

DISSENTING OPINION OF JUDGE XUE

1. Much to my regret, I am unable to concur with the decision of the Court that The Gambia has standing in the present case, which leads me to vote against paragraph 115 (4) and (5). Pursuant to Article 57 of the Statute, I will explain the reasons for my dissent.

2. The Gambia's institution of the proceedings against Myanmar before the Court for the protection of the common interest of the States parties to the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or "the Convention") is, in essence, a collective lawsuit, which renders this case exceptional. Notwithstanding its purported objective, The Gambia's legal action raises some fundamental issues that bear on the statutory framework of the judicial mechanism for dispute settlement under the Charter of the United Nations. The way in which Article IX of the Genocide Convention is being interpreted in the Judgment, in my opinion, deviates from the rules on treaty interpretation and the settled jurisprudence of the Court with regard to the Genocide Convention.

I. ACCESS TO THE COURT AND THE NATURE OF THE CASE

3. In its first preliminary objection, the Respondent claims that the Court lacks jurisdiction, or alternatively that the Application is inadmissible, because the real applicant in these proceedings is the Organisation of Islamic Cooperation (hereinafter the "OIC"), which cannot be a party to proceedings before the Court pursuant to Article 34, paragraph 1, of the Statute. It argues that this objection concerns both law and fact.

4. Myanmar's first preliminary objection raises a substantive issue, namely, whether the Court is competent under the Statute to entertain a case which is in fact initiated by an international organization and entrusted to one of its members to act on its behalf. The evidence and documents adduced by the Respondent, in my view, sufficiently prove that The Gambia was tasked and appointed by the OIC to institute the proceedings against Myanmar in the Court. This is not only supported by the resolutions adopted by the OIC, but also publicly acknowledged by its Member States, in particular The Gambia itself. As is recalled in the Judgment, The Gambia expressly announced in the United Nations General Assembly that "it would champion an accountability mechanism for the alleged crimes against the Rohingya" and "lead concerted efforts to take the Rohingya issue to the International Court of Justice *on behalf of the Organization of Islamic Cooperation*" (United Nations, *Official Records of the General Assembly*, UN doc. A/74/PV.8, 26 September 2019, p. 31, emphasis added (see paragraph 69 of the Judgment)). Being the chair of the Ad hoc Ministerial Committee on Accountability for Human Rights Violations against the Rohingyas established by Resolution No. 59/45-POL of the OIC Council of Foreign Ministers in May 2018, The Gambia is specifically instructed and directed by the OIC to take legal action in the International Court of Justice. Moreover, the decision to file a case in the Court was negotiated and agreed upon among its members, particularly with regard to the representation and funding of the envisaged legal action (OIC, *Report of the Ad Hoc Ministerial Committee on Human Rights Violations against the Rohingya*, 25 September 2019; OIC, Resolution 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; *OIC Secretary General Thanks the ISF for its Support in Financing the Rohingya Case at the ICJ*, OIC press release, 7 October 2020).

5. The Gambia does not deny those facts but maintains that it instituted the proceedings in its own name and has a dispute with Myanmar regarding "its own rights" as a State party to the Genocide Convention. Notably, The Gambia does not claim any link with the alleged acts in Myanmar. In its

own words, it has no individual interest in the case but acts for the common interest of the States parties. Given its character, The Gambia's legal action, either for the common interest of the OIC Member States, or for the common interest of the States parties to the Genocide Convention, is arguably tantamount to a public-interest litigation.

6. In rejecting the Respondent's first preliminary objection, the Court simply dismisses as irrelevant Myanmar's evidence relating to the OIC's decision and its financial support for The Gambia's legal action. In the Court's view, those factors do not detract from The Gambia's status as the Applicant before the Court, and The Gambia's motivation to commence the proceedings is irrelevant for establishing the jurisdiction of the Court. This reasoning, in my view, is evasive of the real hard issue before the Court.

7. Article 34, paragraph 1, of the Statute provides that "[o]nly States may be parties in cases before the Court". By virtue of that provision, international organizations do not enjoy access to the Court. The issue in the present case is not in whose name the proceedings are instituted, what motive the Applicant may pursue, or who has arranged the litigation team; no one has ever challenged The Gambia's capacity to have access to the Court. The matter for the Court to determine is whether The Gambia is acting on behalf of the OIC for the common interest of its member States, some of which are parties to the Genocide Convention, while others are not. The evidence shows that the issue of the Rohingyas was never considered as a bilateral dispute between The Gambia and Myanmar in the OIC. It was the OIC, not The Gambia, which took the decision to submit the issue of the Rohingyas to the International Court of Justice, and The Gambia was entrusted to find a proper way to implement the OIC's decision. Although The Gambia independently made its decision to institute proceedings in the Court, the fact remains that The Gambia's legal action is initiated by the OIC and that The Gambia is acting under the mandate and with the financial support of the OIC.

8. To establish the existence of a bilateral dispute between the Parties, there must be some link — a territorial, national or other form of connection — between the applicant and the alleged acts of the respondent. This linkage requirement has a substantive bearing on the merits phase. Allegations of genocide or other genocidal acts require serious investigation and proof. When the applicant has no link whatsoever with the alleged acts, it is apparently difficult, if not impossible, for it to collect evidence and conduct investigation on its own. Relying entirely on the evidence and material sources collected by third parties, for example United Nations organs, human rights bodies or the State concerned, only reinforces the argument that the case is a public-interest action, *actio popularis*. Such action, even in the form of a bilateral dispute, may in fact allow international organizations to have access to the Court in the future.

9. Although I agree with the Court's finding that the conduct of The Gambia to institute the proceedings before the Court does not amount to an abuse of process, I doubt very much the Court's conclusion that there are no other grounds of inadmissibility which would require it to decline the exercise of its jurisdiction (paragraph 49 of the Judgment). Judicial propriety, in my view, is a relevant issue under the circumstances of the present case. In the administration of justice, the Court must ensure that the principles of international adjudication be observed, both in form and in substance.

10. Under the Statute, the Court's function in contentious cases is confined to disputes between two or more States. The bilateral and adversarial structure of the dispute settlement mechanism is reflected in the procedural rules of the Court. Such rules are not suitable to entertain public-interest actions. When the applicant is in fact acting on behalf of an international organization, albeit in its own name, the respondent may be placed in a disadvantageous position before the Court. This is

particularly true if several judges on the bench are nationals of member States of the international organization concerned. With the organization in the shadow, inequality of the Parties may be hidden in the composition of the Court, thereby undermining the principle of equality of the parties, one of the fundamental principles of the Court for dispute settlement. However desirable it is to provide judicial protection to the victims of the alleged acts, the respondent is entitled to a fair legal process in accordance with the provisions of the Statute and the Rules of Court. For a comparison, reference may be made to the International Tribunal for the Law of the Sea (hereinafter “ITLOS”). Under Articles 20 and 37 of its Statute, ITLOS and its Seabed Disputes Chamber shall be open to specific entities, including certain international organizations. Article 22 of the Rules of the Tribunal provides that an international organization which is a party to a dispute before the Tribunal has the right to choose a judge *ad hoc* if there is a judge of the nationality of a State that is the other party to the dispute and if there is no judge of the nationality of one of the member States of the international organization (Rules of the Tribunal, 25 March 2021, ITLOS/8, Article 22 (1)-(2)). Equally, “[w]here an international organization is a party to a case and there is upon the bench a judge of the nationality of a member State of the organization, the other party may choose a judge *ad hoc*” (*ibid.*, Article 22 (3)). It is further provided that “[w]here two or more judges on the bench are nationals of member States of the international organization concerned . . . the President may . . . request one or more such judges to withdraw” (*ibid.*, Article 22 (4)). Clearly, proper identification of the character of a legal action before the Court directly concerns the good administration of justice.

11. Moreover, The Gambia’s legal action may challenge the principle of finality in the adjudication of the dispute. Articles 59 and 60 of the Statute provide that the decision of the Court has no binding force except between the parties and in respect of that particular case and that the decision of the Court shall be final and without appeal. In the present case, if any State party has standing to take legal action in the Court for the protection of the common interest of the States parties in compliance with the obligations *erga omnes partes* of the Genocide Convention, one may wonder whether the Court’s decision has binding force on all other States parties as well. According to Article 59, the effect of *res judicata* of the judgment should be limited solely to the parties. It follows that, at least in theory, those States parties will not be prevented from exercising their right to institute separate proceedings for the same cause against the same State before the Court. This is not a far-fetched concern. In considering The Gambia’s standing, the Court states that the situation with Bangladesh does not affect the right of all other States parties to assert the common interest in compliance with the obligations *erga omnes partes* under the Convention (paragraph 113 of the Judgment). In other words, according to the Court, even if Bangladesh is regarded as a specially affected State, whether it files a case or not does not affect the right of other States parties to institute proceedings before the Court. This reasoning apparently is not in line with the rules of State responsibility.

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

II. ARTICLE IX AND THE ISSUE OF STANDING

13. In the present case, largely due to the character of The Gambia’s legal action, the question of jurisdiction *ratione personae* and the issue of standing are delicately interlinked. Whether Article IX of the Convention provides jurisdiction *ratione personae* to a non-injured State party also bears on the standing of the Applicant.

14. In determining whether it has jurisdiction *ratione personae* in the case with regard to the Respondent's first preliminary objection, the Court only examines whether The Gambia meets the conditions laid down in Articles 34 and 35 of the Statute, without examining the terms of the compromissory clause of the Genocide Convention, which is considered only in relation to the question of standing under Myanmar's second preliminary objection. Articles 34 and 35, however, basically concern the right or "the legal capacity" of a party to appear before the Court, which is a question of statutory requirements for access to the Court, not a matter of consent for jurisdiction (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 295, para. 36). As is pointed out above, the issue before the Court is not about The Gambia's legal capacity to institute the proceedings, but whether the Court has jurisdiction *ratione personae* to entertain the case instituted by a non-injured State. The matter relates, first and foremost, to the interpretation of Article IX of the Genocide Convention, namely whether the States parties have agreed to grant a general standing to all the States parties for the invocation of responsibility of any other State party solely on the basis of their common interest in compliance with the obligations under the Convention.

15. Article IX of the Genocide Convention reads as follows:

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

16. The wording of Article IX, *per se*, does not indicate much about what exactly was intended by the contracting parties. In response to Myanmar's argument that The Gambia, as a non-injured State, has no standing in the case, the Court states the following:

"[T]he terms of Article IX providing that disputes are to be submitted to the Court 'at the request of any of the parties to the dispute', as opposed to any of the Contracting Parties, do not limit the category of Contracting Parties entitled to bring claims for alleged breaches of obligations *erga omnes partes* under the Convention. This phrase clarifies that only a party to the dispute may bring it before the Court, but it does not indicate that such a dispute may only arise between a State party allegedly violating the Convention and a State 'specially affected' by such an alleged violation." (Paragraph 111 of the Judgment.)

This interpretation, in my opinion, has unduly expanded the scope of Article IX. Although the international law on State responsibility has evolved significantly since the adoption of the Genocide Convention, the terms of the Genocide Convention must be interpreted in accordance with the applicable rules on treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. As the Court stated in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter the "Advisory Opinion"), in interpreting the Genocide Convention, regard should be given to "[t]he origins and character of th[e] Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects" (*I.C.J. Reports 1951*, p. 23).

17. The Genocide Convention provides several means and mechanisms for the implementation of the obligations under the Convention; judicial settlement is just one of them. Most importantly, the States parties must enact national legislation to prevent and punish acts of genocide and any other acts enumerated in Article III (Article V of the Convention). Perpetrators may be tried in national

courts or by a competent international criminal court (Article VI). The States parties also undertake to co-operate through extradition to bring the alleged offenders to justice (Article VII). In addition, any State party, whether it is directly or indirectly affected by the alleged acts of genocide, may engage the competent organs of the United Nations to take such action under the Charter as they consider appropriate for the prevention and suppression of acts of genocide (Article VIII). Lastly, a dispute between States parties with regard to the interpretation, application or fulfilment of the Convention, including the responsibility of a State for acts of genocide, may be submitted to the Court at the request of any of the parties to the dispute (Article IX). This set of mechanisms takes into account the situation where a non-injured State party may raise the issue of genocide against another State party, but the mechanisms to which such State party may resort apparently do not include the International Court of Justice. This interpretation can be confirmed by the *travaux préparatoires* of the Genocide Convention.

18. The treaty was drafted at a time when the notions of obligations *erga omnes partes* or *erga omnes* were not established in general international law. During the negotiation process of Article IX, contracting parties did not have much discussion on the word “disputes”; its ordinary meaning was presumed to refer to bilateral disputes. The debate among the contracting parties primarily focused on the meaning and scope of the phrase “responsibility of a State for genocide” and whether to include it in the clause. A number of contracting parties expressed doubt and raised questions about the inclusion of State responsibility in so far as that would cover situations in which a State commits genocide against its own nationals (see e.g. United Nations General Assembly, Sixth Committee, Hundred and Third Meeting, 12 November 1948, UN doc. A/C.6/SR.103, pp. 432-433 (Greece), 434 (Peru) and 435 (Poland); *ibid.*, Hundred and Fourth Meeting, 13 November 1948, UN doc. A/C.6/SR.104, p. 443 (Iran)). Upon the understanding that the term “responsibility of a State for genocide” in Article IX refers to reparation for damages inflicted on the nationals of one State party by another State party, they agreed to retain that reference in Article IX. In clarifying the scope of State responsibility, the United States stated that

“[i]f the words ‘responsibility of a State’ were taken in their traditional meaning of responsibility towards another State for damages inflicted, in violation of the principles of international law, to the subjects of the plaintiff State; and if, similarly, the words ‘disputes . . . relating to the . . . fulfilment’ referred to disputes concerning the interests of subjects of the plaintiff State, then those words would give rise to no objection. But if, on the other hand, the expression ‘responsibility of a State’ were not used in the traditional meaning, and if it signified that a State could be sued for damages in respect of injury inflicted by it on its own subjects, then there would be serious objections to that provision; and the United States Government would have reservations to make about that interpretation of the phrase.” (*Ibid.*, Hundred and Thirty-Third Meeting, 2 December 1948, UN doc. A/C.6/SR.133, pp. 703-704 (United States of America).)

The United States’ position was generally shared and accepted by the contracting parties.

19. The intention of the contracting parties to limit the scope of claims that can be brought to the Court under Article IX is also manifested in the general debate relating to the Belgian/British joint proposal on the compromissory clause of the Genocide Convention. This joint proposal stated 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 articles II and IV, shall be submitted to the International Court of Justice *at the request of any of the High Contracting Parties.*” (*Belgium and United Kingdom: Joint amendment to article X of*

the draft Convention (E/794), 10 November 1948, UN doc. A/C.6/258; emphasis added.)

20. India introduced an amendment to the Belgian/British joint proposal to replace the phrase “at the request of any of the High Contracting Parties” by the phrase “at the request of any of the parties to the dispute” (UN doc. A/C.6/260, as reproduced in United Nations General Assembly, Sixth Committee, Hundred and Third Meeting, 12 November 1948, UN doc. A/C.6/SR.103, p. 428, fn. 1). In its consideration of the Belgian/British proposal, India stated that

“the inclusion of all disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV would certainly give rise to serious difficulties. It 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.” (United Nations General Assembly, Sixth Committee, Hundred and Third Meeting, 12 November 1948, UN doc. A/C.6/SR.103, pp. 437-438.)

Immediately after India expressed this concern, Luxembourg clarified who might claim rights to reparations following the perpetration of the crime of genocide. It stated “that the principle that no action could be instituted save by a party concerned in a case should be applied in that connexion. [R]esponsibility would thus arise whenever genocide was committed by a State in the territory of another State” (*ibid.*, p. 438). The Indian amendment was approved in the general debate and the text of Article IX was amended accordingly.

21. During the subsequent negotiations, India continued to express its concern over the terms of Article IX. After the adoption of Article IX, it warned that “the provisions of the joint amendment of Belgium and the United Kingdom . . . were capable of being interpreted in a much wider sense than the authors of the amendment had themselves intended” (United Nations General Assembly, Sixth Committee, Hundred and Fifth Meeting, 13 November 1948, UN doc. A/C.6/SR.105, p. 459). After the vote against reconsideration of the text of Article IX, India reiterated its position, stating that “the text of article IX would help to strain relations between States and was therefore contrary to the very purpose of the convention” (United Nations General Assembly, Sixth Committee, Hundred and Thirty-First Meeting, 1 December 1948, UN doc. A/C.6/SR.131, p. 690). India, of course, was not the only contracting parties who indicated its reservation over a possible expansive interpretation of Article IX.

22. The *travaux préparatoires* demonstrate that the contracting parties were fully conscious of the potential problems of vague, insubstantial and even abusive actions relating to the fulfilment of obligations and responsibility for genocide. Such situations would more likely arise if an unlimited standing was granted to the States parties. There was no indication among the contracting parties that, given the *raison d’être* of the Genocide Convention, the principle that no action could be instituted save by a party concerned in a case would not apply to cases that are filed under Article IX.

23. I agree with the Court that The Gambia is not exercising diplomatic protection in the present case, but that does not mean there need not be a link between the applicant and the alleged acts of the respondent. Although the word “[d]isputes” in Article IX is without any qualification, opposition of views between the two parties must relate to a legal interest that the applicant may claim for itself under international law. Unless otherwise expressly provided for in a treaty, general standing of the States parties cannot be presumed. In this regard, a provision in contrast can be given. Article 33 of the European Convention on Human Rights provides that “[a]ny High Contracting Party may refer to the [European Court of Human Rights] any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party”. If the Genocide

Convention had contained a similar clause, the requirement of a link between the applicant and the respondent's alleged acts for jurisdictional purpose would be unnecessary.

24. In cases concerning alleged violations of the Genocide Convention, the Court has affirmed that Article IX includes all forms of State responsibility, including the responsibility of a State for an act of genocide perpetrated by the State itself through the acts of its organs (see e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 616, para. 32; see also the divergent views in *ibid.*, joint declaration of Judges Shi and Vereshchetin, pp. 631-632, and declaration of Judge Oda, pp. 626-629, paras. 4-7), which reflects the development of international law on State responsibility. In none of those cases, however, did the Court consider or even imply that a State party may invoke international responsibility of another State party solely on the basis of the *raison d'être* of the Genocide Convention; the applicant must have a territorial, national or some other form of connection with the alleged acts.

25. To recall what the Court said in the Advisory Opinion, “[i]t is well established that in its treaty relations a State cannot be bound without its consent” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 21). It is doubtful that, either at the time when they each became party to the Genocide Convention, the Parties had ever envisaged such treaty relationship between them or more generally, that the States parties ever intended to give such a broad standing to the States parties for addressing alleged breaches of the obligations under the Genocide Convention. The Court's innovative interpretation has extended well beyond the reasonable expectations of the States parties, inconducive to the security and stability of treaty relations.

III. RAISON D'ÊTRE OF THE GENOCIDE CONVENTION AND ITS IMPLICATION

26. By reference to the *raison d'être* of the Genocide Convention as enunciated in the Advisory Opinion, the Court upholds The Gambia's standing for the following reasons:

“All the States parties to the Genocide Convention . . . have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention. As the Court has affirmed, such a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case.” (Paragraph 107 of the Judgment.)

It goes on to say that

“[t]he common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of obligations *erga omnes partes* . . . regardless of whether a special interest can be demonstrated”.

It explains that “[i]f a special interest were required for that purpose, in many situations no State would be in a position to make a claim” (paragraph 108 of the Judgment). This reasoning, based on a particular reading of the Advisory Opinion, does not seem consistent with the established practice of the States parties.

27. In the Advisory Opinion, the Court was requested by the General Assembly to address exclusively the question of reservations to the Genocide Convention. For that purpose, it considered the characteristics of the Genocide Convention in international law and identified the common interest of the States parties in the accomplishment of the high purposes of the Convention. In the oft cited statement in the Advisory Opinion on which the Court largely relies for its decision in the present case, the Court stated that

“[t]he Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree . . . In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

Notwithstanding the common interest thus identified, the Court did not consider that reservations to the Genocide Convention should be categorically prohibited. Instead, it took the view that the compatibility of a reservation with the object and purpose of the Convention should furnish a criterion for assessing a particular reservation made by a State on accession and appraising an objection lodged by another State to the reservation, thus limiting both the freedom of making reservations and that of objecting to them. The Court observed that, as the intention of the General Assembly and the States parties was to have as many States as possible participate in the Convention so as to ensure the widest possible scope of application, the complete exclusion of States from the Convention for minor reservations would not be deemed desirable for the fulfilment of the object and purpose of the Convention. In the Advisory Opinion, the Court did not specify which reservations to the provisions of the Convention would be deemed as minor reservations and therefore permissible, and which are incompatible with the object and purpose of the Convention. Pursuant to that criterion, in the subsequent treaty practice, a reservation to Article IX of the Genocide Convention has generally been accepted as permissible by the States parties. To date, 16 States parties maintain reservations to Article IX.

28. This position has also been confirmed by the jurisprudence of the Court. According to the Court, a reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. Therefore, a reservation to Article IX of the Genocide Convention is not incompatible with the object and purpose of the Convention (*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; see also *Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 772, paras. 32-33; *Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 924, paras. 24-25).

29. Reservation to a compromissory clause and standing of a non-injured State, although distinct and separate issues, both concern whether the Court can exercise its jurisdiction. A reservation to Article IX has the effect of blocking other States parties from instituting proceedings against the reserving State for its alleged breaches of obligations *erga omnes partes* under the Convention. This means that reservations to Article IX of the Genocide Convention could also lead

to many situations where no State party would be in a position to make a claim before the Court against another State party who has made a reservation to the jurisdiction of the Court, as was the case, for instance, with Rwanda in the *Armed Activities* case, and Spain and the United States in the *Legality of Use of Force* cases. No State party has ever asserted that the Court's decisions upholding the effect of the relevant reservations in those cases prejudiced the common interest of the States parties to the Convention. Logically, the reason given by the Court in the present case for discarding the requirement of a special interest cannot be established; just as, in the situation of a reservation to the jurisdiction of the Court, dismissal of an application for lack of standing of a non-injured State is, in the Court's own words, also just to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, and does not affect substantive obligations relating to acts of genocide themselves under that Convention.

IV. OBLIGATIONS *ERGA OMNES PARTES* AND THE *BELGIUM V. SENEGAL* CASE

30. Introduction of the notion of obligations *erga omnes* and *erga omnes partes* is a positive development of international law. In the second phase of the *South West Africa* cases, the Court rejected the applications submitted by Ethiopia and Liberia, former members of the League of Nations, on the ground that they had no standing in the cases as they each did not have any legal right or interest in the subject-matter of their claim (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 51, para. 99). The Court's decision was severely criticized by the Member States of the United Nations and prompted the General Assembly to adopt the decision placing South West Africa under the direct responsibility of the United Nations.

31. The *South West Africa* cases stand as a constant reminder that in cases where the common interest of the international community is purportedly at stake, the issue of standing of the applicant must be handled with great care. For the purpose of the present case, it is worthwhile to put the *South West Africa* cases into perspective. After the dissolution of the League of Nations, the mandate for South West Africa entrusted to the Union of South Africa by the League continued to exist. By virtue of the Court's Advisory Opinion relating to the international status of South-West Africa, the Union of South Africa as the mandatory remained obliged to submit petitions from the inhabitants of the mandated territory as well as annual reports concerning its administration of the territory to the United Nations for the latter's exercise of its supervisory functions (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 143). The Union of South Africa, however, adopted apartheid in the territory and refused to fulfil its obligations under the mandate. In 1960, Ethiopia and Liberia instituted proceedings against the Union of South Africa in the Court.

32. In his dissenting opinion appended to the Court's Judgment in the second phase, Judge Wellington Koo, then Vice-President, described the character of the mandate for South West Africa as follows:

“The mandates system has a complex character all of its own, with a set of general and particular obligations for the mandatory to observe or carry out, and with a scheme of multiple control and supervision by the League of Nations with its Council, Assembly, member States and the Permanent Mandates Commission and with judicial protection in the last resort by the Permanent Court. It is a novel international institution. Nothing of the kind had existed before. It is *sui generis*.” (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, dissenting opinion of Vice-President Wellington Koo, p. 217.)

This *sui generis* system, in Judge Koo's words, constituted an international joint enterprise. Among the guarantees provided therefore to ensure its success, an adjudication clause was inserted into Article 7, paragraph 2, of the Mandate for South West Africa, which reads as follows:

“The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.” (*Ibid.*, p. 218.)

With regard to the Court's view that the applicants as individual member States had no legal right or interest in the case, Judge Koo referred to Article 22 of the Covenant and the mandate agreement, by virtue of which, in his view, member States of the League had the legal right and interest in the observation by the mandatory of its obligations both toward the inhabitants of the mandated territory, and toward the League and its members. The adjudication clause was intended as the last resort to enable the member States to seek judicial protection of such right and interest. Obviously, standing of the member States before the Court was based on the statutory provisions of the mandate rather than merely on a common interest; it was granted in advance to the individual member States of the League, and subsequently the member States of the United Nations, on the basis of the consent of the member States (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 343). This unique system cannot be generalized to all other conventions, where a common interest of the States parties may exist.

33. Largely as a rectification of its position taken in the *South West Africa* cases, the Court in the *Barcelona Traction* case made its first pronouncement on the concept of obligation *erga omnes*, recognizing the common interest of the international community as a whole in the protection of certain important rights. It stated that

“an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.” (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.)

The Court, however, stopped short of indicating whether such obligations, either on the basis of treaty provisions or customary international law, would by themselves provide standing for any State to institute proceedings against any other State before the Court for the protection of the common interest.

34. Since *Barcelona Traction*, the Court has referred to obligations *erga omnes* in a number of other cases, in none of which, however, it dealt with the relationship between such obligations and the question of standing (see *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 615-616, para. 31; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 199, paras. 155-157; *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*, pp. 31-32, para. 64; *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. 104, para. 147). In the *Bosnia and Herzegovina v. Serbia and Montenegro* case, with regard to the

applicant's request that the Court make rulings about acts of genocide and other unlawful acts allegedly committed against "non-Serbs" outside its own territory by the respondent, the Court recognized that this request could concern questions about the legal interest or standing of the applicant in respect of such matters and the significance of the *jus cogens* character of the relevant norms. Before turning to those questions, however, the Court found that the evidence offered by the applicant did not in any way support its allegations and, therefore, it did not see the need to address those questions of law (*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. 120, para. 185).

35. The only case in which the Court explicitly affirms the entitlement of a State party to make a claim against another State party on the basis of the common interest in compliance with the obligations *erga omnes partes* is the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case. On the issue of standing, I will not repeat my dissenting opinion appended to that Judgment but highlight three points.

36. First, the issue raised by the applicant in *Belgium v. Senegal* essentially concerns the interpretation and application of the principle of extradition or prosecution, *aut dedere aut judicare*, under Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the "Convention against Torture"), with Article 5 establishing universal jurisdiction over criminal offences of torture as defined in that convention. As its national courts were seised of cases against Mr. Hissène Habré, the former President of Chad, for alleged torture offences, Belgium was a specially affected State in the case. By virtue of its national law and Article 8 of the Convention against Torture, Belgium had the right to make a request to Senegal for the extradition of the alleged offender. According to Article 7, paragraph 1, if a State party in whose territory the alleged offender is found decides not to extradite the person concerned, it is obliged to submit the case to its competent authorities for the purpose of prosecution. Belgium claimed that the respondent, having failed to prosecute Mr. Habré and refused to extradite him to Belgium, had breached its obligation under Article 7, paragraph 1, of that convention. Logically, whether Senegal had fulfilled its obligation under Article 6, paragraph 2, to conduct preliminary inquiry into the facts of the alleged offences constituted part of the legal issues relating to the principle of extradition or prosecution.

37. In any event, the Court's pronouncement on the obligations *erga omnes partes* cannot be taken as a legal basis for Belgium's standing in the case before the Court. The issue that involves Belgium's standing relates to the question whether Belgium remained competent to request the extradition of the alleged offender as a result of the amendments to its national laws. In 1993, Belgium enacted a national law establishing universal jurisdiction for its national courts in respect of war crimes (Law on the repression of grave breaches of the Geneva Conventions of 12 August 1949 and Protocols I and II of 8 June 1977 (*Loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977*), 16 June 1993, Art. 7). In 1999, the scope of punishable offences subject to universal jurisdiction under the 1993 act was expanded to include genocide and crimes against humanity, including torture (Act concerning the punishment of grave breaches of international humanitarian law (*Loi relative à la répression des violations graves de droit international humanitaire*), 10 February 1999, Art. 1 (1)-(2)). In April 2003, a further amendment was made to the law, requiring a request from the Federal Prosecutor for the criminal investigation of a complaint on the basis of universal jurisdiction (Law amending the law of 16 June 1993 concerning the prohibition of grave breaches of international humanitarian law and article 144ter of the judicial code (*Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire*), 23 April 2003, Art. 5). The 1993 act as thus amended was repealed by an act of 5 August 2003, which also amended the Code of Criminal Procedure. Among the changes introduced therein,

the new act provides that there must exist some requisite link with Belgium for prosecution of the alleged offences previously proscribed by the 1993 act (Law on grave breaches of international humanitarian law (*Loi relative aux violations graves du droit international humanitaire*), 5 August 2003, Art. 16 (1)-(2)). All of the above changes to Belgium's criminal law and procedure preceded Belgium's application instituting proceedings before the Court in the *Obligation to Prosecute or Extradite* case. Although Belgium's criminal investigations against Mr. Hissène Habré could be traced back to 2000 and were being conducted pursuant to the 1993 act as amended in 1999, it was only in 2005 that a Belgian investigating judge issued an international warrant *in absentia* for Mr. Habré's arrest and that Belgium subsequently requested his extradition. During the proceedings before the Court, Belgium claimed that the act of 5 August 2003 "imposes no bar to such universal jurisdiction, because the 2003 Law provides that investigations [that] begun before its entry into force may be pursued if they follow from complaints filed by Belgians" (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Memorial of the Kingdom of Belgium, 1 July 2010, Vol. I, p. 20). Apparently, the issue for the Court to decide was whether Belgium was competent in accordance with Article 5 of the Convention against Torture to maintain its request for extradition of Mr. Habré in light of the changes to its national law. The matter concerns the conditions for extradition rather than the obligation to prosecute. The Court's reasoning that "[i]f a special interest were required for that purpose, in many cases no State would be in the position to make such a claim", a purported ground for Belgium's standing in the case, does not, in my view, fit into the situation where the principle of extradition or prosecution is applicable.

38. Secondly, the Court has consistently maintained a clear distinction between substantive norms and procedural rules. It has firmly held that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (*East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29). This position is reiterated 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 (I), p. 104, para. 147) (see also *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012 (I), p. 140, para. 93). The inference drawn from the common interest in the *Belgium v. Senegal* case and the present case confuses the legal interest of the States parties in the compliance with the substantive obligations of the Genocide Convention and the procedure for dispute settlement.

39. Thirdly, the common interest enunciated by the Court in the Advisory Opinion exists not solely in the Genocide Convention. As the Court found in the *Belgium v. Senegal* case, the States parties to the Convention against Torture also have a common interest in compliance with the relevant obligations under that convention, which are characterized as obligations *erga omnes partes*. By analogy, such common interest could equally be identified in many other conventions relating to, for example, human rights, disarmament and environment. If obligations under those conventions are therefore regarded as obligations *erga omnes partes*, by virtue of the Court's reasoning in the present case, it means that any of the States parties, specially affected or not by an alleged breach of the relevant obligations, would have standing to institute proceedings in the Court against the alleged State party, provided no reservation to the jurisdiction of the Court is entered by either of the parties. This approach has two potential consequences: one is that more States would make reservations to the jurisdiction of the Court and the second is that India's concern expressed during the negotiation process on Article IX of the Genocide Convention over vague and insubstantial allegations may be raised again.

40. The situation of the Rohingyas in Myanmar deserves serious responses from the international community. If there is evidence suggesting that there may be commission of genocidal acts in Myanmar, various organs of the United Nations possess powers which can be exercised for the prevention and suppression of acts of genocide pursuant to the initiative of one or more United Nations Member States, even without the exercise of the right under Article VIII of the

Genocide Convention. The fact is that the situation of Myanmar and the Rohingya refugees has been on the agenda of various United Nations organs for years. The human rights situation of the Rohingyas has also been under the investigation of a UN Fact-Finding Mission and the Special Rapporteur for Myanmar. Above all, Myanmar remains bound by its obligations under the Genocide Convention.

41. The situation in Myanmar, as is found in the 2017 Final Report of the Advisory Commission on Rakhine State, represents a development crisis, a human rights crisis and a security crisis; while all communities have suffered from violence and abuse, protracted statelessness and profound discrimination have made the Muslim community particularly vulnerable to human rights violations. As Kofi Annan, chairman of the Advisory Commission, pointed out, “the challenges facing Rakhine State and its peoples are complex and the search for lasting solutions will require determination, perseverance and trust” (*Statement by Kofi Annan, Chair of the Advisory Commission on Rakhine State (Interim Report)*, 16 March 2017).

(Signed) XUE Hanqin.
