

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

INTERNATIONAL COURT OF JUSTICE

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

(THE GAMBIA v. MYANMAR)

**DECLARATION OF INTERVENTION OF THE KINGDOM OF BELGIUM
UNDER ARTICLE 63 OF THE STATUTE OF THE INTERNATIONAL COURT
OF JUSTICE**

12 December 2024

[Translation by the Registry]

**INTERVENTION UNDER ARTICLE 63 OF THE STATUTE
OF THE INTERNATIONAL COURT OF JUSTICE**

To the Registrar of the International Court of Justice (hereinafter the “Court”), the undersigned being duly authorized by the Government of the Kingdom of Belgium (hereinafter “Belgium”):

1. On behalf of Belgium, I have the honour to submit to the Court a Declaration of intervention pursuant to Article 63, paragraph 2, of the Statute of the Court (hereinafter the “Statute”) in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*.

2. Article 82, paragraph 5, of the Rules of Court (hereinafter the “Rules”) provides that a State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute must state the name of an agent and specify the case and the convention to which its declaration relates, which must contain:

- “(a) particulars of the basis on which the declarant State considers itself a party to the convention;
- (b) identification of the particular provisions of the convention the construction of which it considers to be in question;
- (c) a statement of the construction of those provisions for which it contends;
- (d) a list of the documents in support, which documents shall be attached”.

3. These elements are addressed in turn below, following a few preliminary observations on the proceedings and the context in which this Declaration is made.

I. PRELIMINARY OBSERVATIONS

4. On 11 November 2019, the Republic of The Gambia (hereinafter referred to as “The Gambia”) instituted proceedings against the Republic of the Union of Myanmar (hereinafter referred to as “Myanmar”)¹. In its Application instituting proceedings, The Gambia alleges that Myanmar violated the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as the “Convention”), in particular “Articles I, III, IV, V and VI”², on account of “acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group”³.

5. On 23 January 2020, the Court made an Order indicating provisional measures⁴ which had been requested by The Gambia in its Application instituting proceedings⁵. The Court indicated in

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application instituting proceedings and Request for provisional measures, 11 Nov. 2019.

² *Ibid.*, para. 111.

³ *Ibid.*, para. 2.

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020.

⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application instituting proceedings and Request for provisional measures, 11 Nov. 2019, paras. 113-134.

particular that Myanmar must, “in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of th[e] Convention”⁶.

6. On 24 January 2020, pursuant to Article 63, paragraph 1, of the Statute, the Registrar notified Belgium, as a State party to the Convention, that The Gambia “seeks to found the Court’s jurisdiction on the compromissory clause contained in Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide . . . and alleges that the Respondent has violated Articles I, III, IV, V and VI of the Convention. It therefore appears that the construction of this instrument will be in question in the case”⁷.

7. On 22 July 2022, the Court rendered a Judgment on the preliminary objections raised by Myanmar⁸. It rejected these objections and found that it “has jurisdiction, on the basis of Article IX of the Convention”⁹.

8. On 16 October 2023, the Court authorized the submission of a Reply by The Gambia and a Rejoinder by Myanmar¹⁰, with the time-limits for the filing of those written pleadings expiring on 16 May 2024 and 16 December 2024, respectively. Subsequently, in an Order dated 21 November 2024, the Court extended the time-limit for the filing of the Rejoinder of Myanmar to 30 December 2024¹¹.

9. By the present Declaration, Belgium avails itself of the right of intervention conferred upon it by Article 63, paragraph 2, of the Statute, as a State party to the Convention. In accordance with that provision and the Court’s interpretation thereof¹², Belgium will confine itself to setting out its construction of certain provisions of the Convention that are in question in this case, with a view to ensuring a consistent understanding of them. As an intervening State and not a party to the dispute, it will not address any other aspect of the case before the Court¹³.

10. Belgium would like to emphasize that the Convention is an essential instrument for preventing and punishing genocide, a crime under international law whose prohibition is a *jus cogens*

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, para. 86 (1).

⁷ See Ann. I.

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 477.

⁹ *Ibid.*, p. 518, para. 115 (5).

¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order of 16 October 2023, I.C.J. Reports 2023 (II)*.

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order of 21 November 2024*.

¹² See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Admissibility of the Declarations of Intervention, Order of 3 July 2024*, para. 42; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Admissibility of the Declarations of Intervention, Order of 5 June 2023, I.C.J. Reports 2023 (II)*, p. 374, para. 84.

¹³ See e.g. *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013*, p. 9, para. 18.

norm¹⁴. Moreover, as the Court affirmed in its Judgment of 22 July 2022 in this case, the obligations set out in the Convention are “obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case”¹⁵.

11. Belgium considers that the exercise of the right of intervention enables it and other States parties to the Convention to reaffirm their commitment to ensuring respect for the rights and obligations provided for therein and to recognize the Court’s essential role in this area.

12. Belgium wishes to assure the Court that its Declaration has been filed as soon as reasonably possible, in accordance with Article 82, paragraph 2, of the Rules.

II. THE CASE AND THE CONVENTION TO WHICH THIS DECLARATION RELATES

13. This Declaration is filed in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*. The case raises questions relating to the interpretation, application or fulfilment of the Convention. Belgium seeks to exercise its right to intervene in this case in order to provide its construction of certain provisions in question.

III. BASIS ON WHICH BELGIUM CONSIDERS ITSELF A PARTY TO THE CONVENTION

14. Belgium signed the Genocide Convention on 12 December 1949, in accordance with the first paragraph of Article XI of this instrument. Pursuant to the second paragraph of that Article, it deposited its instrument of ratification of the Convention with the Secretary-General of the United Nations, in his capacity as depositary, on 5 September 1951. It has filed no reservations thereto¹⁶.

IV. PROVISIONS OF THE CONVENTION THE CONSTRUCTION OF WHICH BELGIUM CONSIDERS TO BE IN QUESTION

15. In Belgium’s view, the provisions of the Convention the construction of which are in question are not limited to those whose violation is expressly invoked by The Gambia in its Application instituting proceedings. They also include Article II, which defines genocide. As noted by the Court in its Order of 3 July 2024 on the admissibility of the declarations of intervention in this case, “the construction of Article II is in question at the current stage[, as it] is a key provision of the Convention, since it defines the acts and specific intent constituting genocide and informs several other provisions of the Convention, such as Articles I, III, IV, V and VI, the violation of which is alleged in the Application”¹⁷.

16. In the present Declaration, Belgium wishes to focus on its construction of Article II of the Convention, namely, as discussed below, the question of the scope of the specific intent required by

¹⁴ See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), pp. 110-111, paras. 161-162.

¹⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (II), p. 516, para. 107.

¹⁶ See Ann. II.

¹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Admissibility of the Declarations of Intervention, Order of 3 July 2024, para. 43.

that Article. This approach will at the same time enable the meaning of other provisions of the Convention to be clarified, in particular Articles I, III, IV, V and VI.

17. In accordance with Article 86, paragraph 1, of the Rules of Court, Belgium reserves the right to supplement or amend this Declaration and the scope of its observations, should additional matters of construction arise as the case progresses, or should they come to its attention subsequent to its receipt of the pleadings and the documents annexed thereto.

V. STATEMENT OF THE CONSTRUCTION OF THE PROVISIONS IN QUESTION

18. In interpreting the Convention, Belgium bases itself on the general rule of interpretation provided for in Article 31 of the Vienna Convention on the Law of Treaties, which namely includes State practice as a means of interpretation¹⁸, and on supplementary means of interpretation, in accordance with Article 32 of the same Convention. As the Court has recalled, these two provisions are considered as forming part of customary law¹⁹. Belgium further contends that the Convention may be interpreted on the basis of international jurisprudence, in accordance with Article 38, paragraph 1 (*d*), of the Court's Statute, pursuant to which it applies "judicial decisions . . . as subsidiary means for the determination of rules of law".

19. Article II of the Convention reads as follows:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group."

20. In accordance with Article II of the Convention, genocide involves the commission of physical acts (*actus reus*) listed in Article II (*a*) to (*e*). In addition, as the Court has noted, "the essential characteristic of genocide, which distinguishes it from other serious crimes"²⁰, is the specific intent of the perpetrator of these acts, i.e. the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" (*dolus specialis* or genocidal intent). This intent "must be

¹⁸ See Art. 31 (3) (*b*) of the Vienna Convention on the Law of Treaties.

¹⁹ See e.g. *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. 64, para. 138; *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. 110, para. 160.

²⁰ *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. 62, para. 132.

present in addition to the intent required for each of the individual acts involved”²¹ and, together, they constitute the mental elements required for establishing the existence of genocide (*mens rea*)²².

21. Article I of the Convention provides that genocide “is a crime under international law”, “whether committed in time of peace or in time of war”. However, the majority of the cases examined by national and international courts concern allegations of genocide being committed during armed conflicts involving belligerent parties and their members²³. In this context, Belgium wishes to set out its position on the construction of the concept of genocidal intent as laid down in Article II of the Convention in cases where prohibited acts are committed in the particular context of an armed conflict. More specifically, it will endeavour to ascertain whether the existence of an armed conflict may affect the determination of genocidal intent. To this end, it will begin by examining the question of the belligerents’ allegation of a military objective (A) before turning to the invocation of other military considerations (B).

22. In general, Belgium wishes to show that the existence of an armed conflict, and the military considerations often invoked in that context, do not constitute an obstacle to the recognition of genocidal intent. More specifically, it will underline the limits of justifications based on military considerations and will explain why such considerations cannot be invoked to rule out the existence of such intent.

A. The pursuit of a military objective

23. Genocidal intent is generally interpreted in national and international jurisprudence as requiring that the intent²⁴ or “aim”²⁵ of the prohibited acts must be to destroy, in whole or in part, a national, ethnical, racial or religious group (hereinafter a “protected group”) as such, or that the perpetrator must “seek to” achieve such a result²⁶. In other words, genocidal intent is characterized by its objective of destroying, in whole or in part, a protected group as such.

24. Moreover, in accordance with both national and international jurisprudence, “[i]n the absence of a State plan expressing the intent to commit genocide”²⁷, genocidal intent can be inferred from a set of factual circumstances that reveal the pattern of conduct adopted by the perpetrator²⁸.

²¹ *Ibid.*

²² See e.g. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004, 25 Jan. 2005, para. 491; C. Kress, “The Crime of Genocide under International Law”, *International Criminal Law Review* (2006), pp. 484 *et seq.*; W. Schabas, *Genocide in International Law* (CUP 2000), pp. 206 *et seq.*

²³ See, however, for cases in which national courts found that genocide was committed in peacetime, *United States of America v. Alstötter et al.*, United States Military Tribunal, 1948, 6 LRTWC 1, 3 TWC p. 983; *Mputu Muteba et consorts*, Tribunal de grande instance de Kinshasa/Kalamu, RP 11.154, 11.155-11.156.

²⁴ See e.g. *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. 123, para. 190.

²⁵ See e.g. *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. 122, para. 419; ICTY, *Prosecutor v. Krstić* (IT-98-33-T), Judgment, 2 Aug. 2001, para. 571.

²⁶ See e.g. ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 Sept. 1998, para. 498. See also C. Kress, p. 493; K. Ambos, “What does ‘intent to destroy’ in genocide mean?”, *International Review of the Red Cross* (2009), p. 838.

²⁷ See e.g. *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. 66, para. 145.

²⁸ See e.g. ICTY, *Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, 12 Dec. 2012, para. 745.

However, in that case, the intent will be established only if it constitutes “the only reasonable inference which can be drawn from th[at] pattern of conduct”²⁹.

25. It is nonetheless common for belligerents to invoke the pursuit of a military objective to justify committing an act prohibited by the Convention³⁰ and attempt thereby to preclude the existence of genocidal intent. Yet, in Belgium’s view, such an intent cannot be precluded on account of a military objective in the following circumstances:

- First, *when the military objective itself is to destroy, in whole or in part, a protected group as such*. As envisaged in the jurisprudence³¹, the belligerent’s military objective may in fact be to destroy such a group. In these circumstances, the military objective coincides with genocidal intent, making it impossible for such intent to be ruled out.
- Second, when the military objective invoked corresponds to the ultimate goal of the military campaign led by a belligerent, and the aim of destroying, in whole or in part, a protected group as such is simply an interim goal of that campaign. This position is supported not only by the literature³² but also by the jurisprudence, in particular the finding that the Islamic State committed genocide against the Yazidis. Indeed, that genocide was considered an interim goal in the Islamic State’s broader military campaign aimed at establishing a caliphate³³. This scenario illustrates that genocidal intent may remain even when the ultimate military objective with which that intent coincides goes beyond the immediate destruction of the protected group.
- Third, when the military objective is not the only reasonable inference that can be drawn from the pattern of conduct adopted by the belligerent. This interpretation is based on international jurisprudence. Indeed, whenever the courts have ruled out genocidal intent by noting that the belligerent was in fact pursuing another objective, that objective has been presented as the only explanation for its conduct³⁴. In other words, to rule out genocidal intent, the alleged military objective cannot merely be one of several possible explanations for the belligerent’s conduct, coexisting with the intent to destroy, in whole or in part, a protected group as such. It must be the sole explanation for this conduct, based on the evidence available.
- Fourth, when the military objective, presented as the sole explanation for the belligerent’s behaviour, is not supported by compelling evidence. This interpretation also emerges from the

²⁹ *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. 122, para. 417.

³⁰ For different types of military objectives invoked by belligerents, see e.g. *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. 156, para. 278; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004, 25 Jan. 2005, para. 3; ECCC (Case No. 002/19-09-2007-ECCC/SC), Judgment, 23 Dec. 2022, para. 1616.

³¹ See e.g. Swiss Military Court of Cassation, *Fulgence Niyonteze*, 27 Apr. 2001, available at the following address: <https://ihl-databases.icrc.org/en/national-practice/fulgence-niyonteze-case-military-court-cassation-27-april-2001>, para. 9 (e).

³² See e.g. C. J. Tams, L. Berster, B. Schiffbauer, *The Genocide Convention. Article-by-Article Commentary* (2nd ed., C. H. Beck, 2023), p. 150.

³³ See e.g. Higher Regional Court of Frankfurt, *Taha Al-J* case, first instance, 30 Nov. 2021, available at the following address: <https://www.rv.hessenrecht.hessen.de/bshe/document/LARE220002903>, IV (1) (b) (bb); German Federal Court of Justice, *Taha Al-J* case, appeal, 30 Nov. 2022, available at the following address: <https://www.hrr-strafrecht.de/hrr/3/14/3-575-14-1.php>, B (II) (1) (a) (aa).

³⁴ See e.g. ICTY, *Prosecutor v. Stakić* (IT-97-24-T), Judgement, 31 July 2003, para. 553; ICTY, *Prosecutor v. Brđanin* (IT-99-36-T), Judgement, 1 Sept. 2004, paras. 978-979; ICTY, *Prosecutor v. Stakić* (IT-97-24-A), Judgement, 22 Mar. 2006, para. 56. 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 (I), separate opinion of Judge Keith, paras. 4-6.

jurisprudence, in particular that of the International Criminal Tribunal for the former Yugoslavia (hereinafter the “ICTY”). In several cases, the ICTY rejected the argument that the killing in July 1995 of thousands of Bosnian Muslim men in Srebrenica was justified by a military objective — in this instance, preventing them from taking up arms — on account of a lack of sufficiently compelling evidence³⁵. This evidentiary requirement can moreover be set against the standard of proof required to establish genocidal intent. In its Judgment of 26 February 2007 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (hereinafter the “2007 Judgment”), the Court found that, in light of its exceptional gravity, the claim of genocide must be proved by evidence that is “fully conclusive”³⁶. Belgium is of the opinion that, by analogy, the alleged pursuit of a purely military objective is not sufficient to rule out genocidal intent without fully conclusive evidence to support such a contention.

B. Other military considerations

26. Belgium would now like to examine other considerations relating to the existence of an armed conflict. In doing so, it will distinguish between considerations that cannot preclude genocidal intent and considerations likely to influence the interpretation of evidence establishing such intent.

Military considerations that cannot preclude genocidal intent

27. Belgium identifies three categories of military considerations that cannot under any circumstances justify precluding genocidal intent:

— First, *considerations relating to the belligerent’s motives*. Belgium notes that in judicial practice, a distinction is generally made between the motives of the perpetrator of acts prohibited by Article II of the Convention, and the objective pursued by that perpetrator. Motives are defined as “the reason prompting the offender to carry out the offence”³⁷, whereas the objective is “the seeking of a wrongful result”³⁸. However, according to this practice, motives, unlike the objective, cannot under any circumstances be taken into account to establish genocidal intent³⁹. Consequently, when a belligerent invokes military considerations, the latter cannot preclude genocidal intent if they in fact constitute the motives underlying its conduct⁴⁰.

³⁵ See e.g., ICTY, *Prosecutor v. Krstić* (IT-98-33-T), Judgment, 19 Apr. 2004, paras. 26 and 27; ICTY, *Prosecutor v. Krstić* (IT-98-33-T), Judgment, 2 Aug. 2001, paras. 75 and 86. In this regard, see also R. Park, “Proving Genocidal Intent: International Precedent and ECCC Case 002”, *Rutgers Law Review* (2010) p. 168.

³⁶ *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. 129, para. 209.

³⁷ *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)*, dissenting opinion of Judge Mahiou, para. 70. In this regard, see also C. Tournaye, “Genocidal Intent before the ICTY”, *International and Comparative Law Quarterly* (2003), pp. 451-453.

³⁸ *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)*, dissenting opinion of Judge Mahiou, para. 70.

³⁹ See, in particular, ICTY, *Prosecutor v. Tadić* (IT-94-1-A), Judgment, 15 July 1999, para. 269; ICTY, *Prosecutor v. Jelisić* (IT-95-10-A), Judgment, 5 July 2001, para. 49; ICTY, *Prosecutor v. Stakić* (IT-97-24-A), Judgment, 22 Mar. 2006, para. 45.

⁴⁰ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/32/CRP.2), 15 June 2016, para. 158. The Commission refers in this regard to the jurisprudence of the ICTY, which excludes motives as a relevant element in establishing genocidal intent (p. 30, fn. 58). 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 (I)*, separate opinion of Judge Bhandari, paras. 49-50.

- Second, *considerations based on the perception or designation of non-combatant members of a protected group as enemies*. Judicial practice confirms that such considerations do not preclude genocidal intent. Indeed, not a single international court or tribunal has called into question the existence of such intent on the ground that the perpetrator of prohibited acts “perceived” or “designated” non-combatant members of the protected group as enemies maintaining ties of allegiance with the opposing belligerent⁴¹.
- Third, *considerations relating to the conformity of the acts prohibited by the Convention with the law governing armed conflicts*. In general, Belgium wishes to recall, in accordance with the jurisprudence of the Court⁴², that the rules relating to genocide are, as a matter of principle, separate from those of the law of armed conflict. In its view, this separation is not affected by any connections that may exist between the two bodies of rules. Indeed, on one hand, to assess compliance with each body, courts can rely on similar facts, such as a high number of fatalities relative to the military objective envisaged. On the other hand, a single act may constitute the crime of genocide in addition to violations of the law of armed conflict. In this regard, Belgium notes that in the jurisprudence, nearly all instances in which a crime of genocide has been established in times of armed conflict involve physical acts, especially killings, which are characterized as both a crime of genocide and a war crime⁴³. This dual characterization is based on the fact that these crimes comprise distinct constituent elements that justify both crimes being established. Indeed, for an act to be considered a genocide, it must be committed with specific, genocidal intent. However, to be characterized as a war crime, a link must be established between the act in question and the armed conflict. This link — often referred to as the “nexus”⁴⁴ — is generally considered in legal writings as a condition *sine qua non* for the applicability of the law of armed conflict⁴⁵. Yet, a single act can be perpetrated with genocidal intent while also taking place in the context of an armed conflict. In this regard, Belgium considers that, in accordance with the jurisprudence, the demonstration of such a link cannot preclude genocidal intent.

⁴¹ For a similar finding, see also ICC, *The Prosecutor v. Omar Al Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 Mar. 2009, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 65. Concerning the perception of members of the protected group as enemies, see e.g. ECCC (Case No. 002/19-09-2007-ECCC/SC), Judgment, 16 Nov. 2018, paras 332, 3379, 3388; ECCC (Case No. 002/19-09-2007-ECCC/SC), Judgment, 23 Dec. 2022, paras 1623, 1626; ICTR, *The Prosecutor v. Kayishema and Ruzindana* (ICTR-95-1-T), Judgment, 21 May 1999, paras. 293, 281, 296; Report of the Commission for Historical Clarification. Conclusions and Recommendations, undated, paras. 110, 122. Concerning the designation of members of the protected group as enemies, see e.g. ECCC (Case No. 002/19-09-2007-ECCC/SC), Judgment, 16 Nov. 2018, para. 3388; ICTR, *The Prosecutor v. Semanza* (ICTR-97-20-T), Judgment, 15 May 2003, para. 518; Report of the Commission for Historical Clarification. Conclusions and Recommendations, undated, para. 31.

⁴² *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. 68, para. 153. On this subject, see e.g. G. Rona, N. K. Orpett, “Can Armed Attacks That comply With IHL Nonetheless Constitute Genocide?”, *Lawfare* (5 June 2024).

⁴³ See e.g. ICTY, *Prosecutor v. Krstić* (IT-98-33-T), Judgment, 2 Aug. 2001, para. 680; ICTR, *The Prosecutor v. Rutaganda* (ICTR-96-3-A), Judgment, 26 May 2003, para. 583; ICTR, *The Prosecutor v. Semanza* (ICTR-97-20-A), Judgment, 20 May 2005, para. 369; ICTY, *Prosecutor v. Popović* (IT-05-88-T), Judgment, 10 June 2010, para. 2116; ICTY, *Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, 12 Dec. 2012, para. 1205; ICTY, *Prosecutor v. Mladić* (IT-09-92), Judgment, 22 Nov. 2017, para. 2116; ECCC (Case No. 002/19-09-2007-ECCC/SC), Judgment, 16 Nov. 2018, paras. 4335 and 4336; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/32/CRP.2), 15 June 2016, paras. 165 and 169-170; Higher Regional Court of Frankfurt, *Taha Al-J* case, first instance, 30 Nov. 2021, available at the following address: [https://www.rv.hessenrecht.hessen.de/bshe/document/LARE220002903, IV \(1\) and \(3\).](https://www.rv.hessenrecht.hessen.de/bshe/document/LARE220002903, IV (1) and (3).)

⁴⁴ On this subject, see e.g. E. Pothelet, *Searching for the “nexus”: A proposal to refine the scope of the applicability of international humanitarian law and war crimes*, doctoral thesis under the supervision of Professor Sassòli, Geneva (2020); A. Cassese, “The Nexus Requirement for War Crimes”, *Journal of International Criminal Justice* (2012); N. Lubell, N. Derejko, “A Global Battlefield?”, *Journal of International Criminal Justice* (2013).

⁴⁵ See e.g. M. Sassòli, *International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising in Warfare* (Elgar 2024), pp. 219-226.

Military considerations that may affect the interpretation of evidence of genocidal intent

28. As mentioned above⁴⁶, genocidal intent is rarely expressed explicitly, be it verbally or in writing. In practice, it is generally inferred from a body of material evidence so abundant and wide-ranging that it cannot be listed in full in the context of this Declaration⁴⁷. This evidence has typically been assessed as a whole⁴⁸ — in a “holistic”⁴⁹ manner — “in line with the fluid concept of intent”⁵⁰.

29. Belgium observes that, among this evidence, the existence of an armed conflict is sometimes brought to the fore, particularly when aggressive language is aimed at a protected group. Indeed, such statements, made in this context, tend to reveal the existence of hostile intentions that go beyond mere military intent in so far as they target not only the armed forces of the enemy but also and especially the protected group⁵¹.

VI. CONCLUSION

30. On the basis of the information set out above, Belgium avails itself of the right of intervention conferred upon it by Article 63, paragraph 2, of the Statute, as a party to the Convention the construction of which is in question in the present case brought before the Court by The Gambia against Myanmar.

31. Belgium will expand on its Declaration of intervention in the context of the written proceedings if it is found to be admissible by the Court.

32. The Government of Belgium has appointed as Agent and Co-Agent:

- Ms Sabrina Heyvaert, General Counsel, Director of the Directorate for Public International Law, Directorate-General of Legal Affairs, Federal Public Service for Foreign Affairs, Foreign Trade and Development Co-operation; and
- Mr Olivier Belle, Ambassador, Permanent Representative of the Kingdom of Belgium to the International Organizations in The Hague.

⁴⁶ See para. 24.

⁴⁷ However, regarding attempts at such categorization, with references to relevant jurisprudence, see ICC, *The Prosecutor v. Omar Al Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 Mar. 2009, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, paras. 37-54; International Commission of Jurists, “Questions and Answers on the Crime of Genocide. Legal Briefing Note” (Aug. 2018), pp. 25-32.

⁴⁸ See e.g. ICTY, *Prosecutor v. Stakić* (IT-97-24-T), Judgement, 31 July 2003, para. 2939; ICTY, *Prosecutor v. Popović* (IT-05-88-T), Judgement, 10 June 2010, para. 820; ECCC, Judgment (Case No. 002/19-09-2007-ECCC/SC), 16 Nov. 2018, para. 803.

⁴⁹ ICTY, *Prosecutor v. Tolimir* (IT-05-88/2-A), Judgement, 8 Apr. 2015, para. 247.

⁵⁰ ICTY, *Prosecutor v. Tolimir* (IT-05-88/2-T), Judgement, 12 Dec. 2012, para. 772.

⁵¹ ECCC (Case No. 002/19-09-2007-ECCC/SC), Judgement, 16 Nov. 2018, para. 3412. The English version, which reads “[d]espite the contemporaneous military offensives” (emphasis added), is even more explicit regarding the role of armed conflict in the interpretation of the evidence in question.

33. The Registrar of the Court may send all communications relating to the present case to the following address:

Permanent Representation of the Kingdom of Belgium
to the International Organizations in The Hague
Johan van Oldenbarneveltlaan 11
2582 NE The Hague
Netherlands

The Hague, 11 December 2024.

Respectfully,

(Signed) Olivier BELLE,

Co-Agent of the Government, Ambassador,
Permanent Representative of the Kingdom of Belgium
to the International Organizations in The Hague.



153168

24 January 2020

Excellency,

I have the honour to refer to my letter (No. 152867) dated 11 November 2019 informing your Government that the Republic of The Gambia filed in the Registry of the Court an Application instituting proceedings against the Republic of the Union of Myanmar in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar). A copy of the Application was appended to that letter. The text of the Application is also available on the website of the Court (www.icj-cij.org).

Article 63, paragraph 1, of the Statute of the Court provides that:

[w]henever 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”.

Further, under Article 43, paragraph 1, of the Rules of Court:

“Whenever the construction of a convention to which States other than those concerned in the case are parties may be in question within the meaning of Article 63, paragraph 1, of the Statute, the Court shall consider what directions shall be given to the Registrar in the matter.”

On the instructions of the Court, given in accordance with the said provision of the Rules of Court, I have the honour to notify your Government of the following.

In the above-mentioned Application, the Applicant seeks to found the Court’s jurisdiction on the compromissory clause contained in Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the “Genocide Convention”) and alleges that the Respondent has violated Articles I, III, IV, V and VI of the Convention. It therefore appears that the construction of this instrument will be in question in the case

./.

[Letter to the States parties to the Genocide Convention
(except The Gambia and Myanmar)]

Your country is included in the list of parties to the Genocide Convention. The present letter should accordingly be regarded as the notification contemplated by Article 63, paragraph 1, of the Statute. I would add that this notification in no way prejudices any question of the possible application of Article 63, paragraph 2, of the Statute, which the Court may later be called upon to determine in this case.

Accept, Excellency, the assurances of my highest consideration.



Philippe Gautier
Registrar

ANNEXE II

1951 Nations Unies — Recueil des Traités 295

No. 973. GENEVA CONVENTION
RELATIVE TO THE PROTECTION
OF CIVILIAN PERSONS IN TIME
OF WAR. SIGNED AT GENEVA,
ON 12 AUGUST 1949¹

N° 973. CONVENTION DE GENÈVE
RELATIVE A LA PROTECTION
DES PERSONNES CIVILES EN
TEMPS DE GUERRE. SIGNÉE A
GENÈVE, LE 12 AOÛT 1949¹

RATIFICATION

*Instrument deposited with the Swiss
Federal Council on:*

3 August 1951
NORWAY
(To take effect on 3 February 1952.)

*Certified statement relating to the above-
mentioned ratification was registered by
Switzerland on 30 August 1951.*

RATIFICATION

*Instrument déposé auprès du Conseil
fédéral suisse le:*

3 août 1951
NORVÈGE
(Pour prendre effet le 3 février 1952.)

*La déclaration certifiée relative à la rati-
fication mentionnée ci-dessus a été enregistrée
par la Suisse le 30 août 1951.*

No. 1021. CONVENTION ON THE
PREVENTION AND PUNISHMENT
OF THE CRIME OF GENOCIDE.
ADOPTED BY THE GENERAL
ASSEMBLY OF THE UNITED NA-
TIONS ON 9 DECEMBER 1948²

N° 1021. CONVENTION POUR LA
PRÉVENTION ET LA RÉPRESSION
DU CRIME DE GÉNOCIDE. ADOPTÉ
PAR L'ASSEMBLÉE GÉNÉ-
RALE DES NATIONS UNIES LE
9 DÉCEMBRE 1948²

RATIFICATION

Instrument deposited on:

5 September 1951
BELGIUM
(To take effect on 4 December 1951.)

RATIFICATION

Instrument déposé le:

5 septembre 1951
BELGIQUE
(Pour prendre effet le 4 décembre 1951.)

¹ United Nations, *Treaty Series*, Vol. 75, p. 287; Vol. 78, p. 368; Vol. 84, p. 416. Vol. 87, p. 395; Vol. 91, p. 381, and Vol. 96, p. 326.

² United Nations, *Treaty Series*, Vol. 78, p. 277; Vol. 91, p. 383, and Vol. 96, p. 327.

¹ Nations Unies, *Recueil des Traités*, vol. 75, p. 287; vol. 78, p. 368; vol. 84, p. 416; vol. 87, p. 395; vol. 91, p. 381, et vol. 96, p. 326.

² Nations Unies, *Recueil des Traités*, vol. 78, p. 277; vol. 91, p. 383, et vol. 96, p. 327.