

3 JULY 2024

ORDER

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

(THE GAMBIA v. MYANMAR)

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

(GAMBIE c. MYANMAR)

3 JUILLET 2024

ORDONNANCE

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INTERNATIONAL COURT OF JUSTICE

YEAR 2024

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**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

Present: President SALAM; Vice-President SEBUTINDE; Judges TOMKA, YUSUF, XUE, NOLTE, CHARLESWORTH, BRANT, GÓMEZ ROBLEDÓ, CLEVELAND, AURESCU, TLADI; Judges ad hoc PILLAY, KRESS; Registrar GAUTIER.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 48 and 63 of the Statute of the Court and to Articles 82, 83, 84 and 86 of the Rules of Court,

Makes the following Order:

1. On 11 November 2019, the Republic of The Gambia (hereinafter “The Gambia”) filed in the Registry of the Court an Application instituting proceedings against the Republic of the Union of Myanmar (hereinafter “Myanmar”) concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter the “Genocide Convention” or the “Convention”).

2. In its Application, The Gambia sought to base the Court’s jurisdiction on Article IX of the Genocide Convention, in conjunction with Article 36, paragraph 1, of the Statute of the Court.

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

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

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

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

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

8. By an Order of 23 January 2020, the Court, having heard the Parties, indicated certain provisional measures.

9. By a further Order of 23 January 2020, the Court fixed 23 July 2020 and 25 January 2021 as the respective time-limits for the filing of a Memorial by The Gambia and a Counter-Memorial by Myanmar. By an Order of 18 May 2020, at the request of the Applicant, the Court extended to 23 October 2020 and 23 July 2021 the respective time-limits for the filing of the Memorial of The Gambia and the Counter-Memorial of Myanmar. The Gambia filed its Memorial within the time-limit thus extended.

10. By a letter dated 24 January 2020, pursuant to the instructions of the Court under Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to the States parties to the Genocide Convention the notification provided for in Article 63, paragraph 1, of the Statute of the Court. In addition, by a letter of the same date, in accordance with Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the United Nations, through its Secretary-General, the notification provided for in Article 34, paragraph 3, of the Statute of the Court.

11. By a joint letter dated 11 November 2020, the Governments of Canada and the Kingdom of the Netherlands, referring to Article 53, paragraph 1, of the Rules of Court, asked to be furnished with copies of the pleadings and documents filed in the case. Having ascertained the views of the Parties in accordance with that same provision, and having taken into account the objection raised by one Party, the Court decided that it would not be appropriate to grant that request. The Registrar communicated this decision to the Governments of Canada and the Kingdom of the Netherlands, and to the Parties, by letters dated 27 November 2020.

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

13. Public hearings on the preliminary objections raised by Myanmar were held on 21, 23, 25 and 28 February 2022. By a Judgment of 22 July 2022, the Court found that it had jurisdiction on the basis of Article IX of the Genocide Convention to entertain the Application filed by The Gambia on 11 November 2019, and that the said Application was admissible.

14. By an Order of 22 July 2022, the Court fixed 24 April 2023 as the time-limit for the filing of the Counter-Memorial of Myanmar. By Orders of 6 April 2023 and 12 May 2023 respectively, the Court, at the request of the Respondent, extended that time-limit first to 24 May 2023 and then to 24 August 2023. The Counter-Memorial of Myanmar was filed within the time-limit thus extended.

15. By an Order of 16 October 2023, the Court authorized the submission of a Reply by The Gambia and a Rejoinder by Myanmar, and fixed 16 May 2024 and 16 December 2024 as the respective time-limits for the filing of those written pleadings. The Gambia duly filed its Reply.

16. On 15 November 2023, the Republic of the Maldives (hereinafter “the Maldives”) filed a declaration of intervention in the case, with reference to Article 63 of the Statute of the Court. On the same date, a joint declaration of intervention was filed, pursuant to the same provision, by Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland (hereinafter respectively “Canada”, “Denmark”, “France”, “Germany”, “the Netherlands” and “the United Kingdom”; together the “Joint Declarants”). In accordance with Article 83, paragraph 1, of the Rules of Court, the Registrar immediately transmitted certified copies of the declaration of the Maldives and of the joint declaration to The Gambia and Myanmar, which were informed that 15 January 2024 had been fixed as the time-limit for the submission of written observations on those two declarations. In accordance with paragraph 2 of the same Article, the Registrar also transmitted copies of the declarations to the Secretary-General of the United Nations and to the States entitled to appear before the Court.

17. By letters dated 15 January 2024, Myanmar and The Gambia each filed written observations on the declaration of intervention submitted by the Maldives and on the joint declaration submitted by Canada, Denmark, France, Germany, the Netherlands and the United Kingdom. While Myanmar objected to the admissibility of the two declarations, The Gambia contended that they were admissible.

18. By letters dated 24 January 2024, the Registrar informed the Parties, the Maldives and the Joint Declarants that, in light of the fact that Myanmar had objected to the admissibility of the declarations of intervention, the Court was required, pursuant to Article 84, paragraph 2, of its Rules, to hear the States seeking to intervene and the Parties on the admissibility of the declarations of intervention, and had decided to do so by means of a written procedure. The Registrar further stated that the Court had fixed 26 February 2024 as the time-limit within which the States seeking to intervene could furnish their written observations on the admissibility of their declarations and 26 March 2024 as the time-limit within which the Parties could furnish their written observations in response.

The Maldives filed its written observations on the admissibility of its declaration of intervention on 21 February 2024 and the Joint Declarants filed their written observations on the admissibility of their declaration of intervention on 26 February 2024. The Parties filed their written observations in response on 26 March 2024.

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I. INTRODUCTION

19. Article 63 of the Statute of the Court provides that:

“1. 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.

2. 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.”

20. The Court recalls that intervention under Article 63 of the Statute, which is an incidental proceeding, involves the exercise of a right by a State party to a convention the construction of which is in question before the Court (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, *Declarations of Intervention, Order of 5 June 2023*, para. 26; *Whaling in the Antarctic (Australia v. Japan)*, *Declaration of Intervention of New Zealand, Order of 6 February 2013*, *I.C.J. Reports 2013*, p. 5, para. 7; *Haya de la Torre (Colombia v. Peru)*, *Judgment, I.C.J. Reports 1951*, p. 76; *S.S. “Wimbledon”*, *Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 12).

21. The object of the intervention under Article 63 of the Statute is limited to the construction of the convention concerned. In this context, the Court is not required to ascertain whether the State seeking to intervene has “an interest of a legal nature” which “may be affected by the decision [of

the Court]” in the main proceedings, as it is obliged to do when it is seised of an application for permission to intervene under Article 62 of the Statute. The legal interest of the declarant State in the construction of the convention is presumed by virtue of its status as a party thereto.

22. When a declaration of intervention is filed, the Court must ensure that it falls within the provisions of Article 63 of the Statute and that it meets the requirements set forth in Article 82 of the Rules of Court (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Declarations of Intervention, Order of 5 June 2023*, para. 28; *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013*, pp. 5-6, para. 8).

23. In the present case, the declarations of intervention concern the construction of provisions of the Genocide Convention.

24. The States seeking to intervene and The Gambia submit that the declarations of intervention are admissible, given that they meet all the requirements set out in Article 63 of the Statute and Article 82 of the Rules of Court.

25. Myanmar, for its part, considers that the declarations are inadmissible.

26. Although the declarations of intervention were presented separately, the Court, in accordance with the principle of the good administration of justice, will decide on their admissibility in a single Order.

II. CONFORMITY OF THE DECLARATIONS OF INTERVENTION WITH THE REQUIREMENTS SET OUT IN ARTICLE 82 OF THE RULES OF COURT

27. The Court will first examine whether the declarations of intervention comply with the requirements of Article 82 of its Rules. The Court recalls that Article 82 was amended on 1 February 2024 and that the amendment entered into force on 1 June 2024. Since the declarations were filed on 15 November 2023, before such amendment entered into force, the Court will examine the conformity of the declarations of intervention with Article 82 as in force at that time. When the declarations of intervention were filed, paragraphs 1 and 2 of that provision read as follows:

“1. A State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall file a declaration to that effect, signed in the manner provided for in Article 38, paragraph 3, of these Rules. Such a declaration shall be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings. In exceptional circumstances a declaration submitted at a later stage may however be admitted.

2. The declaration shall state the name of an agent. It shall specify the case and the convention to which it relates and shall 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.”

A. Article 82, paragraph 1, of the Rules of Court

28. The Court notes that the two declarations were filed in a timely manner, before the date fixed for the opening of the oral proceedings. The joint declaration of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom was signed by their respective Agents, whose signatures were certified by their diplomatic representatives at the seat of the Court or by the Minister of Foreign Affairs (in the case of the Netherlands), in accordance with Article 38, paragraph 3, of the Rules of Court.

29. Myanmar does not challenge the compliance of the joint declaration with Article 82, paragraph 1, of the Rules of Court. However, Myanmar argues that the declaration of the Maldives is defective because the signature of its Agent — who is not its diplomatic representative at the seat of the Court — ought to have been authenticated by that diplomatic representative or by the competent authority of the Maldives’ Ministry of Foreign Affairs, which was not done. In Myanmar’s view, the declaration should thus be found inadmissible.

30. The Gambia and the Maldives deny that the declaration was formally defective. They recall that the Maldives’ declaration was transmitted to the Court by one of its diplomatic representatives at the seat of the Court and contend that no further authentication of the Agent’s signature was required. They add that, together with its written observations filed on 21 February 2024, the Maldives provided a letter from its Minister of Foreign Affairs certifying that the signature on its declaration was that of its appointed Agent. In their view, this confirms that the requirements of Article 38, paragraph 3, of the Rules were met.

31. The Court considers that the signature of the Agent of the Maldives should have been authenticated in the manner provided for in Article 38, paragraph 3, of the Rules of Court at the time the declaration of intervention of the Maldives was presented. However, this defect was later remedied when the Minister of Foreign Affairs of the Maldives confirmed, in a letter provided to the Court, that the signature on the Maldives’ declaration of intervention was that of the appointed Agent. In addition, the Court recalls that it “cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned” (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14).

32. The Court finds, therefore, that both declarations of intervention fulfil the requirements of Article 82, paragraph 1, of the Rules of Court.

B. Article 82, paragraph 2, of the Rules of Court

33. The Court observes that both declarations of intervention state the names of the appointed agents and specify the case and the convention to which they relate. The declarations also contain, in individual sections: (a) the basis on which the States seeking to intervene consider themselves to be parties to the Genocide Convention; (b) the provisions of the Genocide Convention they consider to be in question in the case; (c) the construction of the provisions for which they contend; and (d) a list of documents in support of the declarations, which documents are attached.

34. Myanmar argues that the declarations fail to comply with Article 82, paragraph 2 (c), of the Rules of Court because they do not clearly articulate the construction of the provisions of the Genocide Convention for which they contend, but are limited to very general propositions. In Myanmar's view, this makes it impossible to determine whether the proposed interventions relate to interpretive points that are actually in question in the proceedings and to ensure that any subsequent substantive observations under Article 86 of the Rules contend for the same construction as articulated in the declarations of intervention. For these reasons, Myanmar maintains that the declarations should be found inadmissible.

35. The Court recalls that Article 63 of its Statute provides for a right of intervention whenever the construction of a convention is in question. Paragraphs 2 (b) and 2 (c) of Article 82 of the Rules of Court require the States seeking to intervene to indicate the provisions they consider to be in question and to state the construction of these provisions for which they contend. These paragraphs do not require States seeking to intervene to show in addition that they address interpretive points that are in dispute in the proceedings between the parties, as contended by Myanmar. Furthermore, and contrary to what Myanmar appears to suggest, paragraph 2 (c) does not contain the requirement that a proposition for a construction of the convention in question must meet a particular standard of specificity. The Court finds that the declarations of intervention in the present case comply with Article 82, paragraph 2 (c), of the Rules of Court.

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36. The Court concludes that the declarations of intervention filed in the case meet the requirements of Article 82 of the Rules of Court.

III. WHETHER THE DECLARATIONS OF INTERVENTION GO BEYOND THE PERMITTED SCOPE OF INTERVENTION UNDER ARTICLE 63 OF THE STATUTE

37. Myanmar emphasizes that declarations of intervention under Article 63 of the Statute must be confined to a presentation of observations on the construction of provisions of the convention in question in the case. They may not address matters relating to the merits of a case such as the evidence, the facts or the application of the convention in the case. Nor can they address the interpretation or application of other norms of international law, or issues such as the rules of procedure and evidence to be applied by the Court. In Myanmar's view, the declarations of intervention at issue go beyond what is permissible under Article 63 of the Statute. In particular, according to Myanmar, the Maldives' declaration discusses alleged events in Myanmar, diplomatic statements of the Maldives concerning those alleged events, the motives for filing the declaration of

intervention and the *erga omnes partes* character of obligations under the Genocide Convention. Similarly, the joint declaration refers to the common interest of States parties to the Genocide Convention, makes a factual assertion that sexual violence is often a cornerstone of genocidal campaigns, and presents arguments as to the standard of proof to be applied and the kinds of matters that can be regarded as evidence of acts of genocide or genocidal intent. Myanmar also maintains that the joint declaration of intervention cannot address the construction of Article II of the Genocide Convention because that construction is not in question in the case, since the Application of The Gambia does not refer to that provision.

38. In Myanmar's view, it is not sufficient for the Court merely to disregard the parts of the declarations that go beyond the permitted scope of intervention under Article 63 of the Statute. Where significant portions of a declaration of intervention contain impermissible matters, as Myanmar submits is the case here, the Court should find the entire declaration inadmissible. At the very least, the Court should admit the declaration only to the extent that it concerns points of interpretation that are in dispute between the parties in the proceedings.

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39. The Gambia maintains that the declarations of intervention do not go beyond the limits of intervention under Article 63 of the Statute. Some of the paragraphs and sentences in the declarations impugned by Myanmar merely provide relevant context for the declarations, and there is no ground in the Statute or Rules of Court to find such parts inadmissible. According to The Gambia, the other parts of the declarations challenged by Myanmar do not go beyond the construction of provisions of the Genocide Convention in question in the case. First, the proper construction of Article II of the Convention is in question in the case since the scope of that provision and the means and standards for demonstrating its violation are in dispute. Secondly, it is permissible for the declarant States to refer to other rules and principles of international law to assist in the construction of the Convention, in accordance with the customary rules of interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Thirdly, the declarant States may offer their views on the terms of establishment of breaches of the Convention's provisions, and this includes matters related to the standard of proof and type of evidence to demonstrate a breach. The Gambia also considers that, contrary to Myanmar's contention, the declarant States can raise any points of interpretation regarding the provisions of the Convention that they consider to be in question, even if such a point was not previously raised by one of the Parties, as this enhances the Court's ability to carry out its judicial function and to take into account all pertinent views on the construction of the relevant convention.

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40. The Maldives denies that its declaration impermissibly addresses matters such as the evidence, the facts or the application of the Convention, explaining that the paragraphs impugned by Myanmar merely recall press releases and statements and discuss the Maldives' motivation for its intervention. The Maldives further contends that its declaration need not address only points of

interpretation in dispute between the Parties, but may also raise other points of interpretation which it considers to be in question. In any event, the Maldives has not yet been provided with the written pleadings of the Parties and cannot, at this stage, see what points of interpretation are in dispute between them.

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41. The Joint Declarants submit that their declaration is admissible in its entirety. In their view, the proper construction of Article II of the Convention is in question since this provision defines genocide and is directly relevant to the resolution of the dispute before the Court. The Joint Declarants deny offering any views on the facts of the case, the application of the Convention to these facts or the question of whether a Party violated its obligations under the Convention. They argue that the paragraphs of their joint declaration referring to the common interest of States parties to the Genocide Convention merely provide context. They maintain that they are entitled to rely on, and point to, other sources of international law outside the Genocide Convention to support their construction of the Convention, in accordance with the customary rule of interpretation reflected in Article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties. Finally, the Joint Declarants submit that it is permissible to present their views on issues of construction pertaining to the establishment of breaches of the Convention, including on matters related to the standard of proof and evidence to establish genocidal intent, which are inherently questions of construction of the Convention.

* * *

42. The Court recalls that the right of intervention under Article 63 of its Statute is limited to the construction of a convention's provisions in question at the relevant stage of the proceedings (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Declarations of Intervention, Order of 5 June 2023*, para. 84).

43. Under Article 82, paragraph 2 (b) and (c), of the Rules of Court, a State seeking to intervene shall indicate the provisions of the convention the construction of which it considers to be in question and set out its position thereon. The Court is of the view that the declarations of intervention at issue mainly concern the construction of Articles I, II, IV, V and VI of the Genocide Convention, which are in question at the merits stage of the proceedings. In particular, and contrary to Myanmar's contention, the construction of Article II is in question at the current stage. Article II 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.

44. Contrary to Myanmar's contention, the Court does not consider that intervention under Article 63 is only permitted in relation to points of interpretation that are in dispute between the

parties. As explained above (see paragraph 35), there is no such limitation in Article 63 of the Statute or Article 82 of the Rules. Ultimately, it will be for the Court to assess the relevance of the construction of the provisions of the Genocide Convention.

45. The Court observes that the declarations at issue, in some instances, address matters other than the construction of provisions of the Genocide Convention, such as facts and the evidentiary value of a certain category of documents. To that extent, the Court will not consider such issues and expects the interveners to refrain from addressing them any further. Moreover, references to other rules and principles of international law outside the Genocide Convention will only be taken into account by the Court in so far as they may be relevant for the construction of the Convention's provisions, in accordance with the customary rules of treaty interpretation reflected in the Vienna Convention on the Law of Treaties, in particular Article 31, paragraph 3 (c) (see *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Declarations of Intervention, Order of 5 June 2023*, para. 84).

IV. CONCLUSION

46. The Court concludes that the declarations of intervention filed by the Maldives and the Joint Declarants are admissible in so far as they concern the construction of the provisions of the Genocide Convention. The Court will not have regard to any parts of the observations going beyond the scope thus fixed.

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47. The Court further recalls that Article 86 of the Rules of Court — as amended on 1 February 2024, which amendment entered into force on 1 June 2024 — provides as follows:

“1. If an intervention under Article 63 of the Statute is admitted, the intervening State shall be furnished with copies of the pleadings and documents annexed, and shall be entitled, within a time-limit to be fixed by the Court, or by the President if the Court is not sitting, to submit its written observations on the subject-matter of the intervention.

2. These observations shall be communicated to the parties and to any other State admitted to intervene. The intervening State may also submit its observations with respect to the subject-matter of the intervention in the course of the oral proceedings, unless the Court decides otherwise.”

48. In accordance with this provision, the declarant States will be furnished with copies of the written pleadings of the Parties. Once all the written pleadings have been filed, the Court will fix a

time-limit for the declarant States to submit their written observations on the subject-matter of their intervention. In accordance with Article 86, paragraph 2, of the Rules, the Court will determine at a later date whether the declarant States should be authorized to make observations in the course of the oral proceedings.

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* * *

49. For these reasons,

THE COURT,

(1) Unanimously,

Decides that the declaration of intervention under Article 63 of the Statute submitted by the Republic of the Maldives is admissible in so far as it concerns the construction of provisions of the Convention on the Prevention and Punishment of the Crime of Genocide;

(2) Unanimously,

Decides that the declaration of intervention under Article 63 of the Statute submitted jointly by Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland is admissible in so far as it concerns the construction of provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this third day of July, two thousand and twenty-four, in ten copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of The Gambia, the Government of the Republic of the Union of Myanmar, and the Governments of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Republic of the Maldives, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland, respectively.

(Signed) Nawaf SALAM,
President.

(Signed) Philippe GAUTIER,
Registrar.
