingly read:

> A party to this Convention may call upon *any competent organ of the United Nations* to take such action as may be appropriate under the Charter for the prevention and suppression of genocide. […][297]

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292 UN, Ad Hoc Committee on Genocide, Summary Record of the Ninth Meeting (14 April 1948), UN doc. E/AC.25/SR.9, 21 April 1948, p. 3 (emphasis added), POM, Annex 39.

293 UN, Ad Hoc Committee on Genocide, Draft Articles for the inclusion in the Convention on Genocide proposed by the delegation of China on 16 April 1948, UN doc. E/AC.25/9, Article IV (emphasis added), POM, Annex 40.

294 UN, Ad Hoc Committee on Genocide, Summary Record of the Twentieth Meeting (26 April 1948), UN doc. E/AC.25/SR.20, 4 May 1948, p. 4 and E/AC.25/SR.20/Corr.1, POM, Annex 41; see also M. Ventura, "The Prevention of Genocide as a *Jus Cogens* Norm? A Formula for Lawful Humanitarian Intervention", in C. Jalloh and O. Elias (eds.), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (2015), p. 304, POM, Annex 30.

295 UN, Ad Hoc Committee on Genocide, Draft Convention on Prevention and Punishment of the Crime of Genocide, UN doc. E/AC.25/12, 19 May 1948, Article VIII, POM, Annex 42.

296 *Ibid.* (emphasis added).

297 *Ibid.* (emphasis added).

414. The debate as to which UN organs should be encompassed by draft Article VIII then resurfaced in the debate on the draft convention in the Sixth Committee of the General Assembly.

415. The USSR again tried to replace the existing draft which, as mentioned, referred to the seisin of "any competent organ", with a draft article that would make exclusive reference to the Security Council.[298]

416. The USSR was supported by France, which shared the view that any such possibility to seise organs of the United Nations should be limited to the possibility to call upon the Security Council to take action.[299] This then led to a joint Soviet-French proposal which still only contained an exclusive reference to the Security Council.[300]

417. Peru however rejected such a limitation, explicitly stating that "measures to be taken against genocide should be *juridical*".[301]

418. As it was not acceptable to the majority of delegates to limit the scope of the article to the possibility of seising the Security Council, the Iranian delegate at that juncture proposed adding the words "or of the General Assembly" after the words "Security Council" as contained in the joint Soviet-French proposal.[302] This proposal, which would nonetheless have still limited the scope of Article VIII to the possibility of seising the two main *political* organs of the United Nations, was however also not accepted as it was still considered too restricted.

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298 UNGA, Sixth Committee, Genocide – Draft Convention and Report of the Economic and Social Council, Union of Soviet Socialist Republics: Amendments to the draft convention (E/794), UN doc. A/C.6/215/Rev.1, 9 October 1948, p. 3, proposed Article VIII, POM, Annex 44.

299 UNGA, Sixth Committee, Hundred and First Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (11 November 1948), UN doc. A/C.6/SR.101, pp. 409-410, Mr. Chaumont (France), POM, Annex 49.

300 UNGA, Sixth Committee, Hundred and First Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (11 November 1948), UN doc. A/C.6/SR.101, pp. 409ff, POM, Annex 49.

301 UNGA, Sixth Committee, Hundred and First Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (11 November 1948), UN doc. A/C.6/SR.101, p. 410, Mr. Maûrtua (Peru) (emphasis added), POM, Annex 49.

302 UNGA, Sixth Committee, Hundred and First Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (11 November 1948), UN doc. A/C.6/SR.101, p. 412, Mr. Abdoh (Iran), POM, Annex 49.

419. Tellingly, the United States delegate in the Sixth Committee clarified that any reference in draft Article VIII to only the Security Council would contradict draft Article X (now Article IX of the Genocide Convention), saying that providing a reference to the Security Council could lead States to "avoid submitting their disputes to the International Court of Justice"[303] under the convention's envisaged compromissory clause. He thus thereby already highlighted the interrelationship between the scope of draft Article VIII on the one hand, and the exercise by the Court of its contentious jurisdiction under draft Article X (now Article IX of the Genocide Convention) on the other.

420. This approach was then supported by the delegates of both Belgium and Denmark, who reinforced the idea of mentioning "all the competent organs of the United Nations".[304] Yet, and once again, this cannot be understood but as a reference that was *not* limited to the Security Council and the General Assembly. Otherwise, these two latter speakers would obviously have aligned themselves with the above-mentioned proposal previously made by the Iranian delegate to add a reference to the General Assembly in addition to the reference to the Security Council as the only relevant organs of the United Nations that could be seised under draft Article VIII.

421. While a decision was then first reached in the Sixth Committee to delete draft Article VIII *in toto*, the debate on draft Article VIII was later reopened in light of new, additional proposals.[305] In particular the USSR, France and Iran had come to an agreement to submit a joint proposal on draft Article VIII which once again read as follows:

> The High Contracting Parties may call the attention *of the Security Council or, if necessary, of the General Assembly* to the cases of genocide and of violations of the present Convention

303 UNGA, Sixth Committee, Hundred and First Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (11 November 1948), UN doc. A/C.6/SR.101, p. 413, Mr. Maktos (United States of America) (emphasis added), POM, Annex 49.

304 UNGA, Sixth Committee, Hundred and First Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (11 November 1948), UN doc. A/C.6/SR.101, p. 413, Mr. Kaeckenbeeck (Belgium) and Mr. Federspiel (Denmark), POM, Annex 49.

305 UNGA, Sixth Committee, Hundred and Second Meeting, Continuation of the consideration of the draft convention on genocide [E/794] : report to the Economic and Social Council [A/633] (12 November 1948), UN doc. A/C.6/SR.102, p. 423, POM, Annex 50.

> likely to constitute a threat to international peace and security, in order that the Security Council may take such measures as it may deem necessary to stop that threat.[306]

422. Yet, this further proposal, to limit the scope of draft Article VIII to the seisin of the Security Council and the General Assembly only, was again defeated by 27:13 votes with 5 abstentions.[307] After the vote the delegate of the Philippines, Mr. Ingles, explicitly stated that he had voted against the proposed amendment since:

> the revised text […] would undermine the authority of some of the organs of the United Nations. His delegation had wished to preserve the rights of Member States to appeal to *the organs [of the United Nations] they chose*.[308]

423. After this negative vote, the debate on draft Article VIII was accordingly considered closed and the Sixth Committee moved on to the discussion of draft Article X containing the proposed compromissory clause.

424. Draft Article X (which was later to become Article IX), as it then stood, read as follows:

> Disputes between the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice provided that no dispute shall be submitted to the International Court of Justice, involving an issue which has been referred to and is pending before or has been passed upon by a competent international criminal tribunal.[309]

425. Revealingly, it was as part of this debate on the envisaged compromissory clause that Australia then re-introduced the content of draft Article VIII as a new paragraph 2 to be added to draft Article X. Australia hereby confirmed the close relationship between draft Article VIII (now Article VIII of the Genocide Convention) on the one hand, and

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306 UNGA, Sixth Committee, Hundred and Second Meeting, Continuation of the consideration of the draft convention on genocide [E/794] : report to the Economic and Social Council [A/633] (12 November 1948), UN doc. A/C.6/SR.102, p. 421 (emphasis added), POM, Annex 50.

307 UNGA, Sixth Committee, Hundred and Second Meeting, Continuation of the consideration of the draft convention on genocide [E/794] : report to the Economic and Social Council [A/633] (12 November 1948), UN doc. A/C.6/SR.102, p. 423, POM, Annex 50.

308 UNGA, Sixth Committee, Hundred and Second Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (12 November 1948), UN doc. A/C.6/SR.102, p. 424 Mr. Ingles (Philippines) (emphasis added), POM, Annex 50.

309 UN, Report of the Ad Hoc Committee on Genocide, 5 April to 10 May 1948, UN doc. E/794, 24 May 1948, p. 38, POM, Annex 43.

draft Article X (now Article IX of the Genocide Convention) on the other. The Australian delegate, Mr. Dignam, notably confirmed on that occasion that:

> the International Court of Justice […] was one of the competent organs of the United Nations covered by [draft] article VIII.[310]

426. Accordingly, he then further stated that since previously a decision had been reached to delete draft Article VIII, which had provided for the seisin of *any* competent organ of the United Nations, thus including the Court, the Committee "[s]trictly speaking, therefore, […] should not discuss [draft] article X [now Article IX Genocide Convention]".[311]

427. This confirmed that the Court's exercise of jurisdiction on the basis of draft Article X (now Article IX of the Genocide Convention) was clearly premised on the applicability of draft Article VIII (now Article VIII of the Genocide Convention) in any given case. Or, to put it another way, it was understood that if the Court could not be validly seised under draft Article VIII, it would not be in a position to exercise its jurisdiction under draft Article X. The Australian delegate therefore continued that if the debate on the compromissory clause was to continue at all it ought to be "for the definite purpose of rectifying the mistake of having deleted article VIII".[312]

428. Although the Chairman then ruled that the Australian proposal was out of order given the prior rejection of draft Article VIII, the Chairman was overruled by a two-thirds majority vote,[313] so that the debate on draft Article X including a newly proposed paragraph 2 thereof could continue. This new paragraph 2 which was thus added to draft Article X was however *mutatis mutandis* identical to what is now Article VIII of the Genocide Convention. In other words, the previous draft Article VIII (now Article VIII of the Genocide Convention) and draft Article X (now Article IX of the

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310 UNGA, Sixth Committee, Hundred and Third Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (12 November 1948), UN doc. A/C.6/SR.103, p. 428 Mr. Dignam (Australia) (emphasis added), POM, Annex 51.

311 *Ibid.*

312 *Ibid.*

313 UNGA, Sixth Committee, Hundred and Fifth Meeting, Continuation of the consideration of the draft convention on genocide [E/794]: report to the Economic and Social Council [A/633] (13 November 1948), UN doc. A/C.6/SR.105, pp. 455-456, POM, Annex 53.

Genocide Convention) had been merged into one single provision, which once again confirms their close interlinkage. Draft Article X, as approved, therefore read:

> *Any* dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV, shall be submitted to the International Court of Justice at the request of *any* of the parties to the dispute.
>
> With respect to the prevention and suppression of acts of genocide, a party to the present Convention may call upon *any competent organ of the United Nations* to take such action as may be appropriate under the Charter of the United Nations.[314]

429. This amendment to draft Article X, which notably still referred in its paragraph 1 to "*any*" dispute arising under the convention being capable of being submitted to the Court, was then, after short consideration, approved.[315] As part of the final drafting process the Sixth Committee's Drafting Committee then decided to reorganize and renumber draft Article X, paragraph 2, as adopted, to become Article VIII of the final draft text.[316]

430. This rearrangement further confirms not only the close interrelationship between Articles VIII and IX of the Genocide Convention, but also the idea that the exercise by the Court of its jurisdiction under Article IX is premised on the fulfilment of the pre-condition of a valid seisin under Article VIII of the Genocide Convention. Otherwise, it would have been more natural to retain the sequence as contained in draft Article X, paragraphs 1 and 2, *i.e.* to first address the Court's jurisdiction in one provision, and then to address the ability to seise the competent organs of the UN in a subsequent provision.

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314 UNGA, Sixth Committee, Genocide – Draft Convention and Report of the Economic and Social Council, Text as adopted by the Sixth Committee for articles VII to XIII of the draft Convention (E/794), UN doc. A/C.6/269, 15 November 1948, draft article X (emphasis added), POM, Annex 54; see also M. Ventura, "The Prevention of Genocide as a *Jus Cogens* Norm? A Formula for Lawful Humanitarian Intervention", in C. Jalloh and O. Elias (eds.), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (2015), p. 312, fn. 147, POM, Annex 30.

315 *Ibid.*

316 UNGA, Genocide: Draft Convention and Report of the Economic and Social Council, Report of the Sixth Committee, UN doc. A/760, 3 December 1948, p. 6, POM, Annex 57.

431. What is therefore brought out by a consideration of this drafting process as a whole is, first of all, that it was deliberately decided to not limit the scope of Article VIII to include only the Security Council, or only the Security Council and the General Assembly. Rather, Article VIII of the Genocide Convention was meant to encompass, as its plain wording indicates, *all* competent organs of the United Nations, which, given Article 7 of the UN Charter, also includes the Court.

432. Furthermore, this drafting history also demonstrates that there was also a broad understanding that the seisin of the Court under Article VIII on the one hand, and the exercise by the Court of its jurisdiction under Article IX on the other, were closely interrelated, the latter being premised on the former.

433. As confirmed by the Court, those two provisions can thus indeed "be said to have distinct areas of application".[317] Article VIII of the Genocide Convention relates, as its text puts it, to the ability of any Contracting Party to the Genocide Convention to "call upon" or "saisir" all competent organs of the United Nations to take action, provided that the respective organ has jurisdiction to entertain such a request.

434. The latter, *i.e.* Article IX of the Genocide Convention, then regulates the competence of one of the competent organs referred to in Article VIII, namely the Court, while the competencies of the political organs of the United Nations to deal with any such seisin are already regulated by the relevant provisions of the UN Charter itself.

435. This result which is brought out by the drafting of Article VIII of the Genocide Convention is also in line with the very object and purpose of Article VIII.

d. Object and purpose of Article VIII of the Genocide Convention

436. Article VIII of the Genocide Convention, being a simple treaty-based provision only, cannot add to or diminish the powers of the organs of the United Nations pursuant to the UN Charter, nor the rights of UN Member States arising under the Charter to call

317 Provisional Measures Order, p. 12, para. 35.

upon the Security Council or the General Assembly to take appropriate action in case of genocide.

437. Thus, if Article VIII of the Genocide Convention were to be interpreted as addressing the issue of the seisin of the political organs of the United Nations only, but as *not* regulating the question of the exclusively treaty-based seisin of the Court in cases arising under the Genocide Convention, then Article VIII would, as former Judge Gaja eloquently put it, be solely expository in character,[318] or indeed be even completely senseless.[319] It cannot however be assumed that a treaty includes a provision that would be redundant or meaningless. Rather, and in line with the principle of *ut res magis valeat quam pereat*, any interpretation of a given treaty provision has to secure to such clause its proper effects.[320] Thus, as already the Permanent Court and this Court have said, the clauses of an agreement:

> must, if it does not involve doing violence to their terms, be construed in a manner enabling *the clauses themselves* to have appropriate effects.[321]

438. It follows by necessary implication that in the case at hand, Article VIII of the Genocide Convention must be understood as regulating the right of a non-injured Contracting Party to bring a case against another Contracting Party to that treaty, provided such a right exists in the first place. Were it otherwise, Article VIII of the Genocide Convention would be devoid, as shown, of any meaningful object and purpose. This is because the seisin of the *political* organs of the United Nations is already guaranteed by Article 11, paragraph 2, and Article 35 of the Charter of the United Nations. Yet, as one commentator to the Genocide Convention has rightly

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318 G. Gaja, "The Role of the United Nations in preventing and Suppressing Genocide", in P. Gaeta (ed.), *The UN Genocide Convention – A Commentary* (2009), p. 400, POM, Annex 23.

319 P.N. Drost, *The Crime of State*, vol. II, *Genocide: United Nations legislation on international criminal law* (1959), p. 133, POM, Annex 21.

320 *Whaling in the Antarctic (Australia* v. *Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2013, p. 33 para. 54; see also: *Interpretation of Peace Treaties (second phase)*, Advisory Opinion, I.C.J. Reports 1950 p. 229.

321 PCIJ, *The Free Zones of Upper Savoy and the District of Gex*, Order of 19 August 1929, Series A, No. 22, p. 13, emphasis added; see also PCIJ, *Acquisition of Polish Nationality*, Advisory Opinion of 15 September 1923, Series B, No. 7, p. 17; PCIJ, *Exchange of Greek and Turkish Populations*, Advisory Opinion of 21 February 1925, Series B, No. 10, p. 25; ICJ, *Corfu Channel case, I.C.J. Reports 1949*, p. 24; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, p. 125, para. 133.

stated, "Article VIII is by no means a useless provision" and constitutes much "more than a merely declaratory provision of the Genocide Convention."[322]

> As the Court found in the *Bosnian Genocide* case, Article VIII of the Genocide Convention does not "appear […] to confer on it [the Court] any function or competence *additional* to those provided for in its Statute."[323]

439. However, at the same time, Article VIII of the Genocide Convention implies that – should the Court indeed find that a non-injured State has standing to bring a case under the Genocide Convention even in a scenario such as that in the case at hand where the State most concerned by the alleged genocidal acts, *i.e.* Bangladesh, is barred from doing so given its own reservation to Article IX of the Genocide Convention, *quod non*, it is Article VIII which would then provide for the right of any Contracting Party, even if not specially affected by an alleged genocidal situation, to seise the Court, thus allowing for some kind of *actio popularis*, if such right were to exist in a given situation at the first place.

440. This effect of Article VIII has so far simply not been relevant, given that in all previous cases brought under the Genocide Convention it has always been the specially-affected State – be it Bosnia[324] or Croatia[325] – that has brought the case against the State allegedly responsible for acts of genocide.

441. What is more, so far none of the parties in any of the cases in which the Court has so far dealt with the Genocide Convention had made a reservation to Article VIII. Thus, the Court obviously was not called upon in any of the previous cases to pronounce upon the relevance of Article VIII for the seisin of the Court.

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322 B. Schiffbauer, "Article VIII", in C. Tams *et al*. (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), Art. VIII, p. 274 MN 10, 290 MN 58, POM, Annex 28.

323 *Application of the Convention on the Prevention of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 23 para. 47 (emphasis added); see also: G. Gaja, "The Role of the United Nations in preventing and Suppressing Genocide", in P. Gaeta (ed.), *The UN Genocide Convention – A Commentary* (2009), p. 399, POM, Annex 23.

324 *Cf.*: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro).*

325 *Cf.*: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia).*

442. This is due to the obvious fact that where a Contracting Party has neither entered a reservation to Article VIII of the Genocide Convention, nor to its Article IX, the distinction between the seisin of the Court regulated by Article VIII, and the Court's jurisdiction governed by Article IX, is for all practical purposes irrelevant. For this very reason, the point has never arisen for argument by the parties.

e. Conclusion

443. It follows that it is Article VIII of the Genocide Convention rather than its Article IX that defines the situations in which the Court may be seised. Notably, it is Article VIII of the Genocide Convention which provides for the possibility to seise the Court, as the very wording of Article VIII unequivocally puts it, with *any* dispute arising under the Genocide Convention, including disputes arising between the State allegedly having violated the Convention and a non-injured State such as The Gambia.

444. This accordingly then raises the issue as to the legal effects of Myanmar's Article VIII reservation.

D. Legal effect of Myanmar's Article VIII reservation

1. Introduction

445. As demonstrated above, a valid seisin constitutes a necessary precondition for the exercise of the Court's jurisdiction under Article IX of the Genocide Convention, and it is, if at all, Article VIII of the Genocide Convention that provides for the right of *any* Contracting Party to seise the Court with a dispute it might have with Myanmar arising under the Genocide Convention.

446. However, it will now be shown that Myanmar's above-mentioned reservation to Article VIII has the legal effect of limiting the right of Contracting Parties to seise the Court to those Contracting Parties that are specially affected by the purported violations of the Genocide Convention allegedly committed by Myanmar. Finding otherwise would render Myanmar's Article VIII reservation completely redundant and

obsolete, such a result being contrary to well-established principles concerning the interpretation of reservations.

2. Content of Myanmar's Article VIII reservation

447. As will be recalled, when Myanmar (then Burma) acceded to the Genocide Convention on 14 March 1956, it confirmed two reservations it had already submitted when signing the Convention in 1949. Those reservations deal with Article VI and Article VIII of the Convention respectively. They provide as follows:

> (1) With reference to article VI, the Union of Burma makes the reservation that nothing contained in the said Article shall be construed as depriving the Courts and Tribunals of the Union of jurisdiction or as giving foreign Courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in article III committed within the Union territory.
>
> (2) With reference to article VIII, the Union of Burma makes the reservation that the said article shall not apply to the Union.[326]

448. Myanmar notes that only two Contracting Parties to the Genocide Convention contested the legality of Myanmar's reservations, contending that they were incompatible with the very object and purpose of the Convention, and only one State now maintains such an objection.[327]

449. No other Contracting Parties have objected to either of these two reservations. This holds true, in particular, for The Gambia, which, in contrast to the United Kingdom,[328] did not lodge any objection to either of Myanmar's reservations when it acceded to the

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326 Ratification with Reservation by Burma, *Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide*, C.N.25.1956. of 29 March 1956, MG, vol. II, Annex 5.

327 The objections were made by (the Republic of) China and the United Kingdom: see MG, vol. II, Annex 2, p. 6 column 1 and p, 7 column 2. The United Kingdom maintains its objection.

328 *Cf.*: Declaration made by the United Kingdom of Great Britain and Northern Ireland when acceding to the Genocide Convention, MG, vol. II, Annex 2, p. 7.

Genocide Convention in 1978,[329] and which now seems to have accepted their validity.[330]

450. Those reservations were the subject of debates in the parliament of Myanmar (then Burma) prior to the submission of its instrument of ratification. After having confirmed that "here in our country no genocidal act against a group based on ethnicity or religion has ever occurred" and that there was "no reason [for that] to happen in the future",[331] the Government of Myanmar (then Burma) made it clear that the effect of its Article VIII reservation was meant to exclude the ability of outside States to "accuse […] another of committing genocide and submit […] a complaint to the United Nations"[332] in order for the "*relevant organs* of the United Nations" to then eventually take action.[333]

451. The Government of Myanmar was therefore aiming, as stated during the parliamentary debate leading to the approval of the ratification motion, at precluding the possibility of "*the relevant organs* of the United Nations" taking action where another Contracting Party alleges that Myanmar is responsible for a violation of the Genocide Convention.

452. Neither the wording nor the underlying intention of Myanmar's Article VIII reservation limits its effect to precluding action being taken by the *political* organs of the United Nations, or some of them, while continuing to allow Article VIII to be used to seise the Court. Rather, the reservation was meant to be broad in nature. It must have been intended to extend to precluding action being taken by *any* organ of the United Nations, including by precluding the Court, its principal judicial organ, from being seised by any contracting party not being an injured Contracting Party.

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329 See UNTC, *Convention on the Prevention and Punishment of the Crime of Genocide, Declarations and Reservations*, MG, vol. II, Annex 2.

330 MG, p. 30.

331 Myanmar, Pyithu Hluttaw, Motion for the Union Government to ratify, with two reservations, the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations in 1948, 2 September 1955, Unofficial Translation, p. 2, POM, Annex 127.

332 *Ibid*.

333 *Ibid*. (emphasis added).

453. This understanding of Myanmar's Article VIII reservation is furthermore supported by the fact that Myanmar acceded to the Genocide Convention five years after the Court's seminal 1951 advisory opinion on reservations to the Genocide Convention, which had underlined the special, *erga omnes* character of the Genocide Convention. This advisory opinion had thus warned Myanmar of the possibility that some States might seek to draw from the careful and balanced statements made by the Court an erroneously overbroad conclusion that even non-injured Contracting Parties to the Genocide Convention would be entitled to bring an *actio popularis* against other Contracting Parties.

454. In the debates in the parliament of Myanmar, the Government of Myanmar therefore made it clear that the aim of both reservations was to exclude the possibility of "outside interference" when it comes to events unfolding internally.[334]

455. At the same time, Myanmar deliberately did not, unlike many other Contracting Parties at the time,[335] enter a full-scale reservation to Article IX of the Genocide Convention. Myanmar therefore accepted that, at least as a matter of principle, disputes arising under the Genocide Convention can be brought before the Court. Putting the two together, Myanmar's reservation to Article VIII of the Genocide Convention was meant, and has to be interpreted, as barring *non-injured* Contracting Parties like The Gambia from seising the Court with a case arising under the Genocide Convention even if otherwise the Court would have jurisdiction. Otherwise, Myanmar's Article VIII reservation would be devoid of any substance.

456. Myanmar is obviously aware of the position taken by the Court in the Provisional Measures Order on this very issue. However, given the time-constraints inherent in proceedings on provisional measures, this question was not able to be fully argued by the parties, nor could it have been fully addressed by the Court. Myanmar is however fully convinced that an in-depth analysis of the question will now confirm Myanmar's position as to the legal effects of both Article VIII of the Genocide Convention and Myanmar's reservation thereto.

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334 *Ibid.*

335 Ever since the adoption of the Genocide Convention in 1948, no fewer than 30 States have entered reservations to Article IX, some of which have in the meantime been withdrawn.

457. It is obvious that Myanmar, when acceding to the Genocide Convention, made a deliberate decision to enter a reservation as to Article VIII, but to *not* enter a reservation to Article IX. This decision must be given effect. As the ILC confirmed in its 2011 Guide to Practice on Reservations to Treaties:

> A reservation is to be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated.[336]

458. In line with the Court's jurisprudence, emphasis must thus be placed on the intention of the author of a given reservation as one of the main elements on which interpretation of the reservation should be based.[337] Accordingly, any such interpretation must focus on "the objective their author *purports* to attain",[338] "whose good faith must be presumed".[339]

459. The intention of the reserving State in turn, as the Court has confirmed:

> may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served[340]

which circumstances may then further clarify the meaning of the reservation.[341]

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336 ILC, Guide to Practice on Reservations to Treaties, *Yearbook of the International Law Commission*, 2011, vol. II, Part Three, UN doc. A/CN.4/SER.A/2011/Add.1 (Part 3), p. 275, POM, Annex 72.

337 *Anglo-Iranian Oil Co. case (United Kingdom* v. *Iran)*, Preliminary Objection, Judgment, I.C.J. Reports 1952, p. 107; *Fisheries Jurisdiction case (Spain* v. *Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 454, paras. 48-49; *Aegean Sea Continental Shelf case (Greece* v. *Turkey)*, Judgment, I.C.J. reports 1978, p. 29, para. 69; ILC, Guide to Practice on Reservations to Treaties, *Yearbook of the International Law Commission*, 2011, vol. II, Part Three, UN doc. A/CN.4/SER.A/2011/Add.1 (Part 3), p. 276, POM, Annex 72.

338 ILC, Guide to Practice on Reservations to Treaties, *Yearbook of the International Law Commission*, 2011, vol. II, Part Three, UN doc. A/CN.4/SER.A/2011/Add.1 (Part 3), p. 276 para. 6 [emphasis in the original], POM, Annex 72.

339 *Ibid*., p. 277 para. 11; *cf.* also: *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 27.

340 *Fisheries Jurisdiction case (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 48.

341 *Aegean Sea Continental Shelf case (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 29, paras. 63-69.

460. In this regard it is first crucial to recall that the right of Contracting Parties to the Genocide Convention to seise the General Assembly or the Security Council of the United Nations with an alleged violation of the Genocide Convention exists independently of Article VIII of the Genocide Convention, as per Article 11, paragraph 2, and Article 35, of the UN Charter. Accordingly, the right to seise either of these two *political* organs is *not* dependant on Article VIII of the Genocide Convention being applicable as between Myanmar and any Contracting Party to the Genocide Convention seeking to bring a matter before those organs.

461. Furthermore, any reservation entered to Article VIII of the Genocide Convention with the aim of preventing another Contracting Party from exercising its right to seise either the General Assembly or the Security Council under Articles 11 and 35 of the UN Charter respectively would be devoid of any legal effect. In any such situation, the obligation to accept the right of other Contracting Parties to seise either of these two political organs of the United Nations, as guaranteed by and provided for in the Charter of the United Nations, would prevail over any such broadly-framed Article VIII reservation in light of Article 103 of the UN Charter.

462. And it is exactly for this very reason that Myanmar has never questioned the legal entitlement of other Contracting Parties to the Genocide Convention to bring to the forum of the General Assembly or the Security Council allegations of Myanmar having committed violations of the Genocide Convention and requesting the United Nations to take action within the meaning of Article VIII of the Genocide Convention, Myanmar's valid reservation to that provision notwithstanding.[342]

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342 See *inter alia* the requests and statements made by Denmark (UNGA, *Official Records*, Seventy-third session, 27th plenary meeting (29 October 2018), UN doc. A/73/PV.27, p. 9, POM, Annex 76), Bangladesh (UNGA, *Official Records*, Seventy-third session, 28th plenary meeting (29 October 2018), UN doc. A/73/PV.28, p. 21, POM, Annex 77), the United States of America (UNGA, Third Committee, *Official Records*, Seventy-third session, Summary record of the 50th meeting (16 November 2018), UN doc. A/C.3/73/SR.50, p. 10, para. 63, POM, Annex 78) and Canada (UNGA, Third Committee, *Official Records*, Seventy-third session, Summary record of the 50th meeting (16 November 2018), UN doc. A/C.3/73/SR.50, pp. 14-15, para. 91, POM, Annex 78; UNGA, Third Committee, *Official Records*, Seventy-third session, Summary record of the 30th meeting (23 October 2018), UN doc. A/C.3/73/SR.30, p. 5 para. 21, POM, Annex 74) in the General Assembly, as well as those made by the United Kingdom (UNSC, 8333rd meeting (28 August 2018), UN doc. S/PV.8333, p. 7, POM, Annex 73; UNSC, 8381st meeting (24 October 2018), UN doc. S/PV.8381, p. 3, POM, Annex 75), France (UNSC, 8333rd meeting (28 August 2018), UN doc. S/PV.8333, p. 8, POM, Annex 73) and the Dominican Republic (UNSC, 8477th meeting (28 February 2019), UN doc. S/PV.8477, p. 9, POM, Annex 79) in the Security Council.

463. However, at the same time, interpreting Article VIII of the Genocide Convention, as well as Myanmar's reservation thereto, as exclusively encompassing the seisin of the political organs of the United Nations would render both the provision itself, as well as Myanmar's Article VIII reservation, completely redundant and meaningless. Such interpretation would thus run counter to the obligation to interpret it in line with the principle of good faith.

464. Any such interpretation would in particular assume that Myanmar had at the time it entered its Article VIII reservation either wanted to submit a completely useless reservation, or that it had wanted to enter a reservation that runs counter to Article 103 of the UN Charter.

465. Yet, as confirmed by the work of the ILC, it must be presumed that a State entering a reservation to a treaty not only acts in good faith, but that it also wants to submit a reservation that is able to produce legal effects.[343] This result is also in line with the Court's own holding in the *Right of Passage* case, in which it said that:

> It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.[344]

466. In the case at hand this means that the only reasonable conclusion that may be drawn from Myanmar's Article VIII reservation is that Myanmar indeed wanted to limit the scope *ratione personae* of Article VIII, by excluding non-injured Contracting States from its operation, in the event that the Court were in the future ever to find that non-

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343 ILC, Guide to Practice on Reservations to Treaties, *Yearbook of the International Law Commission*, 2011, vol. II, Part Three, UN doc. A/CN.4/SER.A/2011/Add.1 (Part 3), p. 65, para. 12, 275 (Guideline 4.2.6.), POM, Annex 72; it lies in the very nature of reservations as already shown by the definition contained in Article 2(1)(d) of the Vienna Convention on the Law of Treaties, that they are intended to produce legal effects, or as Reuter put it: "*L'essence de la 'réserve' est de poser une condition l'Etat ne s'engage qu'à la condition que certains effets juridiques du traité ne lui soient pas appliqués, que ce soit par l'exclusion ou la modification d'une règle ou par l'interprétation ou l'application de celle-ci.*" ["The essence of the 'reservation' is to lay down a condition: the State binds itself only on condition that certain legal effects of the treaty are not applied to it, whether by excluding or modifying a rule or by interpreting or applying it."] See: P. Reuter, *Introduction au Droit du Traités* (third revised edn. by P. Cahiers, 1995), p. 61, POM, Annex 26; See also: *Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Ireland, and the French Republic*, Decision of 30 June 1977, UN Reports of International Arbitral Awards, vol. XVIII, p. 40, para. 55, POM, Annex 14.

344 *Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142.

injured Contracting Parties of the Genocide Convention would otherwise be entitled to seise the Court.

467. Otherwise, it cannot be explained why Myanmar entered a reservation to Article VIII of the Genocide Convention in the first place, while *not* at the same time also entering a full-fledged or at least a partial reservation to the Convention's compromissory clause contained in its Article IX.

468. Myanmar's Article VIII reservation could thus only have been meant to, and indeed was only meant to, preclude the seisin of the Court by "*any* Contracting Party", *i.e.* parties to the Genocide Convention that are not injured States. It thus has the effect of precluding any form of *actio popularis* by *any* not-specially-affected Contracting Party to the Genocide Convention, if such right were to exist under the Genocide Convention in the first place. On the other hand, it does *not* purport to preclude, nor does it preclude, the Court from exercising jurisdiction on the basis of Article IX of the Genocide Convention – provided the Court has been validly seised by an injured State.

469. The Gambia has thus either misunderstood or deliberately misrepresented Myanmar's argument based on its Article VIII reservation when claiming that Myanmar's argument is that *no* Contracting Party to the Genocide Convention whatsoever could bring a case against Myanmar under the Genocide Convention's compromissory clause. Myanmar would agree that *such* interpretation of Article VIII of the Genocide Convention and Myanmar's reservation thereto would indeed empty Article IX, and Myanmar's acceptance thereof, of its content.[345] But that is, it bears no mentioning, *not* the combined result of Myanmar's reading of Article VIII, as confirmed by its very wording and drafting history, and its Article VIII reservation. Rather, Myanmar's Article VIII reservation merely confirms that the scope *ratione personae* of Article VIII, in relation to Myanmar, is limited to those Contracting Parties that are injured States, thereby excluding any form of *actio popularis* – if ever the Genocide Convention did enshrine such a concept, *quod non*.

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345 CR 2019/20, p. 29, para. 31 (d'Argent) : "*Parce que le Myanmar n'a pas accepté l'article VIII de la convention, aucun Etat partie ne pourrait valablement saisir la Cour, alors même que, de l'aveu de l'Etat défendeur, celui-ci a donné compétence à son égard en consentant à l'article IX. Le Myanmar vide l'article IX de son contenu et Me Staker n'a pas expliqué ce que le consentement de l'Etat défendeur à l'article IX et à votre compétence pouvait en ce cas signifier*."

470. It is exactly this difference that explains the fact that Myanmar, when acceding to the Genocide Convention, while entering a reservation to Article VIII of the Genocide Convention, did *not* enter at the same time a reservation to Article IX of the Convention.

471. It is also only such an interpretation of both Article VIII and Myanmar's reservation thereto, contrary to what The Gambia wrongly claimed during the provisional measures phase of this case,[346] that leads to a result in line with the principle of good faith. If one were indeed to follow, be it only *arguendo*, The Gambia's interpretation of Article VIII and Myanmar's reservation thereto, both Article VIII of the Genocide Convention as such, as well as Myanmar's reservation thereto, would be deprived of any relevance. As a matter of fact, both Article VIII of the Genocide Convention itself, which in The Gambia's view only governs the seisin of the political organs of the United Nations but not the seisin of the Court, as well as Myanmar's Article VIII reservation which in The Gambia's view only purports to exclude the right to address the General Assembly and the Security Council, would be superseded by the relevant provisions of the UN Charter as per its Article 103. It is difficult to see how such a result would indeed, as claimed by The Gambia, constitute a *bona fide* interpretation of Article VIII and of Myanmar's reservation thereto. Is it really *bona fide* to assume that Myanmar had wanted in 1955 to enter a reservation that would put into question the supremacy of the Charter as contemplated in its Article 103?

472. Moreover, one cannot but wonder why The Gambia did not then object to Myanmar's Article VIII reservation as allegedly running counter to the requirements of the Charter when The Gambia itself joined the Genocide Convention, given that on The Gambia's interpretation, the reservation would be clearly impermissible. Put otherwise, one cannot but infer that The Gambia, when acceding to the Genocide Convention without objecting to Myanmar's Article VIII reservation, thereby accepted Myanmar's exclusion of any possible right to bring an *actio popularis* under the Genocide Convention, if such right had existed at the first place, *quod non*.

346 CR 2019/20, pp. 28-29, paras. 30-32 (d'Argent).

473. Having thus defined the scope and legal effect of Myanmar's Article VIII reservation, it will now be demonstrated that this reservation is permissible and thus able to provide for its intended legal effects.

3. Permissibility of Myanmar's Article VIII reservation

474. The Court has, time and again, confirmed the permissibility of reservations to Article IX of the Genocide Convention.[347] Notably in its 2006 judgment in the *Armed Activities on the Territory of the Congo (New Application: 2002)* case, the Court stressed that such a reservation to Article IX of the Genocide Convention "bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention".[348] Accordingly, the Court further found that it:

> *cannot* conclude that the reservation [concerning Article IX of the Genocide Convention] […] which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.[349]

475. *A fortiori* this must hold even more true where, like in the case at hand, a Contracting Party to the Genocide Convention does not prevent the Court from exercising its contentious jurisdiction *in toto*, but merely limits the seisin of the Court under Article VIII, and the ensuing exercise by the Court of its contentious jurisdiction under Article IX, to injured States.

476. Myanmar's situation, given its reservation to Article VIII, is thus akin to a situation where a State Party to the Convention Against Torture has entered a reservation to that treaty to the effect that only injured States may bring a case before the Court under

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347 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 2006*, pp. 32-33, paras. 66-70; *Legality of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 924, paras. 24-25; *Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 772, paras. 32-33.

348 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 2006*, p. 32, para. 67.

349 *Ibid*. (emphasis added).

Article 30 of the Convention Against Torture. Under those circumstances, those States Parties to the Convention Against Torture that could claim to be specially affected by the State Party's alleged violations of the Convention Against Torture could still bring a case against the State having entered such reservation. And it is exactly such a limited effect that is produced by Myanmar's Article VIII reservation when it comes to the ability of Contracting Parties to seise the Court with a case under Article IX of the Genocide Convention.

477. Hence, Myanmar's Article VIII reservation, properly understood, does not preclude the Court from exercising its jurisdiction. Rather, it merely circumscribes those Contracting Parties to the Genocide Convention that, *vis-à-vis* Myanmar, would have standing to bring a case under the Genocide Convention. Accordingly, the legal effect of Myanmar's Article VIII reservation, as compared to the reservations to Article IX upheld by the Court as shown above on several occasions,[350] is very limited in nature.

478. First, Myanmar's Article VIII reservation would in any event only become relevant if the Court were to find that even non-injured States may, as a matter of principle, bring cases before the Court under Article IX of the Genocide Convention.

479. Second, Myanmar's Article VIII reservation would be relevant only in cases to be brought under the Genocide Convention against Myanmar, since Myanmar is the only Contracting Party to the Convention with such reservation. Among the other 151 Contracting Parties, Article VIII would fully come into play. Accordingly, - assuming *arguendo* in the first place that the Court were to find that the Genocide Convention encompasses the concept of *actio popularis*, *quod non* - even a non-injured Contracting Party would have standing *vis-à-vis* all other 150 Contracting Parties to bring cases under the Genocide Convention.

480. Third, even *vis-à-vis* Myanmar, cases could still be brought under Article IX by those Contracting Parties said to be specially affected by alleged violations of the Convention for which Myanmar is claimed to be responsible. Thus, even The Gambia seems to have accepted that Bangladesh is a Contracting Party to the Genocide Convention that is specially affected by Myanmar's alleged failure to comply with the

350 See paragraphs 222, 223 and 474 above.

Convention,[351] such that Bangladesh could have brought a case before the Court against Myanmar were it not for Bangladesh's own Article IX reservation. Thus, unlike Myanmar, Bangladesh decided to bar the Court completely from dealing with *any* cases arising under the Genocide Convention without the consent of all parties to the dispute.

481. Fourth, as already previously shown,[352] even where a specially-affected State such as Bangladesh is not able to bring a case before the Court given its own Article IX reservation, it might still take countermeasures against Myanmar provided Myanmar were to commit a violation of the Genocide Convention. Put otherwise and given that, as the Court itself put it, bringing a case before the Court under Article IX of the Genocide Convention is but one among various methods of settling a dispute relating to the interpretation, application or fulfilment of the Genocide Convention,[353] Myanmar's Article VIII reservation merely excludes one specific method of settling disputes arising under the Genocide Convention, and does so with regard to non-injured States only.

482. In fact, even Bangladesh can raise any alleged violations of the Genocide Convention by Myanmar either bilaterally, or by calling upon the political organs of the United Nations to take action, a Charter-based right not affected (and which could have not been affected anyhow) in any way, as shown above,[354] by Myanmar's Article VIII reservation.

E. Conclusion

483. As demonstrated above, Article VIII of the Genocide Convention covers and regulates not only the seisin of the political organs of the United Nations but, as its wording, a

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351 CR 2019/19, p. 53, para. 56 (Staker), CR 2019/21, pp. 14, 17, 18, paras. 15, 28, 32 (Staker). This qualification was not challenged by The Gambia.

352 See paragraph 336 above.

353 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 67.

354 See paragraphs 437 and 438 above.

comparison with the wording of its Article IX, as well as its drafting history all confirm, also controls the seisin of the Court.

484. It has further been demonstrated that – provided the Court were to ever find that the Genocide Convention provides for the right even of non-injured or not-specially-affected States to bring cases under its compromissory clause in the first place – it is Article VIII of the Genocide Convention that guarantees such right.

485. Accordingly, Myanmar's limited, yet carefully calibrated Article VIII reservation, while not setting aside the Court's exercise of jurisdiction under Article IX of the Genocide Convention as such, prevents non-injured States such as The Gambia from bringing an *actio popularis*. It thereby serves the legitimate purpose of preventing a misuse of the Court in a situation where a given Contracting Party to the Genocide Convention, allegedly specially affected by the purported violations by Myanmar of the Genocide Convention, is barred from bringing a case given the fact that it has entered and maintains a reservation to Article IX of the Genocide Convention, while another Contracting Party then *de facto*, if not *de jure*, brings a case on behalf of that State.

486. It is for these reasons that the Court should give substantive and good faith effect to both Article VIII of the Genocide Convention itself, as well as to Myanmar's Article VIII reservation, rather than to adopt an interpretation that would render both devoid of any legal relevance.

IV. FOURTH PRELIMINARY OBJECTION: The Court lacks jurisdiction, or alternatively the application is inadmissible, as there was no dispute between The Gambia and Myanmar on the date of filing of the Application instituting proceedings

A. Introduction

487. For the Court to exercise jurisdiction in this case, a fundamental requirement must be satisfied: at the time that The Gambia filed its Application instituting proceedings on 11 November 2019, a dispute must have existed between The Gambia and Myanmar in relation to the claims made by The Gambia in its Application.

488. The Gambia does not appear to question the existence of this requirement. Rather, The Gambia's position is that the requirement is satisfied. The Gambia's application contends that "The Gambia has […] made clear to Myanmar that its actions constitute a clear violation of its obligations under the [Genocide] Convention", and that "Myanmar has rejected and opposed any suggestion that it has violated the Genocide Convention".[355] For the reasons elaborated below, that is however *not* what the record shows.

489. This requirement of the existence of a dispute has been considered by the Court in six cases over the last decade, in the *Convention on Racial Discrimination* case in 2011,[356] the *Obligation to Prosecute or Extradite* case in 2012,[357] the *Sovereign Rights and Maritime Spaces* case in 2016,[358] and the three *Nuclear Arms and Disarmament* cases in 2016.[359] These cases set out even more precisely than in the Court's previous case

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355 AG, para. 20. See also MG, para. 2.11.

356 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70.

357 *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

358 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 3.

359 *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*, p. 255; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to*

law the legal principles relating to that requirement. Whether one regards these cases as a more detailed elaboration of principles that have long been applied in the jurisprudence of this Court and its predecessor, or whether one regards them as going beyond the Court's earlier case law, the principles that they articulate must now be regarded as the settled law of the Court.

490. The various elements that need to be cumulatively established to satisfy the requirement for the existence of a dispute are dealt with in paragraphs 495 to 577 below. The position of Myanmar is that each of these elements must be satisfied in all cases within the Court's contentious jurisdiction. The alternative position of Myanmar is that even if certain of these elements might not necessarily be mandatory in *all* cases, such elements nonetheless are required to be satisfied in the circumstances of a case such as the present, where the application instituting proceedings alleges breaches of obligations of an *erga omnes partes* character, and where the applicant State is not specially affected by the alleged breaches.

491. There are good reasons why the fundamental requirement of a pre-existing dispute between the parties at the time of the application should be applied even more rigorously in such circumstances. This would be so, particularly if, contrary to the submissions of Myanmar in relation to its second preliminary objection, the Court were to find that any Contracting Party to the Genocide Convention is able to bring a case before this Court against any other Contracting Party to that Convention, regardless of whether or not the applicant State is specially affected by the alleged breach. Such a finding would raise the prospect of potentially dozens of States who have no particular connection to the facts of a situation instituting separate proceedings before this Court against the same respondent State in relation to the same facts, alleging breaches of the same provisions of the Genocide Convention or other treaty allegedly imposing obligations of an *erga omnes partes* character. Maintenance of the proper functioning of the international dispute settlement system, and of the manageability of the workload of the Court, would require particularly careful attention to be given to whether, prior to the submission of each of those applications,

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Nuclear Disarmament (Marshall Islands v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833.

there genuinely was, as a matter of objective fact, a legal dispute between the applicant State and the respondent State.

492. In the *Nuclear Arms and Disarmament* cases, the Court said that:

> While it is a legal matter for the Court to determine whether it has jurisdiction, it remains for the Applicant to demonstrate the facts underlying its case that a dispute exists.[360]

493. Accordingly, this preliminary objection should be upheld unless The Gambia proves the facts necessary to establish the existence of a dispute under the Genocide Convention at the time it filed its Application instituting proceedings.

494. The only facts relied upon by The Gambia as establishing this are those set out in paragraph 578 below. For the reasons given in paragraphs 579 to 719 below, these facts are however not sufficient to establish the existence on 11 November 2019, immediately before the filing of The Gambia's application, of a dispute in relation to the claims which are the subject matter of The Gambia's application. Paragraphs 720 to 729 below also set out additional considerations as to why no relevant dispute existed between The Gambia and Myanmar at that time, if The Gambia is in fact bringing these proceedings on behalf of the OIC.

B. Applicable legal principles

1. Necessity for the existence of a dispute

495. The existence of a dispute between the parties is a mandatory precondition for *any* exercise of the Court's contentious jurisdiction. This follows from Article 38, paragraph 1, of the Statute, which provides that the Court's function is "is to decide in

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360 *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*, p. 255, p. 272, para. 41, also separate opinion of Judge Owada, p. 294, para. 8 ("In making this objective determination, the Court has always been led to consider whether the party claiming the existence of a dispute (*i.e.*, the applicant) has established by credible evidence that its claim is positively opposed by the other party (*i.e.*, the respondent)"). To similar effect, see *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 569, para. 41; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, pp. 851-852, para. 44.

accordance with international law such *disputes* as are submitted to it" (emphasis added).[361]

496. Additionally, in the present case the sole basis of jurisdiction invoked by The Gambia is Article 36, paragraph 1, of the Statute, together with the compromissory clause in Article IX of the Genocide Convention, which states that:

> *Disputes* between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those [that is, those *disputes*] 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*.[362]

497. Thus, in the absence of a dispute, the Court has no jurisdiction because the compromissory clause in Article IX of the Genocide Convention does not apply, and because the proceedings fall outside the function of the Court under Article 38, paragraph 1, of the Statute.

2. Necessity for the dispute to exist at the time of filing of the application

498. As the Court held in the *Nuclear Arms and Disarmament* cases:

> In principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court … [N]either the application nor the parties' subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings.[363]

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361 *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. 269, para. 33; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (II)*, p. 566, para. 33; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 849, para. 36.

362 POM, Annex 1 (emphasis added).

363 *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 444-445, paras. 53-55; *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*, p. 255, pp. 271-272, paras. 39-40; *Obligations concerning*

499. Thus, in the words of Judge Abraham, "the respondent must not discover the existence of a claim against it by the applicant in the document instituting proceedings".[364]

500. This requirement can also be explained on the basis of Article 38, paragraph 1, of the Statute. The function of the Court is to *settle* existing disputes between the parties, and not to be a forum within which new disputes can be *created*. As Judge Donoghue said in the *Nuclear Arms and Disarmament* cases:

> An application in a contentious case initiates proceedings to settle a dispute that is "submitted to [the Court]" (Article 38, paragraph 1, of the Statute of the Court). It is not a means to elicit a respondent's opposing views in order to generate a dispute during those proceedings.[365]

501. The very concept of submitting a dispute to the Court for settlement necessarily implies that the dispute must already exist at the time of its submission. Logically, it is not possible to submit to the Court a dispute that does not yet exist.[366]

502. The rule that "the dispute must in principle exist at the time the Application is submitted to the Court" is settled case law of the Court.[367] It was affirmed again in the

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Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 568, paras. 39-40; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 851, paras. 42-43.

364 See, for instance, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, declaration of Judge Abraham, p. 575, para. 3.

365 See, for instance, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, declaration of Judge Donoghue, p. 1035, para. 5.

366 *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*, p. 255, pp. 271-272, para. 39; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 568, para. 39; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 851, para. 42: "when it is stated in Article 38, paragraph 1, of the Court's Statute that the Court's function is 'to decide in accordance with international law such disputes as are submitted to it', this relates to disputes existing at the time of their submission".

367 *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*, p. 255, pp. 271-271, para. 39 (first sentence), para. 40 (last sentence); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, pp. 568-569, para. 39

Provisional Measures Order in the present case.[368] Indeed, as has been noted, The Gambia does not appear to question the existence of this rule.[369]

503. The settled case law is to the effect that the dispute must "in principle" exist at the time the application is submitted to the Court. Several of the individual opinions in the *Nuclear Arms and Disarmament* cases observe that the words "in principle" indicate that the rule admits of exceptions.[370] However, a rule that is expressed to apply "in principle" is nonetheless a rule. The words "in principle" mean that the rule will apply, unless a valid reason for not applying the rule has been established. The cases affirming the existence of this rule do not deal with the question of exactly what exceptions to the rule might exist. As no exception to the rule has been invoked by The Gambia in these proceedings, the question of what possible exceptions to the rule might exist is merely hypothetical.

504. The existence of this rule is not negated by the fact that The Gambia's application makes claims of violations of obligations having an *erga omnes partes* character. In the *Obligation to Prosecute or Extradite* case,[371] while the Court accepted that the *erga*

(first sentence), para. 40 (last sentence); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 851, para. 42 (first sentence), para. 43 (last sentence); *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. 3, p. 27, para. 52; *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. 70, p. 85, para. 30; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9, pp. 25-26, paras. 43-45; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 115, pp. 130-131, paras. 42-44.

368 Provisional Measures Order, para. 20, final sentence.

369 See MG, para. 1.40, in which The Gambia contends that "The facts show that there was plainly a dispute between the Parties when The Gambia submitted its Application". See also MG, paras 2.9 and 2.18, first sentence.

370 See, for instance, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, dissenting opinion of Judge Yusuf, p. 869, paras. 33-34; separate opinion of Judge Tomka, p. 890, paras. 17-18; dissenting opinion of Judge Cançado Trindade, p. 918, footnote 15; separate opinion of Judge Sebutinde, pp. 1048-1049, para. 20; dissenting opinion of Judge Robinson, p. 1079, para. 41; dissenting opinion of Judge Crawford, p. 1097, para. 10; dissenting opinion of Judge *ad hoc* Bedjaoui, pp, 1117-1118, para. 34.

371 *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

omnes partes character of a treaty obligation might be of some relevance to standing in cases brought under Article 30 of the Convention Against Torture,[372] the Court's consideration of jurisdiction proceeded on the obvious premise that there still had to be a dispute specifically between Belgium and Senegal for the Court to have jurisdiction under the Convention Against Torture.[373]

505. As the Court said in the *Armed Activities* case:

> The Court observes, however, as it has already had occasion to emphasize, that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.[374]

506. The reference in this last sentence to the consent of the parties applies both to Article 38, paragraph 1, of the Statute, and Article IX of the Genocide Convention, by which the States Parties to the Statute of the Court and the Contracting Parties to the Genocide Convention have consented only to the submission of *disputes* to the Court.[375]

507. Indeed, the Court has specifically indicated that the requirement of an existing dispute at the time of filing the application applies in cases alleging breaches of the Genocide Convention. In the *Nuclear Arms and Disarmament* cases, the applicant State (the

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372 *Ibid*., pp. 448-450, paras. 64-70.

373 *Ibid*., pp. 441-445, paras. 44-55.

374 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, pp. 32 and 52, paras. 64 and 125.

375 Compare *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, separate opinion of Judge Owada, p. 587, para. 4.

Marshall Islands) argued that the *Bosnian Genocide* case[376] was an example of a case where the very filing of the application sufficed to establish the existence of a dispute. The Court rejected this contention, stating that:

> while it is true that the Court did not explicitly reference any evidence before the filing of the application demonstrating the existence of a dispute in its Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, in the particular context of that case, which involved an ongoing armed conflict, the prior conduct of the parties was sufficient to establish the existence of a dispute (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, paras. 27-29). Instead, the issues the Court focused on were not the date when the dispute arose but the proper subject-matter of that dispute, whether it fell within the scope of the relevant compromissory clause, and whether it "persist[ed]" at the date of the Court's decision. As stated above, although statements made or claims advanced in or even subsequently to the application may be relevant for various purposes — notably in clarifying the scope of the dispute submitted — they cannot create a dispute *de novo*, one that does not already exist […][377]

508. As Judge Owada further observed in the same case:

> It is true that the Court in its 1996 Judgment in the *Genocide* case did not make an explicit reference to any evidence before the filing of the Application in affirming the existence of a dispute. However, it is important to highlight the two key elements unique to that case. […] The first is that, in that case, Bosnia and Herzegovina invoked the Convention on the Prevention and Punishment of the Crime of Genocide as the source of the Court's jurisdiction. […] [I]n this case Yugoslavia did not contest the "existence of a dispute" for the purposes of the seisin of the Court, but rather questioned the "existence of a dispute for the purposes of the compromissory clause of the Convention (i.e., Article IX)", as in its view this was not an international dispute for the purposes of the Convention. This clearly serves to distinguish that case from other cases, where the issue was purely "the existence of a legal dispute". […] Furthermore, in weighing the statements made by the parties during the course of the proceedings, the Court "note[d] that there persists" a situation of

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376 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595.

377 *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*, p. 255, p. 275, para. 50; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, pp. 571-572, para. 50; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, pp. 854-855, para. 54.

> opposing views, thus signifying that a dispute had been in existence at the time of the filing of the Application […] The use of this language could be taken as an indication of the position taken by the Judgment that the statements made after the filing of the Application were referred to only as an affirmation of the continuation of a pre-existing dispute. […] In light of these factors, the reference in that Judgment to statements made after the filing of the Application were due to the special circumstances of that case and therefore should not be understood as signaling a departure from the Court's consistent jurisprudence on this subject.[378]

509. Thus, since the dispute must exist immediately prior to the application instituting proceedings, in principle, only documents issued and statements made up to the time of institution of proceedings may be considered when determining the existence of a dispute.[379] While statements or evidence post-dating the application may be relevant for various purposes, such evidence, as the Court confirmed, cannot create a dispute *de novo*.

3. Definition of a "dispute"

510. Almost a century ago, in the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice defined a "dispute" as "a disagreement on a point of law or fact, a conflict of legal views or of interests" between the parties.[380] In the intervening decades, that definition has been consistently cited by the Court.[381]

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378 See, for instance, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, separate opinion of Judge Owada, pp. 882-883, paras. 16-18.

379 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011*, p. 70, p. 85, para. 30.

380 *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

381 For instance, *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, p. 99, para. 22; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, p. 13, para. 27; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, p. 314, para. 87; *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.CJ. Reports 2005*, p. 6, p. 18 para. 24; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, p. 40, para. 90; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 3, p. 26, para. 50*; 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*, p. 100, pp. 138-139,

511. However, that "abstract and general formulation"[382] is inadequate, particularly to the extent that it could be read as suggesting that a "dispute" might exist where there is no more than a disagreement between the parties on a point of fact with no legal consequences turning on that disagreement, or where there is merely a conflict of legal *interests*.[383]

512. The Court is a judicial body. Its function is accordingly confined to deciding *legal* disputes.[384] This is necessarily implicit in Article 38, paragraph 1, of the Statute, which states that the function of the Court is to decide "disputes" submitted to it "in accordance with international law". This is further reflected in Article 36, paragraph 2, of the Statute, which refers specifically to "legal disputes", and in Article 36, paragraph 3, of the UN Charter, which provides that "legal disputes should as a general rule be referred by the parties to the International Court of Justice".

513. For a *legal* dispute to exist, there must be a conflict between the parties concerning legal rights and obligations, the resolution of such conflict having some concrete consequence. As the Court said in the *Northern Cameroons* case:

> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The

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para. 124; *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*, p. 255, pp. 269-270, para. 34; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 566, para. 34; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 849, para. 37.

382 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, separate opinion of Judge Owada, pp. 586-587, para. 3.

383 *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at p. 328 ("Nor is it adequate to show that the interests of the two parties to such a case are in conflict").

384 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, dissenting opinion of Vice-President Yusuf, p. 864, para. 16 ("The jurisdiction of the Court is to be exercised in contentious cases only in respect of legal disputes submitted to it by States"), separate opinion of Judge Bhandari, p. 1057, para. 3 ("Under Article 36, paragraph 2, and Article 38, paragraph 1, of the Statute of the Court, it can only exercise its jurisdiction in case of a dispute between the parties. The concept of "dispute", and more specifically "legal dispute", is thus central to the exercise of the Court's jurisdiction").

> Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.[385]

514. The Court has therefore emphasized, particularly in its recent case law, that for a dispute to exist, "the two sides [must] hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations".[386]

515. However, even if two States *hold* clearly opposite views, if neither is aware of the view held by the other, then it can hardly be said that the two parties are in *dispute*. In such a situation they may, unbeknown to each other, hold different opinions on a particular matter, but there is no *dispute* between them. Furthermore, even if party A is aware of the clearly opposite view held by party B, it cannot be said that there is any *dispute* between the parties if party B in turn has no awareness of the view held by party A.

516. The word "*dispute*" (or "*différend*"), as used in both in the Statute of the Court and in Article IX of the Genocide Convention, must be interpreted in good faith in accordance with the ordinary meaning to be given to the term, in accordance with the customary international law rule of treaty interpretation reflected in Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties. So interpreted, the word "*dispute*" or "*différend*" refers to a situation where each of two or more parties is aware of the clearly opposite views taken by the other, and furthermore, each is aware that the other is also so aware.

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385 *Case concerning the Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963*, p. 15, pp. 33-34.

386 *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, p. 65, p. 74; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, 1.C.J. Reports 1996*, p. 595, p. 614, para. 29; *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. 3, p. 26, para. 50; *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*, p. 255, p. 270, para. 34; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 566, para. 34; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 849, para. 37; *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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 104, p. 115, para. 22.

517. This is reflected in the statement in the *Rights of Passage* case in 1960 that it is necessary for the parties "to adopt clearly-defined legal positions *as against each other*".[387] This is also reflected in the statement that, for a dispute to exist, "it must be shown that the claim of one party is *positively opposed* by the other".[388]

518. In the *Nuclear Arms and Disarmament* cases, the Court repeated the same formulation, with an added reference to the need to show "that the respondent *was aware, or could not have been unaware*, that its views were 'positively opposed' by the applicant".[389]

519. To put the matter another way, in order for there to be any dispute at all, the respondent State must be aware *of the positively opposed views of the applicant State*. As Judge Owada said in the *Nuclear Arms and Disarmament* cases:

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387 *Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, p. 34 (emphasis added).

388 (Emphasis added.) See: *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment of 21 December 1962*, *I.C.J. Reports 1962*, p. 319, p. 328; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, p. 100, para. 37; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9, p. 16, para. 32; *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6, p. 17, para. 24; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, p. 40, para. 90; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 832, p. 849, para. 41; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, p. 84, para. 30; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422, p. 442, para. 46; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 3, p. 26, para. 50; *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*, p. 255, p. 270, para. 34; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 566, para. 34; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 849, para. 37; *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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 104, p. 115, para. 22.

389 *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*, p. 255; p. 271, para. 38; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 568, para. 38; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, pp. 850, para. 41.

> The crucial point is that the common denominator running through these diverse cases is the element of awareness; as stated in the Judgment, it is the awareness of the respondent which demonstrates the transformation of a mere disagreement into a true legal dispute between the parties. This principle requires the applicant to establish that the respondent "was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant" (Judgment, para. 41). […] I have tried to demonstrate that this element of awareness is not being introduced in the present Judgment as another new criterion that could be used as an alternative to other factors to establish the existence of a dispute. In my view, this element is critical, inasmuch as it is the "objective awareness" of the parties that transforms a disagreement into a legal dispute. The element of awareness therefore constitutes an essential minimum common to all cases where the existence of a dispute is at issue.[390]

520. Although the Court in the *Nuclear Arms and Disarmament* cases speaks of awareness *by the respondent State* of the positively opposed views of the applicant State, for the reasons above, the existence of a dispute in fact requires awareness by both parties of the positively opposed views of the respective other side. This is necessarily implicit in the judgments in those cases. The Court found that there was no dispute at the time of filing of the applications in those cases because the respondent States (India, Pakistan and the United Kingdom) could not be shown to have been aware of the claim made by the applicant State (the Marshall Islands). However, the Court in those cases recalled the case law to the effect that "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".[391] The Court thereby assumed that for a dispute to exist, it would not have been enough for the respondent States to have been aware of the claim made by the Marshall Islands, but that it would also have been necessary for the respondent States to have made their positive opposition known to the Marshall Islands, either expressly, or through their conduct (for instance, by failing to respond when a response was called

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390 For instance, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, separate opinion of Judge Owada, p. 881, paras. 13-14.

391 *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*, p. 255, p. 231, para. 37; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, pp. 567-568, para. 37; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 850, para. 40. See also *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, 65, 74; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, 422, 442, para. 46.

for). As the Court said in those cases, "the question whether there is a dispute in a particular contentious case turns on the evidence *of opposition of views*".[392]

521. This requirement for mutual awareness by both parties of their respectively positively opposed positions does not introduce a *subjective* requirement into the definition of a dispute. A determination of whether or not a party was aware of the position of the other party does not require the Court to ascertain the subjective state of mind of the former. The Court's case law makes clear that the existence of a dispute is to be determined *objectively*, on the basis of the evidence before the Court, and that a mere assertion by one party is not sufficient to prove the existence of a dispute, just as a mere denial of the existence of the dispute does not prove its non-existence either.[393] The issue is thus whether, on the evidence, *objectively*, the party concerned was either aware, or in the circumstances could not have been unaware, of the position of the other party.

522. It is accepted that the requirement of awareness by each of the parties of the positively opposed view of the other does not mean that the applicant State must necessarily expressly notify its position to the respondent State by diplomatic note or other formal means, or that the respondent State must notify its positively opposed views by similar means. The existence of mutual awareness of the parties of their respective positively opposed views, and the means by which that positive opposition can be manifested, are two different matters. The latter issue is dealt with in paragraphs 566 to 577 below.

523. What *is* required is that the evidence must establish objectively that, on the particular facts and circumstances of the case:

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392 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 856, para. 57. See also pp. 848, 854, paras. 35, 50, 53; and separate opinion of Judge Owada, p. 879, para. 7 ("It is this positive opposition *manifested between the parties* which transforms a mere factual disagreement into a legal dispute susceptible of adjudication" (emphasis added). To similar effect, see *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*, p. 255, p. 276, para. 52; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 572, para. 52.

393 *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, p. 328.

(a) one party has made a legal claim,

(b) the other party was aware or could not have been unaware of that legal claim,

(c) the latter party has positively opposed that legal claim, and

(d) the former party was aware or could not have been unaware of that positive opposition.

4. The requisite degree of particularity

524. In order for a legal dispute to exist, the legal claim made by the applicant State (see element (a) in paragraph 523 above), must be articulated with a minimum degree of particularity. This requirement necessarily follows from a number of considerations.

525. First, in the *Nuclear Arms and Disarmament* cases, the Court said that:

> If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct. Furthermore, the rule that the dispute must in principle exist prior to the filing of the application would be subverted.[394]

526. The Court thereby indicates both a rationale for the rule that a dispute must exist prior to the filing of the application, as well as an element of the definition of a dispute. The respondent State is entitled to an *opportunity to react* to the claim of the applicant State before proceedings are brought before this Court. A dispute for present purposes therefore cannot exist until the respondent State has become aware of the claim of the applicant State in a way that enables the respondent State to give a reaction, and until the respondent State has had an appropriate opportunity to react.

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394 *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*, p. 255, p. 272, para. 40; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, pp. 568-569, para. 40; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 851, para. 43.

527. This is not to suggest that there must necessarily be prior *negotiations* between the parties before a dispute can be said to exist, unless the respective compromissory clause provides otherwise.[395] However, while prior *negotiations* may not necessarily be a prerequisite for the existence of a dispute as such, the existence of an opportunity for the respondent State to *react* to the claim of the applicant State is such a prerequisite. That is to say, the respondent State must have had the opportunity to give due consideration to the claim made by the applicant State prior to bringing the case before the Court, and must also have been provided with a chance to indicate whether the respondent State accepts or rejects that claim. This is no more than the logical consequence of the requirement that for a dispute to exist, both parties must be aware of the positively opposed position of the other party.

528. In order for party B to be *able* to react to a claim made by party A, it will be necessary for party A's claim to be formulated and communicated to party B with a sufficient degree of definition so as to enable a considered response to be given by party B. The Court has thus affirmed that:

> a statement can give rise to a dispute only if it refers to the subject-matter of a claim with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter.[396]

529. A statement by a prospective applicant State expressed in terms so general or vague that the prospective respondent State cannot meaningfully accept or reject its correctness in law would thus not be a legal claim for present purposes.

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395 *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*, p. 255, p. 270, para. 35; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, pp. 566-567, para. 35; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 849, para. 38.

396 *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*, p. 255, p. 274, para. 46; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 570, para. 46; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 853, para. 49, citing *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. 70, p. 85, para. 30.

530. It is therefore not sufficient for the applicant State merely to have identified the *general subject matter to which the claim relates*. In order for the prospective respondent State to be able to adequately react, it will be necessary for the applicant State to have identified to the respondent State the subject matter *of the claim itself*. To express the matter more precisely, the prospective respondent State must be made aware *of the applicant State's claim* against it.[397]

531. In order for such a respondent State to be aware of *a legal claim* of the applicant State, and to have an opportunity to react to such claim, it will be necessary for the prospective respondent State to be made aware of the facts said to amount to a breach of international law, as well as of the provisions of international law said to have been thereby breached.

532. The Court has said that:

> While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83), 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. An express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice.[398]

533. However, this means simply that a specific treaty provision need not be invoked expressly, if, in all of the circumstances considered as a whole, the respondent State could not have been unaware that a breach of such specific treaty provision was being alleged.

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397 *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*, p. 255, declaration of Judge Donoghue, p. 448, para. 8 (stating that "the Court asks whether the Applicant's statements referred to the subject-matter of its claim against the Respondent — i.e., 'the issue brought before the Court' in the Application — with sufficient clarity that the Respondent 'was aware, or could not have been unaware', of the Applicant's claim against it", and citing paragraphs 38 and 48 of the Judgment in that case, indicating her view that this is the effect of the Judgment).

398 *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. 70, p. 85, para. 30.

534. This requirement that the applicant State's claim must be brought to the awareness of the respondent State with a sufficient degree of definition to enable a considered reaction to be given is reflected in the statement made in 1960 in the *Rights of Passage* case that it is necessary for the parties "to adopt *clearly-defined legal positions* as against each other".[399] It is also reflected in the definition of a "dispute" that was given in the *Interpretation of Peace Treaties* case in 1950, as "a situation in which the two sides hold *clearly* opposite views concerning the question of the performance or non-performance of certain treaty obligations".[400]

535. Thus, in the *Chagos Marine Protected Area* arbitration,[401] the arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea ("**UNCLOS**") said that:

> Article 283 [UNCLOS] requires that a dispute have arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed.[402]

536. While the Tribunal said this with specific reference to Article 283 of that Convention, there is no reason why the definition of a dispute for purposes of that provision should differ from the definition of that term for purposes of the Statute of the Court or for purposes of Article IX of the Genocide Convention. Article 283 UNCLOS provides that:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.[403]

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399 *Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, p. 34 (emphasis added).

400 *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, p. 65, p. 74.

401 *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Permanent Court of Arbitration Case No. 2011-03, Award, 18 March 2015, POM, Annex 16.

402 *Ibid.*, para. 382.

403 United Nations Convention on the Law of the Sea, 10 December 1982, *UNTS*, vol. 1833, p. 396, Article 283, POM, Annex 8.

537. The meaning of the word "dispute" in that provision would be no different if the provision stated instead that the dispute may be referred directly to this Court without any prior exchange of views.

538. A second reason why the applicant's claim must be articulated with a minimum degree of particularity is this. The rule that a dispute must exist before the application is filed with the Court means that only the particular dispute(s) that existed before the filing can be included in the application. Where there is *a* legal dispute between two States, each of those States can only be entitled to submit *that* dispute to the Court. The mere fact that there is *a* legal dispute between two States does not mean that an application to the Court can contain different or additional claims that were not in dispute between the parties prior to the filing of the application. Thus, the particular claim that is made in the application must be the same claim that was "positively opposed" by the applicant State in the pre-existing dispute with the respondent State.

539. This means that where an application contains multiple claims, it is necessary to determine separately in relation to each individual claim whether a dispute existed with sufficient specificity in relation to *that particular claim* at the time of the filing of the application.

540. This also means that, even prior to the filing of the application instituting proceedings, a dispute must be defined with sufficient clarity to enable the respondent State and the Court to determine whether the claim made in the application is indeed the matter that was already in dispute, or whether the application includes new or additional claims going beyond the pre-existing dispute.

541. This is apparent from the *Obligation to Prosecute or Extradite* case. In that case, the Court found that prior to the filing of the application instituting proceedings, there was a dispute between the parties as to whether Senegal's failure to prosecute or extradite Mr. Habré was a breach of the Convention Against Torture, but that there was no dispute between the parties as to whether this failure was a breach of a customary international law obligation to prosecute for war crimes and crimes against humanity. The Court said:

> While it is the case that the Belgian international arrest warrant transmitted to Senegal with a request for extradition on 22 September […] referred to violations of international

> humanitarian law, torture, genocide, crimes against humanity, war crimes, murder and other crimes, neither document stated or implied that Senegal had an obligation under international law to exercise its jurisdiction over those crimes if it did not extradite Mr. Habré. In terms of the Court's jurisdiction, what matters is whether, on the date when the Application was filed, a dispute existed between the Parties regarding the obligation for Senegal, under customary international law, to take measures in respect of the above-mentioned crimes attributed to Mr. Habré. In the light of the diplomatic exchanges between the Parties reviewed above […], the Court considers that such a dispute did not exist on that date. The only obligations referred to in the diplomatic correspondence between the Parties are those under the Convention against Torture. […] Under those circumstances, there was no reason for Senegal to address at all in its relations with Belgium the issue of the prosecution of alleged crimes of Mr. Habré under customary international law. The facts which constituted those alleged crimes may have been closely connected to the alleged acts of torture. However, the issue whether there exists an obligation for a State to prosecute crimes under customary international law that were allegedly committed by a foreign national abroad is clearly distinct from any question of compliance with that State's obligations under the Convention against Torture and raises quite different legal problems.[404]

542. That conclusion would have applied *vice versa* if in that case Belgium in its diplomatic correspondence had claimed that Senegal's failure to prosecute or extradite Mr. Habré was a breach of a customary international law obligation, but had made no mention of the Convention Against Torture. In that situation, there would have been no dispute between the parties in relation to that Convention.

543. Similarly, in the *Electricity Company of Sofia and Bulgaria* case,[405] the Permanent Court of International Justice rejected the respondent State's preliminary objections in respect of two of the three claims in its application, but found that the third of the claims was inadmissible on the ground that this claim did not form the subject of a dispute between the two Governments prior to the filing of the application.

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404 *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422, pp. 444-445, para. 54.

405 *Electricity Company of Sofia and Bulgaria (Preliminary Objection), Judgment, 1939, PCIJ., Series A/B, No. 77*, pp. 83-84.

544. Again, in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*,[406] Nicaragua requested the Court to determine two principal claims, one alleging violations by Colombia of Nicaragua's maritime zones, and the other alleging a breach by Colombia of its obligation under Article 2, paragraph 4, of the United Nations Charter not to use or threaten to use force.[407] The Court said that it "will examine these two claims separately in order to determine, with respect to each of them, whether there existed a dispute […] at the date of filing of the Application".[408] The Court found that at the time Nicaragua filed its application, there existed a dispute concerning the former of these claims,[409] but that this dispute did not concern the matter raised in the second claim.[410] Accordingly, the preliminary objection based on the absence of a dispute at the time of filing of the application was rejected in relation to the first claim and upheld in relation to the second claim.[411]

545. Similarly, in the *Eurotunnel Arbitration*,[412] in which the tribunal relied on the case law of this Court in respect of the requirement of the existence of a dispute, two claims (referred to respectively as the "Sangatte claim" and the "SeaFrance claim") were advanced by the claimants. The Tribunal said in relation to these claims, as made against one of the respondents, as follows:

> It must first be observed that, although the Claimants put forward the Sangatte claim and the SeaFrance claim as part of a single dispute, in truth the two are entirely distinct. They involve different acts or omissions of the Respondents, as well as different provisions of the Concession Agreement and (to the extent they may be applicable) also different rules of international law. Questions of jurisdiction and admissibility have to be separately considered with regard to each of them.[413]

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406 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 3.

407 *Ibid.*, pp. 27-28, 31, paras. 53, 67.

408 *Ibid.*, p. 31, para. 67.

409 *Ibid.*, p. 33, para. 74.

410 *Ibid.*, p. 34, para. 79.

411 *Ibid.*, pp. 33-34, paras. 78-79.

412 *Channel Tunnel Group Limited and France-Manche S.A.* v. *United Kingdom and France*, Permanent Court of Arbitration Case No. 2003-06, Partial Award, 30 January 2007, para. 2, POM, Annex 15.

413 *Ibid*., paras. 136, 143.

546. This is an example of where the question of the pre-existence of a dispute was considered separately in relation to each claim, notwithstanding that both claims were based on the same agreement, and involved acts of the same respondents.

547. A third reason why the applicant's claim must be articulated with a minimum degree of particularity is this. The question of whether a dispute exists, and if so what that dispute consist of, may arise for determination in contexts other than the rule that a dispute must exist at the time of filing the application. The test for determining the existence and content of a dispute should not differ unnecessarily in each of these different contexts.

548. Thus, in the award on jurisdiction and admissibility in the *South China Sea* arbitration,[414] the arbitral Tribunal, after referring to case law of the Court on the definition of a dispute,[415] went on to say that:

> Where a dispute exists between parties to the proceedings, it is further necessary that it be identified and characterised. The nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or whether subject-matter based exclusions from jurisdiction are applicable. Here again, an objective approach is called for, and the Tribunal is required to "isolate the real issue in the case and to identify the object of the claim."[416] […]
>
> The existence of a dispute in international law generally requires that there be "positive opposition" between the parties, in that the claims of one party are affirmatively opposed and rejected by the other. In the ordinary course of events, such positive opposition will normally be apparent from the diplomatic correspondence of the Parties, as views are exchanged and claims are made and rejected.[417]

549. In particular, the Court's case law indicates that where an applicant State makes a claim during the course of the proceedings, the question may arise as to whether or not that claim falls within the scope of the dispute that was submitted to the Court in the

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414 *The South China Sea Arbitration* (*Philippines* v. *China)*, Permanent Court of Arbitration Case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, POM, Annex 17.

415 *Ibid.*, paras. 148-149.

416 *Ibid.*, para. 150.

417 *Ibid.*, para. 159 (footnote omitted).

application. This is a consequence of Article 40, paragraph 1, of the Statute, which requires that the application instituting proceedings must indicate the "subject of the dispute". In the *Phosphate Lands in Nauru* case, the Court said:

> Article 40, paragraph 1, of the Statute of the Court provides that the "subject of the dispute" must be indicated in the Application; and Article 38, paragraph 2, of the Rules of Court requires "the precise nature of the claim" to be specified in the Application. These provisions are so essential from the point of view of legal security and the good administration of justice that they were already, in substance, part of the […] the Statute [and Rules] of the Permanent Court of International Justice […] On several occasions the Permanent Court had to indicate the precise significance of these texts. Thus, in its Order of 4 February 1933 in the case concerning the *Prince von Pless Administration (Preliminary Objection)*, it stated that:
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> > "under Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein ..." (*P.C.I.J., Series A/B, No. 52*, p. 14).
>
> In the case concerning the *Société commerciale de Belgique*, the Permanent Court stated:
>
> > "It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute. ... it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention provided for in Articles 62 and 63 of the Statute." (*P.C.I.J., Series A/B, No. 78*, p. 173; cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 427, para. 80.)[418]

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[418] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, pp. 266-267, para. 69. See also *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 639, pp. 656-657, paras. 38-41; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, pp. 695-696, paras. 108-110.

550. In that case, the Court found that one of the claims of Nauru was inadmissible, on the ground that it constituted "both in form and in substance, a new claim", such that "the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim".[419]

551. It follows from this that the application instituting proceedings must indicate the "dispute" with sufficient precision to enable the respondent State and the Court to determine whether submissions subsequently made by the applicant State in the course of the proceedings are still within the scope of the dispute as originally submitted to the Court in the application, or whether such submissions constitute a new or additional claim. As the Court said, this is "essential from the point of view of legal security and the good administration of justice". Any other conclusion would incentivise applicant States to formulate claims in the application instituting proceedings in deliberately vague and imprecise terms, to leave themselves room to expand the scope of their case during the course of the proceedings.

552. This relationship between the claims made in the application and the claims made in subsequent submissions of the parties is essentially the same as the relationship between the claims made in the application and the claims already made in the pre-existing dispute between the parties, as described in paragraphs 538 to 546 above, and particularly in paragraph 540. Accordingly, there is a relationship between all three: the claims made at the end of the proceedings must correspond to the claims made in the application, which in turn must correspond to the claims that were in dispute before the application was filed. At all three stages, the claims must be identifiably the same. For it to be possible for the Court and the parties to determine whether this requirement is satisfied, the claims must be identifiable with sufficient particularity at all three stages. This too is essential to legal security and the good administration of justice.

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419 *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, pp. 266-267, para. 70.

5. The requirement that the "view" be a legal claim

553. Since the dispute submitted to the Court must be a *legal dispute*, the "view" of the applicant State that is positively opposed by the respondent State must in fact be a *legal claim*. If State A makes a political statement, or merely expresses an opinion, that is positively opposed by State B, there will not be a *legal* dispute between the two. At most, there may be a political disagreement or a difference of opinion.

554. As Judge Owada said in the *Nuclear Arms and Disarmament* cases:

> when it comes to the question of whether this court of law is able to exercise jurisdiction in relation to the claim advanced by the Applicant, something more than a mere divergence of positions between the Applicant and the Respondent is required as a matter of law. More specifically, it has to be demonstrated that this factual divergence of positions between the Parties has crystallized into a concrete legal dispute capable of adjudication by this Court at the time of the filing of the Application.
>
> […] The task of the Court in the present case is therefore to ascertain, not the existence *vel non* of a divergence of opinions between the Parties, but whether this divergence had developed into a concrete legal dispute by the time the Application was filed.
>
> […] A legal dispute for this purpose must be clearly distinguished from a mere divergence or difference in the views or positions that could exist in fact between the respective parties on the subject-matter at issue. In international relations between States, as is so often the case between individuals, States frequently adopt different or divergent positions on a given issue. Such differences or divergences, even when they are well established, do not ipso facto represent a legal dispute of which a court of law can be seised for adjudication.[420]

555. A statement by State A might well be a political statement, or an expression of opinion, rather than a legal claim, even if, as will subsequently be shown, it refers to an alleged breach of international law by State B. Whether or not such a "view" expressed by State A is a legal claim, rejection of which will crystalize into a legal dispute, will depend on the circumstances of the case.

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[420] For instance, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 849, separate opinion of Judge Owada, pp. 877, 879, paras. 1-2, 6.

556. Relevant circumstances in determining whether conduct of the applicant State amounts to the making of a legal claim against the respondent State will include, for instance, the forum in which, or means by which, the "view" is expressed, and the terms in which it is expressed.

557. For instance, a UN General Assembly resolution, on the subject of "The situation in State X", might contain a paragraph stating that the General Assembly is "deeply concerned by the violations of human rights law by the Government of State X". This could hardly be characterised as the assertion, as against State X, of a *legal claim* by each of the individual UN Member States who voted in favour of the resolution. It would be a *political* statement. If State X failed to respond to that General Assembly resolution, or issued a response disagreeing with the assertion that there have been violations of human rights law, this could hardly mean that there now existed a *legal dispute* between State X and every one of the UN Member States that voted in favour of the resolution.

558. An example of this would be UN General Assembly resolution 74/246 on the "Situation of human rights of Rohingya Muslims and other minorities in Myanmar", of 27 December 2019.[421] Paragraph 1 of that resolution refers to "continuing reports of serious human rights violations and abuses as well as violations of international humanitarian law". Paragraph 2 then states that the General Assembly:

> *Strongly condemns* all violations and abuses of human rights in Myanmar, and calls upon Myanmar, in particular its security and armed forces, to end immediately all violence and all violations of international law in Myanmar, to ensure the protection of the human rights of all persons in Myanmar, including of Rohingya Muslims and persons belonging to other minorities, and to take all measures necessary to provide justice to victims, to ensure full accountability and to end impunity for all violations and abuses of human rights law and violations of international humanitarian law, starting with a full, transparent and independent investigation into reports of all these violations.

559. It must be obvious that this resolution, coupled with a failure by Myanmar to respond, would be incapable of itself of crystallising a *legal dispute* between the 134 UN

[421] UNGA, resolution 74/246, Situation of human rights of Rohingya Muslims and other minorities in Myanmar, UN doc. A/RES/74/246, 27 December 2019, POM, Annex 86.

Member States who voted in favour of that resolution[422] on the one hand, and Myanmar on the other, relating to alleged non-compliance with international law norms of human rights and international humanitarian law. If it could, this would lead to the conclusion that there is also a *legal dispute* between all UN Member States (other than North Korea) on the one hand, North Korea on the other, as a result of the adoption without a vote on 18 December 2019 of UN General Assembly resolution 74/166 on the "Situation of human rights in the Democratic People's Republic of Korea".[423] It would similarly lead to the conclusion that there is a *legal dispute* between Syria on the one hand, and on the other, the 106 UN Member States who voted in favour of UN General Assembly resolution 74/169 on the "Situation of human rights in the Syrian Arab Republic".[424] That cannot be correct. General Assembly resolutions such as these are political statements, not legal claims.

560. Such political statements can also be made by organs of a State. To give an example, on 20 September 2018, the House of Commons of Canada adopted a motion which stated no more than the following:

> By unanimous consent, it was resolved, — That the House: (a) endorse the findings of the UN Fact Finding Mission on Myanmar that crimes against humanity have been committed by the Myanmar military against the Rohingya and other ethnic minorities and that these horrific acts were sanctioned at the highest levels of the Myanmar military chain of command; (b) recognize that these crimes against the Rohingya constitute a genocide; (c) welcome the recent decision of the International Criminal Court that it has jurisdiction over the forced deportation of members of the Rohingya people from Myanmar to Bangladesh; (d) call on the UN Security Council to refer the situation in Myanmar to the International Criminal Court; and (e)

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422 The voting record is at POM, Annex 87.

423 UNGA, resolution 74/166, Situation of human rights in the Democratic People's Republic of Korea, UN doc. A/RES/74/166, 18 December 2019, POM, Annex 82. The voting record is at POM, Annex 83. Paragraph 1 of this resolution "*Condemns* the long-standing and ongoing systematic, widespread and gross violations of human rights in and by the Democratic People's Republic of Korea, including those that may amount to crimes against humanity according to the commission of inquiry on human rights in the Democratic People's Republic of Korea".

424 UNGA, resolution 74/169, Situation of human rights in the Syrian Arab Republic, UN doc. A/RES/74/169, 18 December 2019, POM, Annex 84. The voting record is at POM, Annex 85. Paragraph 1 of this resolution "*Strongly condemns* the systematic, widespread and gross violations and abuses of international human rights law and violations of international humanitarian law committed in the Syrian Arab Republic and the indiscriminate and disproportionate attacks in civilian areas and against civilian infrastructure, in particular attacks on medical facilities and schools, which continue to claim civilian lives, and demands that all parties comply with their obligations under international humanitarian law".

> call for the senior officials in the Myanmar military chain of command to be investigated and prosecuted for the crime of genocide.[425]

561. Then, on 11 November 2019, the Canadian Minister for Foreign Affairs issued a statement which said that:

> Canada welcomes the Gambia's submission to the International Court of Justice of an application to institute proceedings against the Government of Myanmar for alleged violations of the Genocide Convention. […]
>
> Consistent with the final report of the UN Fact-Finding Mission, which found reasonable grounds to conclude a strong inference of genocidal intent, Canada recognized the crimes against the Rohingya as constituting a genocide through a unanimous motion in the House of Commons in September 2018. The motion reiterated our call for the UN Security Council to refer the situation in Myanmar to the International Criminal Court.
>
> Canada will work with other like-minded countries to end impunity for those accused of committing the gravest crimes under international law. Together with our partners, we will explore options to support the Gambia in these efforts, with assistance from Canada's Special Envoy to Myanmar, the Honourable Bob Rae.[426]

562. It must be obvious that this parliamentary resolution and this statement of the Minister of Foreign Affairs, if considered in isolation,[427] could not possibly be characterised as the making of *legal claims* by Canada against Myanmar. They are political statements. Failure of Myanmar to respond to them would not mean that there is a *legal dispute* between Canada and Myanmar. This follows from both the circumstances and the contents of these statements. Neither is addressed directly by the Government of Canada to Myanmar. Both are extremely brief. Neither gives details of any relevant facts, each simply referring to the reports of the FFM (Independent International Fact-Finding Mission on Myanmar). Both contain mere references to "genocide", without giving any indication of which facts are said to breach which provisions of the

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425 Canada, House of Commons, Forty-second Parliament, First Session, *Journals*, No. 322, 20 September 2018, p. 3988, POM, Annex 115.

426 Canada, Global Affairs Canada, Statement of the Minister for Foreign Affairs, "Canada welcomes the Gambia's action to address accountability in Myanmar", 11 November 2019, POM, Annex 116.

427 These are given as an example to demonstrate the argument. It is acknowledged that officials of the Government of Canada have made other statements, and that the Court is not called upon to determine whether there is any legal dispute between Canada and Myanmar.

Genocide Convention or which principles of customary international law relating to genocide. Both lack the requisite degree of particularity referred to in paragraphs 524 to 552 above that would be required of a legal claim.

563. It is noted that Canada's own subsequent conduct is consistent with this conclusion. Less than a month after the statement of the Canadian Minister of Foreign Affairs referred to above, on 9 December 2019, Global Affairs Canada (the Canadian ministry responsible for foreign affairs) issued a statement, which contains no reference to Canada recognizing that genocide has been committed, but which merely states that "this is a matter that is rightfully brought to the ICJ, so that it can provide judgment on whether acts of genocide have been committed" and that "Canada […] consider it their obligation to support the Gambia before the ICJ, as it should concern all of humanity".[428] The suggestion in this statement is that Canada is not taking the position that genocide has been committed, but merely supports the matter being put before the Court so that the Court can decide whether genocide has been committed, *quod non*.

564. It is furthermore noted that Canada has subsequently indicated in a letter to the Registrar of the Court dated 11 November 2020 (sent jointly on behalf of Canada and the Netherlands), that Canada may wish to intervene in these proceedings. Canada has indicated that any intervention would be under Article 63 of the Statute (as a Contracting Party to the Genocide Convention that is not concerned in the case),[429] rather than under Article 62 (as a State with an interest of a legal nature which may be affected by the decision in the case).[430] This again very much suggests that Canada does not purport to have made a *legal claim* of its own that it is asserting against Myanmar.

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428 Canada and the Netherlands, "Joint statement of Canada and the Kingdom of the Netherlands regarding the Gambia's action to address accountability in Myanmar", 9 December 2019, POM, Annex 118.

429 Article 62, paragraph 1, of the Statute provides: "Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene".

430 Article 63, paragraph 1, of the Statute provides: "Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith". Article 63, paragraph 2, provides: "Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it".

565. The existence of a legal dispute between States is a serious matter. Article 2, paragraph 3, of the Charter of the United Nations imposes a positive obligation on Member States to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". If any political statement of a State were to be characterised as a legal claim, merely because it contains a bare reference to non-compliance with international law, such that disagreement with, or lack of response to, such a statement would crystallise into a legal dispute, then the number of legal disputes in the world would be multiplied exponentially. This would be all the more so if such statements could be so characterised, even when made by a State which itself has no involvement in the facts of the situation in which the breach of international law is said to have occurred.

6. Proof of the existence of a "dispute"

566. It is now the settled case law of the Court that "Whether a dispute exists is a matter for objective determination by the Court which must turn on an examination of the facts",[431] and that "[t]he Court's determination of the existence of a dispute is a matter of substance, and not a question of form or procedure".[432]

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431 *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*, p. 255, p. 270, para. 36; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 567, para. 36; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 849, para. 39; *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.

432 *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*, p. 255, p. 271, para. 38; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 566, para. 35; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 849, para. 38; *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; *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. 70, p. 84, para. 30.

567. This means that there are no particular formalities that must necessarily be followed by one State in order to raise a claim against another State, or in order to oppose positively a claim made by another State.

568. In particular, it is now settled case law that diplomatic exchanges are not necessary in order to establish the existence of a dispute: a formal protest is not a necessary condition for the existence of a dispute, nor for instance is there any requirement for a formal notice of intention to file a case before the Court.[433] In the absence of diplomatic exchanges, it may be possible to establish the existence of a dispute by reference to the conduct of the parties, or indeed, by reference to inferences drawn from the conduct of the parties.[434] In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party.[435]

569. As a matter of principle, if the question is one of substance not form, the converse must also apply. The mere fact that diplomatic exchanges *have* occurred does not of itself necessarily mean that there *is* a dispute between the parties. Similarly, the mere fact that one party *has* signalled an intention to bring a case before this Court does not of itself mean that a legal dispute *has* already crystallised. In all cases, the existence of a dispute will depend on the factual circumstances as a whole.

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433 In addition to citations in the previous footnote, see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998,* pp. 297, 322, paras. 39, 109.

434 *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,* p. 255, p. 271, para. 37; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016,* p. 552, p. 567, para. 36; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016,* p. 833, p. 850, para. 40; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 275, p. 315, para. 89.

435 *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,* p. 255, p. 271, para. 37; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016,* p. 552, p. 567, para. 37; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016,* p. 833, p. 850, para. 40; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 275, p. 315, para. 89.

570. Thus, although prior diplomatic correspondence is not a legal requirement, the fact that there has been no diplomatic correspondence may nonetheless be a factor weighing in favour of the conclusion that there has not been a dispute at the relevant time. For, although formal diplomatic exchanges are not a legal prerequisite, in *practice* a positive finding of the existence of a dispute usually *will* be based on evidence of direct diplomatic exchanges between the executive governments of the two parties,[436] and the Court will look in particular at statements or documents exchanged between the parties.[437] In *Convention on Racial Discrimination*, for instance, the Court specifically limited its consideration to official documents and statements,[438] and said that it paid special attention to "the author of the statement or document, their intended or actual addressee, and their content".[439] The Court observed that "in general, in international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level", and that accordingly, "primary attention will be given to

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436 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, p. 84, para. 30 ("While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter"), p. 87, para. 37 ("a dispute is more likely to be evidenced by a direct clash of positions stated by the two Parties about their respective rights and obligations in respect of the elimination of racial discrimination, in an exchange between them").

437 *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*, p. 255, pp. 270-271, para. 36; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 567, para. 36; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 850, para. 39.

438 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, p. 86, para. 33.

439 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, p. 100, para 63; *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*, p. 255, pp. 270-271, para. 36; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 567, para. 36; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, pp. 849-850, para. 39.

statements made or endorsed by the Executives of the two Parties".[440] It therefore declined in that case to attach legal significance to various resolutions and statements emanating from the Georgian Parliament or Parliamentary Officers which were neither endorsed nor acted upon by the Executive.[441]

571. In cases where there *is* formal diplomatic correspondence between the parties, then the content of that correspondence will be particularly significant. If State A has not in the formal diplomatic correspondence made it clear that it is asserting a legal claim against State B, this should normally support an inference that it is not doing so. It is evident that if State A sends diplomatic correspondence to State B in relation to a matter, there is no reason why State A cannot make clear in it that it is asserting a legal claim, if that is what it is seeking to do. Certainly, if the diplomatic correspondence from State A does not make this clear, it would be difficult to conclude that State B "could not have been unaware" from this correspondence of State A's legal claim, and would be difficult to conclude that a response by State B to that correspondence is "called for".

572. In the consideration of the content of documents relied upon to establish the existence of a dispute, documents that do not allege the breach of international law that is the subject matter of the application to the Court must almost inevitably fail to establish the existence of a dispute concerning such an alleged breach. Thus, in the *Obligations concerning Negotiations* cases, the Court found that documents relied on by the Marshall Islands did not support the existence of a dispute, "since none articulates an alleged breach by the [respondent State] of the obligation enshrined in Article VI of the NPT or the corresponding customary international law obligation invoked by the Marshall Islands".[442]

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440 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, p. 87, para. 37.

441 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, pp. 95-96, 100, 103-105, paras. 54, 55, 63, 73, 74, 76.

442 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, pp. 854, paras. 51-52.

573. The Court's case law indicates that in determining whether or not a dispute exists, the Court *can* take account of statements made by a party in multilateral settings.[443] However, this does not mean that it necessarily *will*. The Court has warned that:

> considerable care is required before inferring from votes cast on resolutions before political organs such as the General Assembly conclusions as to the existence or not of a legal dispute on some issue covered by a resolution. The wording of a resolution, and votes or patterns of voting on resolutions of the same subject-matter, may constitute relevant evidence of the existence of a legal dispute *in some circumstances*, particularly where statements were made by way of explanation of vote. However, some resolutions contain a large number of different propositions; *a State's vote on such resolutions cannot by itself be taken as indicative* of the position of that State on each and every proposition within that resolution, *let alone of the existence of a legal dispute between that State and another State regarding one of those propositions*.[444]

574. Similarly, in the *Convention on Racial Discrimination* case, the Court did not consider that reports to human rights monitoring committees were significant in determining the existence of a dispute, having regard to the actual reports referred to in that case, but also more importantly because "the process under which States report on a regular basis to the monitoring committees operates between the reporting State and the committee in question".[445]

575. Case law of the Court also affirms that "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

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443 *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*, p. 255, pp. 270-271, 276, paras. 36, 52-53; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, pp. 567, 572, paras. 36, 52-53; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, pp. 850, 855, para. 39, 55-56.

444 *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*, p. 255, p. 276, para. 53; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 572, para. 53; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 855, para. 56 (emphasis added).

445 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, p. 102, para. 69.

called for".[446] However, this does not derogate from the principle that for a dispute to exist, there must be mutual awareness by both parties of the positively opposed view of the other party in relation to a legal claim. Silence by one party will therefore be capable of establishing the existence of a dispute only where all of the individual circumstances of the particular case justify the drawing of an inference of positive opposition from that silence.[447]

576. For the reasons given above, for such an inference to be justified, a number of circumstances would need to exist. First, it must be the case that the respondent State is aware, or could not be unaware, of the "view" expressed by the applicant State. Secondly, it must be the case that the respondent State is aware, or could not be unaware, that this "view" is asserting a *legal claim*. Thirdly, the legal claim needs to be articulated in a sufficiently defined way to enable the respondent State to give a considered response. If these requirements are not satisfied, a response from the respondent State will not be called for.

577. Even if a response is called for, positive opposition could only be inferred from a failure to respond if a reasonable period for the giving of a response has passed. What is a reasonable time to respond will also depend on the facts and circumstances of the particular case. A very specific allegation in relation to simple facts will require a shorter response time than a vague or general allegation in relation to very wide-ranging or complex facts. A claim that is so general, or so vague and ill-defined, that the respondent State cannot sensibly respond to it will not call for a response at all.

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446 *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I. C. J. Reports 1998*, p. 275, p. 315, para. 89; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, p. 85, para. 30; *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*, p. 255, p. 271, para. 37; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 567, para. 37; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, pp. 850, para. 40.

447 Cf. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 3, dissenting opinion of Judge ad hoc Caron, para. 12.

C. The facts relied on by The Gambia do not establish the existence of a dispute

1. General

578. The facts relied on by The Gambia as establishing the existence of a dispute between The Gambia and Myanmar on 11 November 2019 are set out in paragraphs 21 and 22 of The Gambia's Application instituting proceedings and paragraphs 2.7 to 2.28 of its Memorial. The only facts relied on by The Gambia are the following:

(a) the adoption of the Dhaka Declaration by the forty-fifth session of the Council of Foreign Ministers of the OIC held in Dhaka, Bangladesh, on 5 and 6 May 2018 (not referred to in The Gambia's Application, but relied upon in its Memorial);[448]

(b) the issuing of a statement by the Myanmar Ministry of Foreign Affairs concerning the Dhaka Declaration on 9 May 2018 (not referred to in The Gambia's Application, but relied upon in its Memorial);[449]

(c) the submission of its first report by the FFM to the Human Rights Council on 12 September 2018; [450]

(d) the making of a statement by the President of The Gambia in the UN General Assembly on 25 September 2018 (not referred to in The Gambia's Application, but relied upon in its Memorial);[451]

(e) the adoption of Res. No. 4/46-MM on "The Situation of the Muslim Community in Myanmar" by the forty-sixth session of the Council of Foreign Ministers of the OIC held in Abu Dhabi, United Arab Emirates, on 1 and 2 March 2019;[452]

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448 MG, para. 2.12. The text of the Dhaka Declaration is at MG, vol. VII, Annex 203.

449 MG, para. 2.12. The text of the press statement is at MG, vol. VI, Annex 158.

450 Application instituting proceedings, para. 21, first dash point; MG, para. 2.11. That report (A/HRC/39/64) is at MG, vol. II, Annex 39.

451 MG, para. 2.12, footnote 94. The text of that statement (UN doc. A/73/PV.7, p. 6) is at MG, vol. III, Annex 41.

452 AG, para. 21, second dash point; MG, para. 2.13. The text of the resolution is at MG, vol. VII, Annex 204.

(f) the adoption at the same session of the OIC Council of Foreign Ministers of Res. No. 61/46-POL on "The Work of the OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas" (not referred to in either its Application or its Memorial, but relied upon by The Gambia in the hearing on 10 December 2019);[453]

(g) the lack of any response by Government of Myanmar to Res. No. 4/46-MM (not referred to in The Gambia's Application, but relied upon in its Memorial);[454]

(h) the adoption of the Final Communiqué of the fourteenth OIC Islamic Summit Conference held in Makkah, Saudi Arabia, on 31 May 2019;[455]

(i) the submission of its second report by the FFM to the Human Rights Council on 8 August 2019; [456]

(j) the submission of its detailed findings by the FFM to the Human Rights Council on 16 September 2019 (referred to in The Gambia's Application, but not relied upon in its Memorial); [457]

(k) the making of a statement by the Vice-President of The Gambia in the UN General Assembly on 26 September 2019;[458]

(l) the making of a statement by the Union Minister for the Office of the State Counsellor of Myanmar in the UN General Assembly on 28 September 2019;[459]

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453 CR 2019/18, pp. 47-48, para. 20 (Suleman). The text of the resolution is at POM, Annex 94.

454 MG, para. 2.13.

455 AG, para. 21, third dash point; MG, para. 2.14. The text of the Final Communiqué of the 14th Islamic Summit Conference is at MG, vol. VII, Annex 205.

456 AG, para. 21, fourth dash point; MG, para. 2.15. That report (A/HRC/42/50) is at MG, vol. III, Annex 47.

457 AG, para. 21, fifth dash point, referring to Human Rights Council, Detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/42/CRP.5, 16 September 2019, at MG, vol. III, Annex 49.

458 AG, para. 21, sixth dash point; MG, para. 2.16. The text of that statement (A/74/PV.8, p. 31) is at MG, vol. III, Annex 51.

459 AG, para. 21, seventh dash point; MG, para. 2.16. The text of that statement (A/74/PV.12, p. 24) is at MG, vol. III, Annex 52.

(m) the sending of a note verbale by The Gambia to Myanmar on 11 October 2019;[460] and

(n) the lack of any response by the Government of Myanmar to that note verbale prior to the filing by The Gambia of its Application instituting proceedings exactly one month later, on 11 November 2019. [461]

579. Each of these facts is considered in further detail below. Contrary to The Gambia's assertions that "The Gambia has consistently made clear to Myanmar that Myanmar had violated its obligations under the [Genocide] Convention owed to The Gambia and other States parties" and that Myanmar has opposed such contentions,[462] an examination of the facts does not in fact establish that Myanmar, prior to the filing of Application instituting proceedings on 11 November 2019, was aware, or could not have been unaware, of the legal claims made by The Gambia in its Application instituting proceedings, let alone that Myanmar positively opposed those claims.

580. Of the 14 facts relied on by The Gambia, four consist of the adoption of OIC resolutions and an OIC communiqué, one consists of a statement made by the Ministry of Foreign Affairs of Myanmar about an OIC resolution, and one consists of Myanmar's lack of response to an OIC resolution.

581. None of the OIC resolutions or the OIC communiqué are documents issued by the Government, or indeed, any other organ or authority of The Gambia. Furthermore, the OIC resolutions and the OIC communiqué were not addressed to Myanmar. They cannot of themselves be taken as expressions of views by The Gambia specifically.[463] They are in any event expressed in terms of political statements, and indeed, they *are* political statements and not assertions of *legal claims* against any State, let alone legal claims specifically against Myanmar on behalf of individual OIC Member States.[464]

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460 AG, para. 21, eighth dash point; MG, para. 2.17. That note verbale, is at POM, Annex 121.

461 AG, para. 22; MG, para. 2.17.

462 MG, para. 2.16.

463 See paragraphs 566 to 577 above.

464 See paragraphs 553 to 565 above.

They are furthermore not expressed with sufficient particularity that they could satisfy the requirements for legal claims.[465]

582. Aside from this, as will be demonstrated below, none of the OIC resolutions or the OIC communiqué contends, as such, that Myanmar bears State responsibility under international law for acts of genocide, much less, that Myanmar has committed violations *of the Genocide Convention*. There would of course have been nothing to prevent the relevant OIC organs from so stating expressly, if that was their view. Their failure to so state if anything suggests that this was not their view.

583. It therefore cannot be said that, on the basis of these OIC resolutions or the OIC communiqué, Myanmar "could not have been unaware", prior to the filing of The Gambia's application on 11 November 2019, that The Gambia was making the legal claims contained in that application.[466]

584. Furthermore, if it was The Gambia's own individual position that Myanmar was in breach of its obligations under the Genocide Convention, there is absolutely nothing that would have prevented The Gambia itself from stating this directly to Myanmar on a bilateral basis at any time, and in particular, at any time after 10 February 2019, when the OIC Ad Hoc Committee had adopted the recommendation to bring a case against Myanmar before the Court.

585. It would have been natural to expect The Gambia, if its own individual view was that breaches of the Genocide Convention had been committed, to communicate this view to Myanmar directly on a bilateral basis.

586. The fact that The Gambia never communicated with Myanmar directly in relation to this matter for a period of 8 months after 10 February 2019, until it sent to Myanmar the diplomatic note of 11 October 2019, is most telling. One obvious inference can be drawn from this lack of direct communication, as well as from The Gambia's substantial reliance on OIC resolutions as evidence of the existence of a dispute. The inference is that The Gambia has not been acting independently in relation to matters leading up to the institution of these proceedings, and has not been expressing its own

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465 See paragraphs 524 to 552 above.

466 See paragraphs 518 to 523 above.

independent positions, but rather, has been playing its role as OIC Member State and as chair of the OIC Ad Hoc Committee in carrying out OIC instructions and mandates, and in expressing positions of the OIC. This is relevant to Myanmar's first preliminary objection, but is also relevant to the issue of whether there existed a dispute between The Gambia and Myanmar at the time of filing the Application instituting proceedings.

2. The May 2018 Dhaka Declaration

587. The Dhaka Declaration,[467] adopted by the forty-fifth session of the Council of Foreign Ministers of the OIC, is some 40 paragraphs long. It deals with a wide range of different subject matters. Only four of its paragraphs (paragraphs 14 to 17) deal with "the Rohingya Muslim Community in Myanmar".

588. Nowhere in the Dhaka Declaration is there any mention at all of the word "genocide", let alone any reference to the Genocide Convention, and even less any reference to an alleged violation of that Convention. There is certainly no such mention in the four specific paragraphs dealing with Myanmar.

589. The Gambia places reliance on paragraph 14 of that document.[468] This paragraph states as follows:

> We express deep concern over the recent systematic brutal acts perpetrated by security forces against the Rohingya Muslim Community in Myanmar that has reached the level of ethnic cleansing, which constitute a serious and blatant violation of international law […]

590. The only violation of international law mentioned in this one paragraph specifically relied on by The Gambia is "ethnic cleansing". Paragraph 15 also contains the words "massive human rights violations of the Rohingya Muslims". This specific reference to "ethnic cleansing" in the paragraph relied on by The Gambia, coupled with the absence of any reference to genocide or the Genocide Convention, makes it impossible to contend that this document was alleging violations of the Genocide Convention by

467 MG, vol. VII, Annex 203.

468 MG, para. 2.11.

Myanmar. Furthermore, it is apparent that the Dhaka Declaration is a political declaration.

591. There is therefore no basis at all for suggesting that the Dhaka Declaration is evidence of a dispute concerning "the interpretation, application or fulfilment of the [Genocide] Convention" within the meaning of Article IX of that Convention.

592. Indeed, the Dhaka Declaration is not even referred to in The Gambia's Application instituting proceedings.[469] It was referred to by counsel for The Gambia in the oral hearing before the Court on 10 December 2019,[470] and is referred to in The Gambia's Memorial as claimed evidence of the existence of a dispute,[471] but without any clear explanation of its supposed relevance.

593. The Gambia appears to be suggesting that the Dhaka Declaration is significant because of a reference in its paragraph 16 to "the state backed violence in Myanmar", and because of its paragraph 17, which states:

> We welcome the resolution adopted on the situation of the Rohingya community of Myanmar and in this regard, agree to address the accountability issue for the violations of human rights against the Rohingyas in Myanmar through formation of an ad hoc ministerial committee, to be chaired by Gambia.

594. According to counsel for The Gambia at the 10 December 2019 hearing:

> Myanmar was thus on notice as early as May of 2018 of the newly formed OIC ad hoc Committee on Accountability for Crimes against the Rohingya, chaired by The Gambia, and its allegations of State-sponsored violence against the Rohingya. [472]

595. The argument is, with respect, impossible to understand. The fact that the OIC may have established an "ad hoc Committee on Accountability for Crimes against the Rohingya", with The Gambia as its chair, does not of itself mean that the OIC, or the OIC Ad Hoc Committee, or any of the individual Member States of the OIC or of the OIC Ad Hoc Committee, considered that Myanmar was in breach of the Genocide

469 See AG, para. 21.

470 CR 2019/18, p. 47, para. 17 (Suleman).

471 MG, para. 2.12.

472 See CR 2019/18, p. 47, para. 18 (Suleman).

Convention. Even now, Myanmar is aware of no evidence at all that the OIC or the OIC Ad Hoc Committee was at the time of adoption of the Dhaka Declaration contemplating making any allegation that Myanmar was in breach of the Genocide Convention. As elaborated above in relation to Myanmar's first preliminary objection, the proposal to bring a case before the Court appears to have been adopted by the OIC Ad Hoc Committee only in February 2019, and by the OIC Council of Foreign Ministers only in March 2019.[473] Furthermore, even in February and March 2019, it is not clear that the proposal at that time was to bring a claim specifically under the Genocide Convention.[474]

596. The Dhaka Declaration did not even contain any suggestion that the "accountability issue" that the OIC Ad Hoc Committee was to address would include raising any issue of State responsibility on the part of Myanmar, as opposed to issues of criminal responsibility of individuals.

597. Furthermore, and in any event, a declaration such as the Dhaka Declaration, adopted by an organ of an international organization with over 50 Member States, is not necessarily the position of all or of any particular Member States. The Dhaka Declaration contained a large number of different propositions, and it cannot be assumed that all OIC Member States took the same position on all of these propositions. Indeed, it cannot even be assumed that all OIC Member States took the same position on all of the propositions contained in the four paragraphs of the document dealing with Myanmar.

598. This follows from what the Court said in the *Obligations concerning Negotiations* cases (see paragraph 573 above). In the present case, this is also underscored by the fact that on 6 May 2018, after the Dhaka Declaration was issued, the Ministry of Foreign Affairs of Pakistan issued a press release which stated:

> Just before the conclusion of the Conference, the host country circulated the text of the Dhaka Declaration. It only reflected the views of the host country, and therefore, issued under its own responsibility, signifying that the text was neither discussed nor negotiated by participating States. The Declaration is without prejudice to the well established positions of OIC member states

473 See in particular paragraphs 81 to 84 above.

474 See in particular paragraphs 648-650, 655, 667 to 670, 676 to 679, 686 to 709 below.

> and the organization, as enshrined in the CFM and Summit documents.[475]

599. There is no publicly available record as far as Myanmar is aware of the debates and negotiations leading to the adoption of the Dhaka Declaration that would indicate the precise position taken by The Gambia in relation to the four paragraphs within it dealing with Myanmar. The Gambia has not pointed, for instance, to any statements made by The Gambia by way of explanation of its position in relation to these paragraphs. The mere fact that The Gambia was appointed as chair of the OIC Ad Hoc Committee does not of itself indicate that The Gambia took any specific position on any of the propositions in the paragraphs of the Declaration dealing with Myanmar.

600. The Dhaka Declaration is therefore not evidence of any dispute between The Gambia and Myanmar.

3. The 9 May 2018 statement by the Myanmar Ministry of Foreign Affairs

601. The statement issued by the Myanmar Ministry of Foreign Affairs on 9 May 2018[476] is again not referred to in The Gambia's Application instituting proceedings. It was referred to by counsel for The Gambia at the hearing before the Court on 10 December 2019, but without any explanation of its supposed relevance, other than to state that it was issued by Myanmar "in response" to the Dhaka Declaration.[477]

602. The Memorial of The Gambia argues that in this statement of its Ministry of Foreign Affairs, Myanmar expresses "a clearly opposite view [to that expressed in the Dhaka Declaration] concerning the characterization of its acts and performance of its international obligations".[478] The suggestion appears to be that because this statement opposed the positions in the Dhaka Declaration, it thereby crystallised a dispute

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475 Pakistan, Ministry of Foreign Affairs, Press Release, "Highlights of the 45th OIC Council of Foreign Ministers meeting held in Dhaka 5-6 May 2018", 6 May 2018, POM, Annex 128.

476 MG, vol. VI, Annex 158.

477 See CR 2019/18, p. 47, para. 18 (Suleman).

478 MG, para. 2.12.

between The Gambia and Myanmar in relation to the matters stated in the Dhaka Declaration.

603. In fact, as indicated above, the Dhaka Declaration made no reference to genocide or the Genocide Convention. Therefore, no position on the Genocide Convention was expressed in the Dhaka Declaration that could have been positively opposed in this statement by the Ministry of Foreign Affairs of Myanmar.

604. Furthermore, and in any event, the statement issued by the Ministry of Foreign Affairs of Myanmar on 9 May 2018 does not express a "clearly opposite view" to everything stated in the four paragraphs of the Dhaka Declaration dealing with Myanmar. Rather, this statement says expressly that no violation of human rights would be condoned by Myanmar, and that allegations supported by evidence would be investigated and action taken in accordance with the law. It states that Myanmar wished to expedite the process of repatriation from Bangladesh to Myanmar of displaced persons from Rakhine State, calls upon Bangladesh to take all necessary steps to help the process, and further states that Myanmar stood ready to facilitate the voluntary, safe and dignified return of displaced persons from Rakhine.

605. The statement makes only two specific criticisms of the Dhaka Declaration.

606. First, it states that the Dhaka Declaration lacked balance and fairness because it failed to denounce the brutal attacks of the terrorist group, the Arakan Rohingya Salvation Army, which had triggered the unfolding humanitarian situation.

607. Secondly, it states that it was irresponsible to describe the events in Rakhine State as "ethnic cleansing" or "State backed violence" when more than half of the Muslim community, which represented a majority in Maungdaw region, had remained in their villages.

608. There is therefore no basis for suggesting that this statement is evidence of a dispute concerning "the interpretation, application or fulfilment of the [Genocide] Convention" within the meaning of Article IX of that Convention.

609. Furthermore, because the Dhaka Declaration is not evidence of any dispute between *The Gambia* and Myanmar, this statement by the Ministry of Foreign Affairs of Myanmar is similarly not evidence thereof.

4. The 2018 FFM report

610. The FFM (Independent International Fact-finding Mission on Myanmar) was established by Human Rights Council resolution 34/22 of 24 March 2017.[479] The FFM consisted of three individuals (Marzuki Darusman (Indonesia) as chair, and Radhika Coomaraswamy (Sri Lanka) and Christopher Sidoti (Australia) as members).

611. On 12 September 2018, the FFM submitted its report to the Human Rights Council (the "**2018 FFM report**").[480]

612. The only paragraphs of the 2018 FFM report to mention genocide are paragraphs 84-87 and 104.

613. Paragraph 83 states that:

> On the basis of the body of information collected, the mission has reasonable grounds to conclude that serious crimes under international law have been committed that warrant criminal investigation and prosecution.

614. Paragraphs 85-87 state that:

> The 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. […]
>
> In the light of the above considerations on the inference of genocidal intent, the mission concludes that there is 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.

615. Paragraph 104 states that:

> The international community, through the United Nations, should use all diplomatic, humanitarian and other peaceful means to assist Myanmar in meeting its responsibility to protect its people from genocide, crimes against humanity and war crimes.

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479 See CR 2019/18, p. 47, para. 18 (Suleman).

480 MG, vol. II, Annex 39.

> It should take collective action in accordance with the Charter of the United Nations, as necessary.

616. Once again, this report is not a document issued by the Government, or indeed by any organ or authority, of The Gambia. Nor is it addressed to Myanmar. This report is addressed to the Human Rights Council, and expresses the personal views of its three individual members, and not the views of the Human Rights Council or of any State. This document is therefore not evidence of any position taken at the time by The Gambia, much less evidence of any awareness by Myanmar at the time of any position taken by The Gambia. In fact, the report does not contain a single reference to The Gambia.

617. Furthermore, the report does not state that genocide has been committed, let alone state that violations of the Genocide Convention have been committed. Rather, it expresses the view that there is sufficient evidence to justify *investigation* into the question of whether or not genocide has been committed. Although it speaks of there being "sufficient information to warrant […] investigation and prosecution", a document issued by a human rights body cannot reasonably be interpreted as suggesting that the outcome of an investigation should be considered a foregone conclusion even before the investigation has been launched. The words "investigation and prosecution" must be understood as meaning "investigation, with a view to eventual prosecution should the results of the investigation justify this".

618. Paragraphs 85 to 87 of the report deal with potential criminal prosecutions of individuals, and not with any question of State responsibility of Myanmar under international law, let alone State responsibility for violations of the Genocide Convention. Paragraph 104 of the report calls on the international community "to assist Myanmar in meeting its responsibility to protect its people from genocide". That wording thereby assumes that Myanmar will meet that responsibility, at least if it has the necessary support from the international community to do so. There is no wording in this document that states that Myanmar has failed to meet that responsibility in the past.

619. Moreover, the report states that "*the mission* concludes that there is sufficient information to warrant the investigation and prosecution" (emphasis added). It thereby makes clear that this is the view of the individual members of the FFM. The report

does not suggest that no one else would be entitled to take a different view. It nowhere suggests that it would be a breach of Myanmar's obligations under the Genocide Convention for Myanmar to take a different view. Indeed, it makes no reference at all to the Genocide Convention, nor any reference to obligations under that Convention to prosecute or punish. There is no suggestion in the report that Myanmar itself bears State responsibility for acts of genocide.

620. There is therefore no basis for suggesting that the 2018 FFM report is evidence of a dispute concerning "the interpretation, application or fulfilment of the [Genocide] Convention" within the meaning of Article IX of that Convention, let alone evidence of such a dispute between The Gambia and Myanmar.

5. The 25 September 2018 statement of the President of The Gambia

621. The President of The Gambia, in his statement made on 25 September 2018 in the UN General Assembly,[481] said:

> Similarly, we recognize the support provided by the Government and the people of Bangladesh to address the plight of the Rohingya Muslims. As the upcoming Chair of the next summit of the Organization of Islamic Cooperation, the Gambia has undertaken, through a resolution, to champion an accountability mechanism that would ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book.

622. Again, this statement makes no mention of the Genocide Convention, or even of genocide at all. It makes no allegation of any kind that Myanmar is in breach of its obligations under international law. It refers to the "accountability mechanism" of the OIC that was already referred to previously in the Dhaka Declaration, namely the OIC Ad Hoc Committee. The wording of the statement, in stating that the "accountability mechanism" would "ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book", if anything implies that the OIC Ad Hoc Committee was intended to be concerned with criminal accountability of individual perpetrators of crimes, rather than with any issues of State responsibility under international law.

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481 MG, vol. III, Annex 41.

623. As is elaborated above in relation to Myanmar's first preliminary objection, Myanmar is aware of no evidence of any specific suggestion of proceedings being brought against Myanmar before this Court, either under the Genocide Convention or at all, prior to the inaugural meeting of the OIC Ad Hoc Committee in February 2019 (see paragraphs 69 to 84 above). This statement of the President of The Gambia, which was made some four months earlier, contains nothing to suggest that any contemplation was being given at that time, either by the OIC or by The Gambia, to making a claim that Myanmar was in breach of its obligations arising under the Genocide Convention. Even if this was in contemplation at the time, there is nothing contained in this statement that would have made Myanmar aware at the time that this was the case.

624. There is therefore no basis for suggesting that this statement is evidence of a dispute concerning "the interpretation, application or fulfilment of the [Genocide] Convention" within the meaning of Article IX of that Convention.

6. OIC Res. No. 4/46-MM of March 2019

625. This resolution,[482] which is some 11 pages long, contains five particular references to genocide.

626. First, the ninth preambular paragraph states:

> **Noting** also the opening Statement of the Chairperson of the United Nations Independent International Fact-Finding Mission on Myanmar, at the UN Security Council on 24 October 2018, in which he stated that "War crimes and crimes against humanity have been committed in Kachin, Shan and Rakhine States. The Mission also found sufficient information to warrant the investigation and prosecution of senior officials in the Tatmadaw on charges of genocide. This means that we consider that genocidal intent, meaning the intent to destroy the Rohingya in whole or in part, can be reasonably inferred […]

627. This paragraph is not the expression of an opinion by the Council of Foreign Ministers of the OIC, much less the expression of any opinion of any OIC Member State, but is merely a reference in a preambular paragraph to a statement made by the chair of the

[482] MG, vol. VII, Annex 204.

FFM to the UN Security Council. The significance of the findings in the 2018 FFM report has already been dealt with above. Furthermore, this paragraph refers only to the investigation and prosecution of individuals for individual criminal responsibility, and not to any potential question of State responsibility.

628. Secondly, the twenty-first preambular paragraph states:

> **Welcoming** the September 2017 letter addressed by President Haydar Abbadi of Iraq to the heads of Muslim countries and the OIC Secretary General, regarding the Rohingya crisis, along with the violations of human rights and genocide against the Rohingya, which letter calls for holding an urgent meeting of the Council of the OIC Foreign Ministers to form an international alliance to counter and stop these violations […]

629. The Gambia does not annex to its Memorial a copy of this letter from the President of Iraq, and in any event, there is no evidence that Myanmar was ever aware of its contents prior to the filing of the Application instituting proceedings. Nor does this preambular paragraph of this resolution give details of the contents of the letter. It cannot be known, and Myanmar certainly could not have been aware prior to the filing of the Application instituting proceedings, whether that letter from the President of Iraq specifically alleged that Myanmar was in breach of its obligations under the Genocide Convention. This cannot be inferred from a general reference in a preambular paragraph to a letter "regarding the Rohingya crisis, along with the violations of human rights and genocide against the Rohingya". Myanmar could not have known from this resolution prior to the filing of The Gambia's application, even if Myanmar was aware of this OIC resolution, exactly what the President of Iraq had said in that letter in relation to "genocide against the Rohingya".

630. Furthermore, this preambular paragraph does not state that the OIC Council of Foreign Ministers agrees with everything stated in that letter of the President of Iraq, nor that The Gambia or any other individual OIC Member State so agrees. It merely states that the OIC Council of Foreign Ministers "welcomes" that letter.

631. Thirdly, paragraph 6 of this resolution then refers to:

> deviant policies and brutal practices of "ethnic cleansing" pursued systematically, at genocidal scale, in Myanmar in violation of human rights and total disregard of all international and civilized norms and laws.

632. This paragraph does not state that genocide has been committed, and it makes no reference to the Genocide Convention. It does refer specifically to "ethnic cleansing". The fact that it refers specifically to ethnic cleansing but not to genocide if anything implies that it is not suggesting that genocide has been committed. The resolution could of course have specifically alleged genocide, or breaches of the Genocide Convention, if that is what the OIC Foreign Ministers had wanted to say.

633. It may well be that the words "ethnic cleansing […] at genocidal scale" reflect some kind of diplomatic compromise between certain OIC Member States who wanted to allege genocide and those who opposed this. Myanmar does not know if this is the case, and this is merely speculation. If that were the case, this would confirm that those adopting the resolution deliberately decided in this resolution not to allege genocide itself. In any event, the wording refers to the "genocidal *scale*" of acts of ethnic cleansing, and not to acts which themselves have a genocidal *character*.

634. Fourthly, paragraph 11 *(a)* of the resolution then calls upon the Government of Myanmar:

> To honor its obligations under International Law and Human Rights covenants, and to take all measures to immediately halt all vestiges and manifestations of the practice of ethnic cleansing, genocide, violence of all types, vigilantism, acts of dispersion and discriminatory practices against Rohingya Muslims.

635. Fifthly, paragraph 12 of the resolution then calls upon OIC Member States to:

> take concrete steps to bring the perpetrators of atrocities, crimes against humanity and genocide and those responsible for destroying a community, its distinct history and culture to the all the International Legal and Juridical institutions and mechanisms. In this context, seeks necessary support from relevant OIC organizations and institutions, under the overall coordination of the Secretary General, and requests cooperation of OIC Ambassadors in New York, Geneva and Brussels.

636. Paragraphs 34 and 35 of the resolution, which do not refer to genocide, then state that the OIC Council of Foreign Ministers:

> 34. **Calls upon** Members of the OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingya to carry out the tasks of ensuring accountability and justice for gross violations of international human rights and humanitarian laws and principles; Assisting in information gathering and evidence collection for accountability

> purposes; Mobilizing and coordinating international political support for accountability for the Human Rights Violations against the Rohingya in Myanmar.
>
> 35. **Welcomes** the decision by the UN Human Rights Council, in its resolution 39/2, to establish an ongoing independent mechanism to collect, consolidate, preserve and analyze evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011 and calls for preparing files and taking all necessary legal steps to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have, or may in the future have, jurisdiction over these crimes, in accordance with international law.

637. Paragraphs 12 and 35 of the resolution thus refer expressly to the bringing of individuals to account for crimes, and contain no claim that Myanmar bears State responsibility under international law. Read in the context of paragraphs 12 and 35, paragraphs 11 *(a)* and 34, as well as the preambular paragraph of the resolution referring to the FFM, cannot be read as necessarily stating anything beyond what was stated in the FFM report, as described in paragraphs 610 to 620 above.

638. There is no basis for suggesting, as The Gambia does, that as a result of this resolution, Myanmar "knew that it was identified as a perpetrator of genocide by The Gambia and other OIC Member States".[483] For this reason alone, there is therefore no basis for suggesting that a response to this resolution by Myanmar was called for.

7. OIC Res. No. 61/46-POL of March 2019

639. As described above in relation to Myanmar's first preliminary objection,[484] this resolution[485] contained only brief operative paragraphs in which the OIC Council of Foreign Ministers decided to "Endorse the Ad Hoc Committee's plan of action to engage in international legal measures to fulfil the Ad Hoc Committee's mandate",

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483 MG, para. 2.13.

484 See in particular paragraphs 79 to 87 above.

485 The text of the resolution is at POM, Annex 94. This resolution is not referred to in the Application instituting proceedings or in the Memorial of The Gambia, but was relied on by The Gambia at the oral hearing on 10 December 2019 as evidence of the existence of a dispute: CR 2019/18, pp. 47-48, para. 20 (Suleman).

and called upon OIC Member States "to contribute voluntarily to the budget of the plan of action and to assist the General Secretariat to allocate other resources needed to implement the plan of action".

640. This resolution did not indicate the contents of the OIC Ad Hoc Committee's plan of action. It gave no indication of whether the plan of action involved proceedings against individuals or inter-State proceedings, for instance. The resolution itself did not indicate that proceedings against Myanmar in the International Court of Justice were envisaged, nor that any such proceedings would be based on the Genocide Convention.

641. The only reference to genocide found in this resolution is in a preambular paragraph which states (without however mentioning the Genocide Convention) that "ensuring accountability and justice is the most crucial step towards preventing genocide and other mass atrocity crimes".

642. At the hearing on 10 December 2019, counsel for The Gambia argued that this resolution "emphasized that accountability was necessary for 'preventing genocide' and endorsed the recommendation of the ad hoc Committee chaired by The Gambia to hold Myanmar accountable under the Genocide Convention".[486] However, in fact, the resolution itself does not disclose what the recommendation of the OIC Ad Hoc Committee was, nor that that recommendation involved accusing Myanmar of breaches of the Genocide Convention.

643. The relevant preambular paragraph of this resolution in any event refers only to "preventing genocide" and does not refer to "punishing" genocide. Given that the Genocide Convention deals expressly with both prevention and punishment of genocide, the natural reading of the words used would be that they make no suggestion that genocide had happened to date. This paragraph of the resolution speaks of establishing accountability for past crimes, but does not state that the past crimes necessarily include genocide. The natural reading of the wording would therefore be that it states that accountability for past crimes (which do not include genocide) is a crucial step towards preventing the possibility of genocide occurring in the future.

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[486] CR 2019/18, p. 48, para. 20 (Suleman).

644. In short, this resolution refers only to the criminal accountability of individuals, and contains no allegation that Myanmar is in breach of international law, let alone the Genocide Convention specifically. It contains a reference in a preambular paragraph to the prevention of genocide. It contains no statement that genocide has in fact already allegedly been committed.

645. At the oral hearing on 10 December 2019, counsel for The Gambia contended that in reaction to this resolution, Myanmar "denied responsibility [for genocide] and criticized the resolution as an interference with its sovereignty".[487] The reference given to this claimed reaction of Myanmar is to a statement made by a spokesman of Myanmar's ruling National League for Democracy Government, as reported in a 5 March 2019 report of Radio Free Asia.[488] According to this article, the spokesman said that "officials need to know which rights for the Rohingya the OIC is talking about". There is nothing in the article to suggest that the spokesman said anything about genocide.[489]

646. The article says (picking up the language of the press release of the Bangladesh Ministry of Foreign Affairs referred to in paragraph 83 above) that an OIC committee had in February 2019 "recommended taking legal steps to establish legal rights for the Rohingya on the principles of international law based on the U.N.'s Genocide Convention and other human rights and humanitarian law principles", but does not itself disclose that the proposal was to bring a case against Myanmar before this Court, as opposed to seeking individual criminal prosecutions. Indeed, a subsequent paragraph of the article states that the 2018 FFM report "called for the prosecution of top military commanders on genocide charges at the International Criminal Court or by another criminal tribunal".

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487 CR 2019/18, p. 48, para. 20 (Suleman).

488 *Ibid*., referring to Radio Free Asia, "World Islamic Group Votes to Take Myanmar Rohingya Abuses to International Court of Justice", 5 March 2019, MG, vol. IX, Annex 304.

489 The article itself earlier refers to a news release of the Government of Bangladesh that in turn refers to the Genocide Convention, which may be the document referred to in paragraph 83 above. However, nothing in the article indicates that the spokesman of the Government of Myanmar made any reference to that news release of the Government of Bangladesh. The spokesman of the Government of Myanmar is reported to be reacting to the "OIC measure" (that is, OIC Res. No. 61/46-POL), which does *not* refer to genocide or the Genocide Convention, apart from the reference in a preambular paragraph described in paragraphs 641 to 643 above.

647. As indicated in paragraphs 81 to 83 above, press releases issued by the Ministry of Foreign Affairs of Bangladesh gave some details of the OIC Ad Hoc Committee's plan of action that was endorsed in this resolution. However, these press releases of the Bangladesh Ministry of Foreign Affairs were obviously not official OIC documents, and cannot be treated as an official or authoritative statement of the content or effect of OIC resolutions. Furthermore, neither the OIC resolution nor the press releases are addressed to Myanmar. In any event, the press releases do not allege on behalf of Bangladesh, much less on behalf of the OIC or The Gambia, that Myanmar is in breach of the Genocide Convention.

648. The press releases of the Bangladesh Ministry of Foreign Affairs indicate that the practical effect of this OIC resolution was a decision to bring proceedings before this Court.[490] However, these press releases are unclear about what the legal basis of the proceedings before this Court would be. The press release of 1 March 2019 says nothing at all about what the legal basis of the proceedings would be. The press release of 4 March 2019 is equivocal. It says that the recommendation of the OIC Ad Hoc Committee adopted at its inaugural meeting on 10 February 2019 involved taking "legal steps for establishing legal rights on *the principles of international law* – specifically the Genocide Convention *and other Human Rights and Humanitarian Law principles*". It then says that the effect of the OIC resolution itself was to set a precedent for the OIC "in pursuing the legal path to justice to address *crimes committed against humanity* and for establishing *the legal rights of the Rohingya population to their rightful homeland* in the Rakhine state of Myanmar" (emphasis added).

649. This wording suggests that at the time a decision had not yet been taken specifically to bring a case before this Court based on the Genocide Convention. Rather, the wording suggests that at the time consideration was still being given by the OIC to various different legal claims that might be potentially brought. There is no indication that at that stage, any conclusions had yet been reached about the viability of any of those potential legal claims that were under consideration. Ultimately, the Application instituting these proceedings did not rely on the "other Human Rights and Humanitarian Law principles" or "crimes against humanity" referred to in the press

490 See paragraphs 81 to 83 above.

release of the Bangladesh Ministry of Foreign Affairs. The wording of that press release would, at the time it was issued, have equally left open the possibility that any application instituting proceedings before the Court might ultimately not rely on the Genocide Convention.

650. Thus, the impression given is that at the time of adoption of OIC Res. No. 61/46-POL, the OIC had decided to bring proceedings before the Court, and was in the process of examining a variety of different legal claims that might potentially form the basis of any such proceedings, but had not yet made any firm decision as to what the legal claim would be. As Myanmar argued at the hearing on 11 December 2019:

> The impression is that the OIC wanted to bring "a" case before the Court, but was not particularly concerned with the legal basis of the claim, that Article IX of the Genocide Convention was simply identified at some point by someone as a vehicle for invoking the Court's jurisdiction, and that the OIC would have been equally prepared to use any other treaty it could identify for that purpose.[491]

651. For these reasons, it cannot be said that OIC Res. No. 61/46-POL, even if read in conjunction with the 4 March 2019 press release of the Bangladesh Ministry of Foreign Affairs, constituted the making of a legal claim by The Gambia, as against Myanmar, of an alleged breach of the Genocide Convention.

8. Lack of response to OIC Res. No. 4/46-MM

652. For the reasons given above, Myanmar would not have been aware from this resolution that a legal claim was being made against it by The Gambia that Myanmar was in breach of the Genocide Convention. Accordingly, a failure by Myanmar to respond to this resolution cannot be interpreted as an implicit positive opposition by Myanmar to any such legal claim of The Gambia.

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491 CR 2019/19, p. 51, para. 46 (Staker).

9. Adoption of the Final Communiqué of the fourteenth Islamic Summit Conference in May 2019

653. This document, adopted on 31 May 2019,[492] is some 18 pages long, and deals with a variety of topics. Five of its paragraphs (paragraphs 45-48 and 88) deal with the subject of the Muslim community in northern Rakhine State.

654. This document contains no reference to genocide or the Genocide Convention. For that reason alone, this document cannot have any legal significance as evidence of a dispute concerning "the interpretation, application or fulfilment of the [Genocide] Convention" within the meaning of Article IX of that Convention.

655. In fact, the contrary is the case. If the fourteenth Islamic Summit Conference genuinely considered that Myanmar was in violation of the Genocide Convention, it seems inconceivable that a document such as this would omit all mention of the fact, given that paragraphs 45 and 47 of the document refer to "acts of violence and all brutal practices targeting this minority" and "the human rights violations in Myanmar", given that OIC Res. No. 4/46-MM had spoken of ethnic cleansing "on a genocidal scale", and given that the members of the fourteenth Islamic Summit Conference were from the same OIC Member States as the members of the OIC Council of Foreign Ministers. If this document is evidence of anything, it is evidence supporting the conclusion that the fourteenth Islamic Summit Conference was *not* alleging any breaches by Myanmar of the Genocide Convention, or at the very least was not making such allegations *any more*. Indeed, a consideration of OIC Res. No. 4/46-MM in the light of the absence of any mention at all of genocide in the subsequent Final Communiqué of the fourteenth Islamic Summit Conference strengthens the conclusion that OIC Res. No. 4/46-MM was also not alleging any breach of the Genocide Convention.

656. Myanmar understands that The Gambia relies on this document for the statement in its paragraph 47 that:

> The Conference affirmed its support for the ad hoc ministerial committee on human rights violations against the Rohingyas in Myanmar, using all international legal instruments to hold accountable the perpetrators of crimes against the Rohingya. In

[492] MG, vol. VII, Annex 205.

> this connection, the Conference urged upon the ad hoc Ministerial Committee led by the Gambia to take immediate measures to launch the case at the International Court of Justice on behalf of the OIC.

657. The Gambia contends that "[t]his statement put Myanmar on notice about the possibility of future legal action aimed at invoking its responsibility under international law".[493]

658. However, the first sentence of this quote, which refers to "using all international legal instruments to hold accountable the perpetrators of crimes against the Rohingya", is clearly speaking of action contemplated to be taken against individual alleged perpetrators of crimes, rather than action to be taken in State to State proceedings alleging State responsibility.

659. The second sentence of this quote, which speaks of the launch of a case before this Court *on behalf of the OIC*, does not itself state what the nature of the contemplated proceedings would be (for instance, whether the envisaged case would be within the Court's contentious or advisory jurisdiction). Furthermore, this sentence does not state by whom the proceedings would be brought, other than to state that they would be brought "on behalf of the OIC" through measures to be taken by "the ad hoc Ministerial Committee led by the Gambia".

660. More importantly, the mere fact that a State is aware that proceedings before this Court are contemplated does not mean that that State is already aware of a *legal claim* being made against it, and does not mean that a *legal dispute* already exists between the applicant State and the respondent State.[494] This sentence in the Final Communiqué does not indicate what the basis of any such proceedings before the Court would be. In particular, nothing in this document suggests in any way that proposed proceedings would be brought under the Genocide Convention. Indeed, the fact that this OIC Final Communiqué contains no reference at all to genocide or the Genocide Convention suggests if anything that this was *not* the envisaged basis of the proposed proceedings.

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493 MG, para. 2.14.

494 See paragraphs 568 and 569 above.

661. There is therefore nothing in this document that would have made Myanmar aware that any State, and even less The Gambia specifically, was proposing to raise a claim, or was actually doing so, against Myanmar concerning "the interpretation, application or fulfilment of the [Genocide] Convention" within the meaning of Article IX of that Convention.

10. The 2019 FFM report

662. On 8 August 2019, the FFM submitted a second report to the Human Rights Council (the "**2019 FFM report**"),[495] containing its findings since the 12 September 2018 FFM report.

663. It is acknowledged that paragraph 18 of this report does state that the FFM has concluded "that Myanmar incurs State responsibility under the prohibition against genocide".[496]

664. However, like the 2018 FFM report, this report expresses the conclusion of the three individual members of the FFM only. It does not purport to be speaking on behalf of The Gambia, or the OIC, or of any other State, international organization or entity.

665. It is further acknowledged that paragraph 107 of this report states that:

> The mission welcomes 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. Elected officials in Canada and the Netherlands have also called on their Governments to pursue such a case. A case before the International Court of Justice would not displace individual criminal accountability through the International Criminal Court or an ad hoc tribunal; rather, it is directed towards the obligations and accountability of Myanmar as a State party to the Convention

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495 MG, vol. III, Annex 47.

496 Paragraph 19 of this report states that this view of the FFM is based on the "reasonable grounds to conclude" standard of proof described in paragraph 6 of the earlier 2018 FFM report. The "reasonable grounds to conclude" standard of proof is not necessarily the standard of proof that would be applied by this Court, such that even the FFM was not necessarily expressing the view that there was sufficient evidence at that stage to establish genocide in accordance with the standards of evidence applied in international inter-State dispute settlement proceedings.

> on the Prevention and Punishment of the Crime of Genocide. Both avenues can and should be pursued in parallel.

666. The Memorial of The Gambia cites this passage, but gives no explanation of what its significance is said to be.[497]

667. This paragraph of the report indicates that, to the knowledge of the FFM, Bangladesh, The Gambia and the OIC were making "efforts" to "encourage and pursue" a case against Myanmar before this Court under the Genocide Convention. This very general language does not indicate that the FFM had any information that Bangladesh, The Gambia and/or the OIC had themselves actually reached any firm decision that any case brought before this Court would rely specifically on the Genocide Convention, rather than on "other Human Rights and Humanitarian Law principles" or "crimes […] against humanity" as referred to in the 4 March 2019 press release of the Bangladesh Ministry of Foreign Affairs. In any event, no further details are given of any such information. The 2019 FFM report contains only second-hand information of a very general nature from the FFM about what Bangladesh, The Gambia and/or the OIC might have been contemplating at the time.

668. The obvious question that arises is why Bangladesh, The Gambia and the OIC, if they had formed a firm intention to bring proceedings based specifically on the Genocide Convention, would inform the FFM of this but not inform Myanmar? The question also arises why the FFM, if it had been informed by Bangladesh, The Gambia and the OIC that they had already reached a firm decision to bring a case before the Court under the Genocide Convention, would not state this clearly in the report.

669. In any event, even if it were to be assumed that Myanmar knew from this paragraph in the FFM report that The Gambia had formed a definite intention to bring a case against Myanmar before the Court under the Genocide Convention, this still would not mean that Myanmar was aware at that stage of a *legal claim* being made against it by The Gambia, and does not mean that a *legal dispute* already existed between The Gambia and Myanmar.[498]

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497 MG, para. 2.15.

498 See paragraphs 568 and 569 above.

670. The information contained in the FFM report about the possible proceedings before this Court is too general to satisfy the requirement for being a *legal claim*.[499] Furthermore, this information was being conveyed by a third party, the FFM, in a document that was not addressed to Myanmar. Given the context of how this information was conveyed, and the content of the information conveyed, the 2019 FFM report cannot be characterised as the assertion of a legal claim by The Gambia against Myanmar.[500]

11. The 16 September 2019 FFM Detailed Findings

671. On 16 September 2019, the FFM submitted to the Human Rights Council a report setting out its detailed findings (the "**2019 FFM Detailed Findings**").[501]

672. The Gambia's Memorial does not rely on this document as evidence of the existence of a dispute. However, it is referred to for this purpose in The Gambia's application,[502] which cites paragraphs 40, 41, 140, 213 and 220 of this document.

673. Paragraph 40 of the 2019 FFM Detailed Findings is in similar terms to paragraph 107 of the 2019 FFM report, which has already been dealt with in paragraph 665 above.

674. Paragraph 41 does not mention genocide, but speaks of a demand for measures additional to holding individuals criminally accountable, and then simply states that "The rules of State responsibility help address this demand".

675. Paragraphs 140, 213 and 220, like paragraph 41, express conclusions of the individual members of the FFM, not of The Gambia. This document once again therefore does not purport to be speaking on behalf of The Gambia, or the OIC, or of any other State, international organization or entity.

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499 See paragraphs 524 to 552 above.

500 The same observations apply to the 10 July 2019 statement of the Special Rapporteur on the situation of human rights in Myanmar, referred to in paragraph 97 above.

501 MG, vol. II, Annex 49.

502 AG, para. 21.

12. The 26 September 2019 statement of the Vice-President of The Gambia

676. On 26 September 2019, the Vice-President of The Gambia made a statement in the UN General Assembly.[503] The verbatim record of the speech is some four and a half pages long. One paragraph of the speech dealt with the Muslims in northern Rakhine State, as follows:

> The Gambia is ready to lead concerted efforts to take the Rohingya issue to the International Court of Justice on behalf of the Organization of Islamic Cooperation, and we call on all stakeholders to support that process. As a global community with a conscience, we cannot continue to ignore the plight of the Rohingya. It is for that reason that my delegation takes this opportunity to call on the United Nations, like-minded nations and concerned stakeholders to synchronize our efforts in the search for a just, speedy and lasting solution to the Rohingya crisis.

677. There was no mention anywhere in this speech of genocide or the Genocide Convention. To the extent that the 2019 FFM report indicated that the proposed proceedings before the Court might be brought under the Genocide Convention, the complete absence of any mention of genocide or the Genocide Convention in this speech if anything suggests that no firm decision had yet been taken in relation to this question.

678. There is also no indication in this speech of the contemplated timing of any application to the Court, and it is not even clear from the wording that a firm decision had even been taken at this stage that proceedings would be brought. The speech speaks merely of "concerted efforts" (indicating that The Gambia was not working on this initiative alone), indicates that these efforts were being taken "on behalf of the OIC", and says that The Gambia is "ready" to "lead" these efforts.

679. It is therefore not the case, contrary to what The Gambia claims, that this speech "removed any possible doubt about Myanmar's awareness of an impending case against it before the Court to hold it accountable under international law for its

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503 MG, para. 2.16. The text of that statement (A/74/PV.8, p. 31) is at MG, vol. III, Annex 51.

genocidal acts against the Rohingya group".[504] Given the complete absence of any reference to genocide or the Genocide Convention in this speech, and given that the speech was made in a political forum and was not addressed directly to Myanmar, it can hardly be said that this single paragraph in this statement amounted to the making of a legal claim by The Gambia that Myanmar was in breach of the Genocide Convention. In any event, the information in this paragraph was also otherwise too general and lacking in particularity to satisfy the requirement for being a *legal claim*.[505]

13. The 29 September 2019 statement of the Union Minister for the Office of the State Counsellor of Myanmar

680. In this statement,[506] the Union Minister for the Office of the State Counsellor of Myanmar, speaking on behalf of Myanmar, neither makes any reference to genocide, nor to the Genocide Convention, nor to The Gambia.

681. The Gambia relies on the following passage in this statement as evidence of the existence of a dispute:

> We have objected to the formation of the independent international fact-finding mission on Myanmar since its inception, because of our serious concern about the mission's composition and mandate, as well as its capacity for fairness and impartiality. Chair Marzuki Darusman's reports, without exception, have been biased and flawed, based not on facts but on narratives. Events have therefore proved that our concerns are justified. The latest reports are even worse. We cannot help but conclude that they were prompted more by hostility towards the democratically elected Government and the peace-loving people of Myanmar than by a genuine desire to resolve the challenges of Rakhine. We therefore also reject 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 we strongly object.

504 MG, para. 2.16.

505 See paragraphs 524 to 552 above.

506 The text of that statement (A/74/PV.12, p. 24) is at MG, vol. III, Annex 52.

682. At the oral hearing on 10 December 2019, counsel for The Gambia claimed that in this statement, Myanmar "rejected wholesale the Fact-Finding Mission's report".[507] That is not the effect of the quoted words. The wording of this passage of the Union Minister's statement expresses general concerns about the fairness and impartiality of the FFM. It does not express any position on compliance by Myanmar with any specific norms of public international law. It does however express "a genuine desire to resolve the challenges of Rakhine", thereby acknowledging that such challenges exist.

683. According to The Gambia,[508] this statement of the Union Minister, together with the prior statement of the Vice President of The Gambia, confirmed that The Gambia continued to characterize Myanmar's conduct as "genocide based", while Myanmar "persisted in rejecting the [FFM] reports as flawed and unfounded".

684. For the reasons given above, it cannot be said that Myanmar, as a result of the statement by the Vice President of The Gambia, "could not have been unaware" that The Gambia was making a legal claim against Myanmar of a violation of the Genocide Convention. That being the case, the 28 September 2019 statement on behalf of Myanmar cannot be understood to be expressing positive opposition to any such legal claim.

685. Put simply, this statement on behalf of Myanmar containing no reference to genocide, responding to a statement on behalf of The Gambia also containing no reference to genocide, can hardly be considered as establishing positive opposition of the two parties on a legal issue related to genocide, let alone violations of the Genocide Convention.

507 CR 2019/18, p. 48, para. 21 (Suleman).

508 MG, para. 2.16.

14. The 11 October 2019 note verbale

686. On 11 October 2019, the Permanent Mission of The Gambia to the United Nations sent a note verbale to the Permanent Mission of Myanmar to the United Nations.[509]

687. The contents of this very brief document, only some five paragraphs long, are as follows.

688. The first paragraph simply makes reference to "all the reports of the [FFM]", including the 2019 FFM report, and to "related resolutions of the [OIC]", including OIC resolution No. 4/46-MM.

689. The second paragraph states that The Gambia is "deeply troubled" by the findings of the FFM "and in particular its findings regarding the ongoing genocide against the Rohingya people […] in violation of Myanmar's obligations under the […] Genocide Convention". It goes on to state that The Gambia considers those findings "well supported by the evidence and highly credible", and that The Gambia is "disturbed by Myanmar's absolute denial of those findings and its refusal to acknowledge and remedy its responsibility for the ongoing genocide […] as required under the Genocide Convention and customary international law".

690. The third paragraph states that The Gambia "fully endorses OIC Resolution No. 4/46-MM", which calls upon Myanmar "To honor its obligations under International Law and Human Rights covenants, and to take all measures to immediately halt all vestiges and manifestations of the practice of genocide against Rohingya Muslims".

691. The fourth paragraph states that The Gambia "emphatically rejects Myanmar's denial of its responsibility for the ongoing genocide against Myanmar's Rohingya population, and its refusal to fulfil its obligations under the Genocide Convention and customary international law".

692. The fifth paragraph states that The Gambia "understands" Myanmar "to be in ongoing breach of those obligations under the Convention and under customary international law", and insists that Myanmar "take all necessary actions to comply with these

509 POM, Annex 121.

obligations, including but not limited to its obligation to make reparations to the victims and to provide guarantees and assurances of non-repetition".

693. Prior to the filing of the Application instituting proceedings, this very brief note verbale was the only direct communication from The Gambia to Myanmar in relation to this matter.

694. This note verbale needs to be considered in the light of the circumstances of the case as a whole.

695. A particularly significant circumstance is the fact that The Gambia is not a State involved in, or a State specially affected by, the factual situation to which this document relates.

696. The circumstances of the present case are thus very different to a case where both parties to a case before the Court are directly involved in the events in question throughout the entire course of events. In the *Bosnian Genocide* case and the *Croatia Genocide* case, the respondent State did not dispute the existence of a dispute at the time of filing the application,[510] and in the *Nuclear Arms and Disarmament* cases, the Court said of the *Bosnian Genocide* case that "in the particular context of that case, which involved an ongoing armed conflict, the prior conduct of the parties was sufficient to establish the existence of a dispute".[511] In the *Convention on Racial Discrimination* case, when determining whether or not there existed a dispute between the parties, the Court considered that the documents relied upon by the applicant State had to be considered against the following background:

> [The Court] observes that disputes undoubtedly did arise between June 1992 and August 2008 in relation to events in Abkhazia and South Ossetia. Those disputes involved a range of matters including the status of Abkhazia and South Ossetia, outbreaks of armed conflict and alleged breaches of international humanitarian law and of human rights, including the rights of

510 Compare paragraphs 507 and 508 above.

511 *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*, p. 255, p. 275, para. 50; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, p. 571, para. 50; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 855, para. 54.

> minorities. It is within that complex situation that the dispute which Georgia alleges to exist and which the Russian Federation denies is to be identified.[512]

697. In a context such as that described by the Court in that case, one party, when considering statements made by the other in relation to a matter, would be expected to understand the contents of the statements in the light of both parties' mutual involvement in the background factual situation. In the present case, there is no such mutual involvement.

698. Secondly, the wording of this note verbale is very much the kind of wording used in a political statement, of which examples have been given in paragraphs 557 to 562 above. The note verbale is very brief. It mentions no relevant facts, but instead simply cites OIC resolutions (which are political statements and do not assert legal claims against Myanmar under the Genocide Convention) and the FFM reports (which express the individual opinions of the three FFM members and also do not assert any legal claims against Myanmar). It then indicates that The Gambia is "deeply troubled" by what it has read in those reports.

699. The note verbale then contains vague and general references to "the ongoing genocide", to Myanmar's "responsibility for the ongoing genocide", and to Myanmar's "refusal to fulfil its obligations under the Genocide Convention and customary international law". However, it contains no indications of which facts are said by The Gambia to breach which provisions of the Genocide Convention or which norms of customary international law. The note verbale also for instance refers to Myanmar's alleged "absolute denial" of the findings of the FFM, without specifying how Myanmar is said to have expressed that "absolute denial".

700. The final paragraph of the note verbale then states that The Gambia "understands" Myanmar to be in breach of its obligations under the Genocide Convention and under customary international law. It does not positively assert this to be the case.

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512 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, p. 85, para. 32.

701. In short, the note verbale reads as a political statement, rather than as the assertion of a legal claim.

702. Thirdly, the note verbale does not set out The Gambia's "views" with a sufficient degree of particularity to satisfy the requirements of a legal claim.[513] It does not specify, for instance, whether Myanmar's failure to comply with its obligations under the Genocide Convention is said to consist of a failure to prevent genocide, or of a failure to punish genocide, or whether Myanmar is alleged to be responsible directly for the commission of the genocide itself, or whether all of these are alleged. Nor does the note verbale specify which of the particular subparagraphs *(a)* to *(e)* of Article II of the Convention are said to have been violated, and which of the particular acts specified in subparagraphs *(a)* to *(e)* of Article III of the Convention are said to have been committed. Nor does it distinguish between claimed breaches of the Genocide Convention and claimed breaches of customary international law, which is important given that Article IX of the Genocide Convention confers no jurisdiction in respect of the latter.

703. It is noted that if The Gambia had specifically alleged in the note verbale only that Myanmar was responsible for a failure to prevent and punish, then even if all other requirements for the existence of a dispute were otherwise established, it would not have been open to The Gambia to include in the subsequent application to the Court a claim of direct responsibility of Myanmar for the commission of genocide, as this would have been a claim going beyond the pre-existing dispute (see paragraphs 538 to 546 above). For the reasons given above, it would be contrary to principles of legal security and the good administration of justice to recognise such a vague and unparticularised note verbale as constituting a legal claim. The note verbale does not contain even the barebones information given in paragraph 111 of The Gambia's Application instituting proceedings.

704. Fourthly, if The Gambia had been intending in this note verbale to assert a legal claim against Myanmar, there is no reason why it could not have made this clear. This was The Gambia's very first direct communication to Myanmar in relation to the matter. It would not be natural to read such a brief and unparticularised opening

513 See paragraphs 524 to 552 above.

communication, coming from a State not specially affected by the factual situation in question, as intending already to advance a specific legal claim. It cannot be said that Myanmar, on the basis of the language of this note, "could not have been unaware" as a result of this note that The Gambia was making a legal claim against it.

705. Fifthly, there is no practical reason why The Gambia could not have given particulars of its claim in this note verbale if it had wanted to. The evidence is that The Gambia had instructed its lawyers for these proceedings before the Court at least by 4 October 2019,[514] a week before the note verbale was sent, and The Gambia provided significantly more details of its claim in its Application instituting proceedings, which was filed only a month after the note verbale was sent. Given that the decision to bring a case before this Court had been taken over seven months earlier, The Gambia must have been capable on 11 October 2019 of giving vastly more information about any legal claim it was proposing to advance against Myanmar than is provided in the note verbale.

706. Sixthly, The Gambia's only involvement in the matter to which the note verbale related was at the diplomatic level, consisting of its role as chair of the OIC Ad Hoc Committee. However, the note verbale, while mentioning resolutions of the OIC, makes no mention of the fact that The Gambia is chair of the OIC Ad Hoc Committee, or indeed any mention of the OIC Ad Hoc Committee at all. Nor is there any mention of the fact that The Gambia had been tasked by the OIC to bring proceedings before this Court on behalf of the OIC. Nor indeed is there any mention of the fact that The Gambia intended to bring a case against Myanmar before this Court, let alone of the fact that it had already instructed lawyers for that purpose.

707. As noted above, it is not a legal requirement for the bringing of a case before the Court that prior notice of the intention to do so has been given to the other party. However, in circumstances where The Gambia *had* formed a firm intention to bring proceedings before the Court over three months earlier,[515] and the Vice-President of The Gambia had announced in the UN General Assembly some weeks earlier that The Gambia was

514 See paragraph 105 above.

515 According to the website of the State House of The Gambia, the Cabinet of The Gambia approved the OIC proposal for The Gambia to bring these proceedings on 4 July 2019: see paragraph 95 above.

"ready" to bring a case before the Court on behalf of the OIC, the absence of any mention at all in this note verbale of an intention to bring a case before the Court supports the inference that the wording of this brief opening communication from The Gambia to Myanmar was not yet at that stage advancing a specific legal claim.

708. In the circumstances as a whole, it cannot be concluded that The Gambia was in its note verbale of 11 October 2019 advancing a *legal claim* against Myanmar. It certainly cannot be concluded that it was so clear that The Gambia was advancing a legal claim that Myanmar "could not have been unaware" that this was the case. Furthermore, it cannot be concluded that any legal claim said to have been made in that note verbale was sufficiently clearly expressed that Myanmar "could not have been unaware" what that claim was.

709. In the circumstances, any failure by Myanmar to respond to that note verbale at all could not crystallise a legal dispute. The note verbale did not "call for" a response by Myanmar.

15. The lack of response by Myanmar to the 11 October 2019 note verbale

710. The Gambia contends that Myanmar's lack of response to its note verbale "further *demonstrates* the existence of a dispute between the Parties".[516] This choice of words is significant, as it suggests that even The Gambia does not contend that the lack of any response to the note verbale itself *crystallised* the dispute.

711. For the reasons above, the note verbale did not call for a response. Nor did it advance a legal claim. This is therefore not a case where an inference of positive opposition to a legal claim could be drawn from Myanmar's failure to respond to the note verbale.

712. However, even if it were accepted for the sake of argument that the note verbale did make a legal claim, and that it did call for a response, there still would have been no dispute between The Gambia and Myanmar on 11 November 2019 unless the note

[516] MG, para. 2.17.

verbale called for a response *by that date*, that is to say, within the space of *a month* from the date of the note verbale.

713. This was not a case of an allegation being made of a specific breach of international law as a result of precise alleged facts. The note verbale merely contained a general reference to "all of the" FFM reports and "related" OIC resolutions, and unparticularised references to Myanmar's "refusal to fulfill its obligations under the Genocide Convention".

714. Upon receipt of the note verbale, Myanmar could hardly have been expected simply to accept or reject out of hand everything stated in the note verbale without giving any consideration to the substance of its contents. Myanmar was entitled to an appropriate period of time to give a considered reaction. Given the reference in the note verbale to "all of the" FFM reports, a considered response would have required a consideration by Myanmar of all of the details of the FFM reports. Yet, at the time of receipt of the note verbale on 11 October 2019, the 2019 Detailed Findings of the FFM, which were some 189 pages long (in single spaced Times New Roman 10 point text), had at that stage only been issued less than a month earlier, on 16 September 2019.

715. Nothing in the note verbale indicates that The Gambia considered there to be any particular urgency about the matter. The Gambia's Application instituting proceedings states that "This is an urgent situation"[517] and "a matter of extreme urgency".[518] However, nothing in the note verbale itself gives any indication of The Gambia's view that this is the case. It does not state that the matter is urgent, or indicate any expected time frame for a response.

716. Furthermore, allegations of the most serious crimes need to be considered and determined in the course of the criminal justice process. These are not matters on which political representatives of countries can be required to take firm positions in short spaces of time.

717. In the circumstances, even if a response from Myanmar was "called for", it was not called for by 11 November 2019. Thus, it cannot be inferred from the failure of

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517 AG, para. 131.

518 AG, paras. 113, 132.

Myanmar to have responded by that date that Myanmar was by that date expressing positive opposition to the note verbale. For this reason also, it cannot be concluded that a dispute between the parties had crystallised by that date.

718. Considered in the light of the circumstances as a whole, the note verbale can be seen to have been sent by The Gambia as a formality, to provide a justification for claiming subsequently that a dispute existed between it and Myanmar on the date of its application to the Court. It was a minimalist document, sent only a month before these proceedings were brought, notwithstanding that the intention to bring these proceedings had already been formed months earlier. It does not set out clearly that it is making a legal claim, much less state what that claim is, notwithstanding that The Gambia must have been in a position at the time to provide considerable particulars of the proposed claim.

719. Rather, the note verbale was an attempt to create the *form* or *procedure* of a dispute. However, there was no dispute in *substance*. The Gambia had not in substance advanced a legal claim against Myanmar, and even if it had, no inference of positive opposition can be drawn from Myanmar's failure to respond to the note verbale by 11 November 2019.

D. The dispute submitted to the Court was not The Gambia's dispute

720. The arguments above in relation to this fourth preliminary objection would apply even if The Gambia were bringing these proceedings in its own right, rather than on behalf of the OIC as contended by Myanmar in relation to its first preliminary objection above.

721. However, if The Gambia is in fact bringing these proceedings on behalf of the OIC, further considerations arise when determining whether a relevant dispute existed between The Gambia and Myanmar at the time of filing of The Gambia's application.

722. While the prohibition of genocide under customary international law may be an obligation *erga omnes*, the prohibition of genocide under the Genocide Convention and other obligations under the Genocide Convention are not. The latter are obligations *erga omnes partes*, owed only to other parties to the Genocide Convention.

723. Where a case is brought before the Court in reliance on the compromissory clause in Article IX of the Genocide Convention, the Court can only have jurisdiction with respect to rights and obligations under that Convention. It has no jurisdiction to deal with claimed violations of customary international law principles relating to genocide.[519]

724. If The Gambia is in fact bringing these proceedings on behalf of the OIC, then any dispute, even if it does exist (*quod non*), would in *substance* be a dispute between the OIC and Myanmar, rather than a dispute between The Gambia and Myanmar.

725. As the OIC as an international organization cannot be, and is not, a party to the Genocide Convention, any disagreement between the OIC and Myanmar, if a dispute at all, would necessarily be, if anything, a dispute as to customary international law principles of genocide. Myanmar has no obligations to the OIC under the Genocide Convention, and therefore the dispute would not be one concerning "the interpretation, application or fulfilment of the […] [Genocide] Convention" to which the compromissory clause in Article IX of the Genocide Convention exclusively applies.

726. In consequence there would be no dispute between The Gambia and Myanmar over which the Court could have jurisdiction.

727. Furthermore, because The Gambia's application alleges violations of the Genocide Convention, while the dispute between the OIC and Myanmar would concern, if anything, alleged violations of customary international law, the claims made in the The Gambia's application would not be the claims that were in dispute prior to the filing of the application.

728. Additionally, even assuming that the Court otherwise had jurisdiction to deal with the case and The Gambia's application was otherwise admissible, there would be no dispute between the parties in this case because, in substance, the dispute is between the OIC and Myanmar.[520]

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519 See footnote 13 above.

520 It is recalled that in *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6, pp. 22-25, paras. 39-46, the Court, referring to earlier case law, affirmed that in

729. These considerations are independent of Myanmar's first preliminary objection. Even if the Court were to reject the first preliminary objection, and were to find that The Gambia can bring these proceedings on behalf of the OIC, the Court would nonetheless still need to satisfy itself that there is a dispute between The Gambia and Myanmar that falls within Article IX of the Genocide Convention. However, for the reasons given, that requirement would not be satisfied.

E. Conclusion

730. For all the reasons above, at the time The Gambia filed its Application instituting proceedings on 11 November 2019, a dispute did not exist between The Gambia and Myanmar in relation to the claims made by The Gambia in its application.

731. According to the more recent case law of the Court, the requirement of a pre-existing dispute between the parties is a *condicio sine qua non* of the Court's jurisdiction,[521] such that if the requirement is not satisfied, the Court *lacks jurisdiction* to entertain the claim.[522] Myanmar thus submits that, because this requirement is not satisfied in the present case, the Court lacks jurisdiction.

732. However, an alternative view has been advanced that this requirement of a pre-existing dispute between the parties is rather a matter concerning the admissibility of the

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determining whether a dispute was of a kind that falls within the terms of a particular compromissory clause, it is required to determine the "source or real cause" of the dispute. See paragraph 53 above.

521 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 3, p. 26, para. 50; *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*, p. 255, pp. 269, 273, paras. 33, 42; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 552, pp. 566, 569, paras. 33, 42; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, p. 849, 852, paras. 36, 45 ("The Court's jurisprudence treats the question of the existence of a dispute as a jurisdictional one").

522 For instance, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, declaration of Judge Abraham, p. 858, para. 3 ("the existence of a dispute between the parties to a case is not only a condition for the exercise of the Court's jurisdiction, but, more fundamentally, a condition for the very existence of that jurisdiction").

application,[523] or that it is otherwise "an indispensable precondition for the seisin of the Court by the Applicant".[524] Myanmar therefore argues in the alternative that, because this requirement is not satisfied in the present case, the application of The Gambia is inadmissible, or the Court should otherwise determine as a preliminary matter that it will not exercise jurisdiction in this case.

SUBMISSION

733. 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.

734. 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

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523 *Electricity Company of Sofia and Bulgaria (Preliminary Objection), Judgment, 1939, PCIJ., Series A/B, No. 77*, in which the Court upheld as "well-founded" a preliminary objection of the respondent State (Bulgaria) that one of the contentions of the applicant State (Belgium) was *inadmissible* because the claim did not form the subject of a dispute between the two Government prior to the filing of the application; also *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962*, p. 319, Dissenting Opinion of Judge Morelli, p. 565, para. 2: "From the whole body of provisions in the Statute and the Rules it is therefore clear, beyond any possibility of doubt, that, in accordance with the Statute and the Rules themselves, the Court cannot exercise its function in contentious proceedings, by giving a decision on the merits, unless a dispute genuinely exists between the parties. … This is a question which, strictly speaking, does not relate to the jurisdiction of the Court: a problem which, indeed, arises prior to any question of jurisdiction, for the very simple reason that it is only in relation to a genuinely existing dispute that it is possible to raise the question whether such a dispute is or is not subject to the jurisdiction of the Court. It follows that if the Court finds that no dispute exists between the parties, it will not be called on to pass upon its jurisdiction itself; it must, in that case, confine itself to a finding that the claim is inadmissible".

524 For instance, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, separate opinion of Judge Owada, p. 878, para. 4; separate opinion of Judge Tomka, p. 889, para. 15 ("Thus, it is not the emergence of a dispute which establishes the Court's jurisdiction or perfects it. The emergence of a dispute is a necessary condition, in the event that one of the disputing parties which has accepted the Court's jurisdiction decides to bring an Application instituting proceedings before the Court against another State with an Article 36 declaration in force, for the Court to exercise that jurisdiction").

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.

H.E. Daw Aung San Suu Kyi

Union Minister for Foreign Affairs
of the Republic of the Union of Myanmar

Agent of Myanmar

LIST OF ANNEXES
AND CERTIFICATION

I hereby certify that the annexes filed with these Preliminary Objections are true copies of the original documents reproduced therein, and that where such a document is accompanied by a translation into English, that translation is accurate.

H.E. Daw Aung San Suu Kyi

Union Minister for Foreign Affairs
of the Republic of the Union of Myanmar

Agent of Myanmar

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