

**DISSERTATION**

**ON**

**The Gambia vs. Myanmar Case: Jurisdiction of the International Court of Justice and  
Admissibility of the Application**

**Course Title: Supervised Dissertation**

**Course Code: LAW 406**

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**Date of Submission:**

**21-05-2022**

## Consent form



### Consent Form

The dissertation titled “The Gambia vs. Myanmar Case: Jurisdiction of the International Court of Justice and Admissibility of the Application” prepared by Rownok Jahan, ID: 2018-2-66-020 submitted to Sayeed Hossain Sarwar, Lecturer, East West University for the fulfillment of the requirements of Course 406 (Supervised Dissertation) for LL.B. (Hons.) degree offered by the Department of Law, East West University is approved for submission.

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Signature of the Supervisor

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## ACKNOWLEDGMENT

At first, I want to thank the Almighty for his blessings and generosity. It would have been difficult to finish the thesis without his assistance. Throughout these times, I received significant help and instruction from a variety of individuals, which ultimately culminated in the effective completion of my project. I consider myself extremely blessed to have all of these pillars of support with me at all times.

I am and always will be indebted to my thesis supervisor, Lecturer Sayeed Hossain Sarwar Sir. I am indebted to him for his unflinching support throughout the semester. You have always maintained a serene and forgiving demeanor which has taught me invaluable. Despite being engaged with other activities, you have always managed to give your undivided attention. I would like to offer my sincere appreciation for your consistent encouragement, recommendations, and patience.

I want to express my respect to the Department of Law faculty members at East-West University. I would want to express my gratitude and appreciation to Dr. Md. Mehedi Hasan Sir, Chairperson & Assistant Professor of Law Department.

Parents are incalculably appreciative. Extroverts are always attempting to conceal their emotions to avoid appearing weak. As a result, I've never said how much I love and appreciate my parents. My Parents are beyond expressions. Lastly, I am thankful to my friends for being my constant supporters.

## **DECLARATION**

I hereby declare that the research paper titled “The Gambia vs. Myanmar: Jurisdiction of the ICJ and Admissibility of the application” is written by me, and it is my original work that has never been used in any assessment before. I also declare that the content of this work is purely my responsibility. However, the contents of other sources are properly recognized in the references. Any material received from other sources or any other work has been properly referred.

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ID: 2018-2-66-020

Course Code: LAW 406

Course Title: Supervised Dissertation

Program: Bachelor of Law (LL.B)

Department of Law

East West University

## ABSTRACT

The case of 'The Gambia vs. Myanmar' was filed before the ICJ on 11 November 2019. But the case has not yet reached Merit. This case is between two parties of the Genocide Convention for the breaches of the obligations of the Genocide Convention. The Gambia has taken Myanmar to the International Court of Justice in this case. Though the Gambia is not directly affected by Myanmar's violation of the Genocide Convention and the genocidal acts in Myanmar, the Gambia has the right to file the case against Myanmar as a party to the Genocide Convention.

This paper has envisaged the jurisdiction of the International Court of Justice. It explains the context of the Gambia vs. Myanmar case before ICJ and discusses the case's current status. It gives a clear concept of the jurisdiction of ICJ in contentious cases. In establishing the jurisdiction in this case, the paper focus on the first and fourth preliminary objections of Myanmar. In addition, the Court has jurisdiction under the R2P and *erga omnes* principle and Myanmar have responsibilities under the Genocide Convention. In doing so, the paper has relied on existing scholarly articles, books, newspaper reports, ICJ Statute, and the Genocide Convention.

**Keywords:** Jurisdiction, Admissibility, ICJ, ICJ Statute, The Gambia vs. Myanmar, Genocide Convention.

**LIST OF ABBREVIATION**

UN	United Nations
ICJ	International Court of Justice
CPPCG	The Convention on the Prevention and Punishment of the Crime of Genocide
ICC	International Criminal Court
UNSC	United Nations Security Council
UNGA	The UN General Assembly
UNHRC	United Nation Human Rights Council
OIC	Organization of the Islamic Cooperation
PCIJ	Permanent Court of International Justice
UNHCR	United Nations High Commissioner for Refugees
FFM	Fact-Finding Mission
ICISS	International Commission on Intervention and States Sovereignty

**TABLE OF CONTENTS**

	<b>PAGE NO</b>
<b>ACKNOWLEDGMENT</b>	1
<b>DECLARATION</b>	2
<b>ABSTRACT</b>	3
<b>LIST OF ABBREVIATION</b>	4
<b>CHAPTER ONE</b>  <b>INTRODUCTORY CHAPTER</b>	
1.1 Introduction	8-9
1.2 Objective of the Research	9
1.3 Methodology	10
1.4 Limitation	10
1.5 Research Questions	11

<b>CHAPTER TWO</b>	
<b>Context of Gambia vs. Myanmar before ICJ</b>	
2.1 Background of Rohingya	12-13
2.2 ‘The Gambia vs. Myanmar’ case before ICJ	13-14
2.3 Relationship of jurisdiction and, Provisional measures of ICJ	14-15
2.4 Preliminary objections of Myanmar	15-16
<b>CHAPTER THREE</b>	
<b>Jurisdiction of the ICJ and Admissibility of an application</b>	
3.1 Contentious Jurisdiction	17-18
3.1.1 <i>Ratione Personae</i>	18
3.1.2 <i>Ratione Materiae</i>	18-19
3.1.3 <i>Ratione Consensus</i>	19
3.2 Admissibility of an application and Jurisdiction	19-20



<b>CHAPTER FOUR</b> <b>First and Fourth Preliminary Objections of Myanmar in detail</b>	
4.1 OIC is the actual applicant	21-22
4.2 No dispute between the Gambia and Myanmar	22-24
4.3 Overall justification on behalf of The Gambia	24-25
4.4 Myanmar's Obligations under the Responsibility to Protect Principle	25-26
4.5 Implementation of the R2P principle in this case and the Court's Role	26
4.6 <i>Erga Omnes</i> Obligations and The Gambia v. Myanmar Case	26-27
<b>CHAPTER FIVE</b> <b>Conclusion</b>	
5.1 Findings	28-29
5.2 Recommendations	29
5.3 Conclusion	29-30
Bibliography	31-34

## CHAPTER ONE

### INTRODUCTORY CHAPTER

#### 1.1 Introduction

For settling international conflicts in a peaceful manner, the International Court of Justice (ICJ) is the principal entity of the United Nations (UN). The ICJ here (the Court) accentuated that it does not legislate law rather it applies the existing law. There are some scope and limitations of this Court. The main duty of the Court is to apply the law and solve any international dispute between two states.<sup>1</sup> The Court can only decide based on law.<sup>2</sup> The Court has two types of jurisdictions. One is Jurisdiction in disputed matters and the other one is Advisory Jurisdiction. The term "jurisdiction in contentious cases" refers to any legal disputes that a state submits to the ICJ. According to Article 36(2) of the Statute of the International Court of Justice which is the ICJ Statute, a matter filed before the Court must be a judicial dispute.<sup>3</sup>

“Application Of the Convention on The Prevention and Punishment of The Crime of Genocide” here (The Gambia v. Myanmar) is now a vital case to discuss before ICJ relating to the genocide. The Gambia submitted an application to initiate proceedings and a request for a provisional measure on 11<sup>th</sup> November 2019. In this application, the Gambia stated that the Myanmar government has persecuted the members of the Rohingya ethnic community, which are mostly situated in Myanmar's Rakhine State. Myanmar’s government wanted to wipe out the Rohingya people by doing various acts which include killing, causing major bodily and mental injury, physical and also mental destruction, enacting birth prevention measures, and forcibly transferring them from Myanmar. These acts committed by Myanmar’s Government are genocidal in nature. Because they seek to exterminate the Rohingya people from their territory entirely or in part. These were carried out in flagrant violation of the Genocide Prevention and Punishment Convention of 1948 (Genocide Convention). Myanmar is accountable for genocide as a result of these acts, which are in violation of the Genocide Convention. Myanmar has also broken other key principles of the Genocide Convention, including attempting, conspiring to commit, encouraging, participating, and also failing to prevent and punish genocide.

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<sup>1</sup> The Northern Cameroons case (Cameroon v. United Kingdom), [1963] ICJ Rep pp. 15, 33

<sup>2</sup> Haya de la Torre case (Colombia v. Peru), [1951] ICJ Rep pp. 71, 79

<sup>3</sup> Nuclear Tests case (Australia v. France), [1974] ICJ Rep pp. 253, 270-1

The jurisdiction of the ICJ is an important issue of discussion. Because these two states in this case are both members of the UN, they are bound by ICJ Statute. The Genocide Convention is also signed by Gambia and Myanmar. On December 30, 1949, Myanmar ratified the Genocide Convention and deposited its instrument of ratification on March 14, 1956. On December 29, 1978, the Gambia has submitted its accession instrument. If there is any dispute between the contracting parties over the interpretation, application, or implementation of the Genocide Convention, or any of the other acts which are listed in Article III then it shall be presented to the Court (ICJ) at the request of any of the disputant's requests to the dispute, according to Article IX of the Genocide Convention.<sup>4</sup> As a result, there was a disagreement between the parties of this case regarding the implementation and application of the Convention, as well as Myanmar's failure to prevent genocide, desist from committing genocide, failure to recompense victims, and provide safeguards and guarantees of non-repetition.

This research and analysis focus on the ICJ's jurisdiction and admissibility of the application in the present case. The first chapter of the study discusses the general synopsis of the Court's jurisdiction and the case. The second chapter focus on the Rohingya people's history and the commencement of the case before ICJ. The third chapter discusses the ICJ's jurisdiction under the ICJ Statute. It also considers the ICJ's order for interim measures and Myanmar's preliminary objections. The fourth chapter scrutinizes the first and fourth preliminary objections of Myanmar in this case and also discusses the R2P principle and *erga omnes partes* in relation to the case. The purpose of this study is to examine the arguments and also establish the ICJ's jurisdiction.

## **1.2 Objective of the Research**

The main object of this research is to find out the jurisdiction of ICJ in this case. Also, to focus on the ICJ's jurisdiction in contentious cases. Another object of this research is to identify the major requirements which are needed to get ICJ's Jurisdiction. To examine the preliminary objections of Myanmar and the responses of The Gambia and after examining it will establish the rationality between them with different arguments. It's another object is to explain the admissibility of the Gambia's application before ICJ. Another objective is to ascertain when a matter logically arises before the Court.

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<sup>4</sup> Convention on the Prevention and Punishment of the Crime of Genocide, (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, here (Genocide Convention) art IX

### **1.3 Methodology**

The research approach used in this study was qualitative and doctrinal research. It took cases and contexts seriously. Also analyzed the Statutory provisions and cases by the application of reasoning. It mainly developed a hypothesis and try to refine it in the process of research. Authentic library research, books, governing laws, articles, journals, reports, legislation, different blogs, as well as newspaper stories and columns, were employed to achieve the research's goals. It has analyzed the ICJ Statute, UN Charter, and decisions of ICJ in the different cases as primary sources. For secondary sources, it researched various journal articles, books, newspaper articles, websites, etc.

### **1.4 Limitations**

Since the present study is the partial fulfillment of the required LL.B degree and it is to be completed within a very short period, it is not possible to include every method involved in the area of study relating to dispute settlement in Public International Law. This is a vast topic for the research of Public International Law for such reason I choose this individual topic. Also, for the limitations of the words I have to be limited to two preliminary objections of Myanmar in this case. This research might be able to provide a better outcome if the time limit had been a little higher.

### **1.5 Research Questions**

- i.** Whether the ICJ has jurisdiction on the case 'The Gambia vs. Myanmar' or not?
- ii.** Whether the application is admissible before ICJ or not?
- iii.** Whether Myanmar is responsible for genocide or not?

## CHAPTER TWO

### Context of The Gambia vs. Myanmar before ICJ

Genocide is an intentional and methodical demolition of a large number of people because of their class, race, nationalism, or religion.<sup>5</sup> The Gambia vs. Myanmar case is commonly known as the Rohingya genocide case. For several decades, the peoples of an ethnic group who are living in Myanmar's Rakhine State has endured a lot of disunity, cruelty, and oppression. People from this ethnic group were forced to leave their homes or pass-through piteous circumstances. After being persecuted in their country, many of them took positions in Bangladesh territories. The Gambia is a small African State which filed a case in opposition to Myanmar for the acts of atrocities on the Rohingya people at the International Court of Justice (ICJ).

#### **2.1 Background of Rohingya:**

The Rohingya is the largest Muslim group of people from an ethnic group residing in Rakhine State, Myanmar. They are the Muslim population from the Northern Rakhine State. They have a different language, culture, and practice. They have never been formally acknowledged as an ethnic group in Myanmar.<sup>6</sup> Since Myanmar's independence in 1948, many ethnic groups or minorities have been subjected to various forms of systematic discrimination and deprivation, particularly following the military takeover and seizure of power in 1962.<sup>7</sup> The Myanmar government has refused to award Rohingya citizenship, and they have been denied access to higher education, their freedom of movement has been restricted, Rohingya males have been forced to work, and Rohingya landowners have lost their lands.<sup>8</sup> The Rohingya people have been persecuted in enormous numbers, and there has been ethnic cleansing. The Rohingya people's persecution has been termed genocide. Since August 2017, over 723,000 Muslims Rohingya have fled to the territory of Bangladesh, according to the United Nations High

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<sup>5</sup> Convention on the Prevention and Punishment of the Crime of Genocide, (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

<sup>6</sup> Dr Kazi Abdul Mannan, 'The Rohingya issue and International Migration: A Historical Perspective' (2017) vol.3 no.2

<sup>7</sup> ibid

<sup>8</sup> ibid

Commissioner for Refugees ("UNHCR").<sup>9</sup> More than 24,000 Rohingya Muslims have been slain by the Myanmar military, police, and local Buddhist militia since the "clearing operations" began on August 25, 2017. Myanmar's army and police sexually abused at least 18,000 Muslim women and girls, 114,000 Rohingya were beaten, 34,000 Rohingya people were burned alive, 115,000 houses of the Rohingya Muslims have been destroyed by fire, and also vandalized 113,000 others, the estimates.<sup>10</sup>

## **2.2 'The Gambia vs. Myanmar' Case before ICJ:**

The Gambia is a little African State which has no definite connections to Myanmar's atrocity, focused on the Rohingya massacre. Gambia agreed to pursue the case to the ICJ with the cooperation of other Organization of Islamic Cooperation (OIC) member states.<sup>11</sup> The Gambia filed its ICJ application against Myanmar on November 11, 2019, under Articles 36(1) and 40 of the ICJ Statute and also Article 38 of the Rules of Court.<sup>12</sup> The applicant (Gambia) claimed Myanmar's actions breached the Genocide Convention in this application. The application claims that the Rohingya community in Rakhine State has been subjected to abuse, mass killing, rape, and community devastation since October 2016. Myanmar is also accused of murdering, forced labor, serious bodily and mental suffering, forcible transfers, and enforcing measures to prevent births, according to the application.<sup>13</sup> The Gambia also claimed that the Myanmar government's actions against the Rohingya people are genocidal and therefore it was a breach of the convention's principles.<sup>14</sup> Article II of the Genocide Convention says about some acts which were committed by Myanmar completely or partially demolish the Rohingya group. On the other hand, every state has the legal responsibility to safeguard its populations from genocide under the responsibility to protect concept. According to the applicant's plea, Myanmar attempted genocide, was intrigued to commit genocide, inflamed in genocide, and

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<sup>9</sup> Kamrul Hasan, 'Rohingya Crisis: Population exploding as 91,000 babies are born in two years' Dhaka Tribune (Dhaka, 29 August 2019) 1

<sup>10</sup> *ibid*

<sup>11</sup> Islam, Md. Rizwanul and Muquim, Naimul, "The Gambia v. Myanmar at the ICJ: Good Samaritans Testing State Responsibility for Atrocities on the Rohingya" California Western International Law Journal (2020) vol.51: 1

<sup>12</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar), [2019] Application Instituting Proceedings and Request for Provisional Measures p. 4

<sup>13</sup> *Ibid* para. 2

<sup>14</sup> *Ibid*

also unsuccessful to restrain and punish genocide.<sup>15</sup> The applicant has initiated proceedings to determine Myanmar's responsibility for Genocide Convention violations, to establish that Myanmar is accountable for genocidal activities against the Rohingya under international law, and to provide the strongest possible safety for people who may face genocide in the future.<sup>16</sup> The petition was based on Article 36(1) of the ICJ Statute and Article IX of the Genocide Convention. The Gambia has also requested temporary protective measures.<sup>17</sup> Myanmar filed "preliminary challenges to the Court's jurisdiction and the admissibility of the Application" on January 20, 2021. The Court issued an order on January 28, 2021, requiring The Gambia to respond to the objections in writing by May 20, 2021. The Gambia met the deadline and submitted its response. The ICJ held public hearings in February 2022 in response to Myanmar's preliminary objections. The Court will then rule in response to early objections, determining whether the case can continue to the merits.

### **2.3 Relationship of Jurisdiction and Provisional Measures of ICJ:**

The Gambia also requested provisional measures<sup>18</sup> of protection in its ICJ application.<sup>19</sup> The Court's ability to make an interim order is a unique power of discretion that it can use only in unusual situations. Under Article 41(1) of the ICJ Statute, the Court may issue a provisory order if the circumstances so require. Provisional orders are a temporary way of dealing with a problem when the final judgment is pending. It is vital to ensure that the final judgment's value is not diminished by the parties' ongoing actions. The Gambia requested the Court to specify six provisional measures when the second round of oral observations was completed, claiming that the provisional measures are strongly related to the rights that are the main issues of the dispute.<sup>20</sup> If the Court determines that these articles prima facie delegate jurisdiction then the Court has the authority to decide the case on its merits. According to the regulations of the Genocide Convention, the Court determined that it has jurisdiction to hear the case on the basis of prima facie evidence.<sup>21</sup> On The Gambia's request for temporary measures, the ICJ issued an order on January 23, 2020, directing Myanmar must take steps to prevent the risk of genocide against the Rohingya minority from occurring again.<sup>22</sup> The Court issued four provisional orders

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<sup>15</sup> Ibid

<sup>16</sup> Ibid para 8

<sup>17</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), [2019] ICJ Order 2020 para. 3

<sup>18</sup> Statute of the International Court of Justice 1945, art 41 and Rules of Court 1978, art 73, 74 and 75

<sup>19</sup> The Gambia vs. Myanmar [2019] ICJ Order 2020 para. 4

<sup>20</sup> Ibid para. 12

<sup>21</sup> Ibid para 37

<sup>22</sup> Ibid



that are instructing the government i) to take all necessary steps to avoid all crimes of genocide, ii) to ensure that acts of genocide are not committed by irregular armed groups, organizations, or individuals under their authority or genocide plot, command encouragement to do genocide, attempt to do any genocide or collaboration in genocide, iii) to prevent the destruction of evidence connected to charges of genocide and to secure its preservation, iv) Myanmar is also required to abide by the order and also to provide a report after four months it is issued, and then every six months thereafter.<sup>23</sup> Because the Court possessed prima facie jurisdiction, those provisional measures were ordered. Myanmar, on the other hand, lodged four preliminary objections.

#### **2.4 Preliminary Objections of Myanmar:**

The Preliminary Objection is a procedural step by which a party to a case can raise questions about the jurisdiction or admissibility.<sup>24</sup> A preliminary objection to jurisdiction can be resolved in three ways.<sup>25</sup> The Court can affirm the challenge, abdicate it, or find that the challenge does not reflect the actual facts of the case. Before the merits of a case or any other matter in the proceedings are reviewed, a respondent can raise questions that should be handled independently.<sup>26</sup> These objections are mostly procedural means of contesting the Court's authority and acceptability of the application in a specific instance, and they must be resolved during the preliminary status of the case.<sup>27</sup> Before the Court address the main issues, these objections need to be solved in a case. Here, in this case, Myanmar appeared with four initiatory objections. The first initial argument of Myanmar is that there is a scarcity of the Court's jurisdiction because the true plaintiff, in this case, is the Organisation of Islamic Cooperation (OIC), and The Gambia filed the claim as the OIC's proxy.<sup>28</sup> The second initial argument is that because the Gambia was not directly affected by Myanmar's genocidal acts, it is not able to stand the complaint, and also there was no controversy between them.<sup>29</sup> Thirdly, Myanmar argued that because it has a reservation to Article VIII of the Genocide Convention which

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<sup>23</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), [2019] ICJ Order 2020. para 86

<sup>24</sup> Robert Kolb, *The International Court of Justice* (Alan Perry, 1<sup>st</sup> edn, HART Publishing 2013)

<sup>25</sup> Rules of Court 1978 art 79(9)

<sup>26</sup> Malcolm N. Shaw, *International Law* (8<sup>th</sup> edn, Cambridge University Press 2020) 816

<sup>27</sup> *Ibid*

<sup>28</sup> *The Gambia v. Myanmar* [2019] preliminary objections of Myanmar 2021 para. 25

<sup>29</sup> *Ibid* para. 27

precluded the applicant from invoking the Court's jurisdiction under Article IX of the Convention.<sup>30</sup> The fourth preliminary objection asserts that there was no disagreement between the parties at that time when the application to institute proceedings was filed, and The Gambia is not directly harmed by Myanmar's violation of the Convention.<sup>31</sup> The ICJ's jurisdiction to hear the Gambia vs. Myanmar case is being questioned in these preliminary objections. We first need to know about ICJ's jurisdiction to know the answer.

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<sup>30</sup> Ibid para. 28

<sup>31</sup> Ibid para. 29

## CHAPTER THREE

### Jurisdiction of the ICJ and Admissibility of an application

There are some preconditions that have to be satisfied before the Court can deal with some disputes between two parties. Firstly, the Court must be properly seated under the appropriate rules. Secondly, the Court must have jurisdiction over the dispute between two parties and must have the legal power to issue rulings.<sup>32</sup> Finally, the application has to be made without any delay or defects so that the Court can take cognizance of it very easily. The word jurisdiction directs a legal power to take action against any legal dispute. The legal power to analyze and determine a matter on its merits defines jurisdiction.<sup>33</sup> It is the authority to decide and investigate any dispute, and it is always granted by law. The Court has twofold jurisdiction. The Court decides any international legal disputes that are brought before the Court by states, which is known as contentious jurisdiction. Also, when the Court provides advisory opinions on any legal subject of international law at the request of any UN primary entity that is called advisory jurisdiction. For the purpose of this dissertation, we will know the ICJ's contentious jurisdiction.

#### **3.1 Contentious Jurisdiction**

Contentious proceedings are any subsequent adversarial proceedings before the Court. There may be certain questions about an applicant state's personal capability to arrive before the Court, the legal nature of a dispute, and the grounds on which the parties can be deemed to have consented to the jurisdiction.<sup>34</sup> The function of the Court is to make decisions in any legal dispute between two parties in conformity with international law. According to Article 36(2) of the ICJ Statute, any subject arrived before the court must be a legal matter or dispute. In the '*Mavrommatis Palestine Concessions (Jurisdiction)*' case the PCIJ declared that an international legal dispute is a difference of opinion on an issue of any lawful or factual matter, as well as a discrepancy of lawful opinions or claims between two parties.<sup>35</sup> Practically, the presence of disagreement among two parties is determined on the date the Court receives

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<sup>32</sup> R Kolb, *The International Court of Justice* (Alan Perry, 1<sup>st</sup> edn, HART Publishing 2013) 199

<sup>33</sup> *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO* [1956] ICJ Rep 87

<sup>34</sup> R Kolb, *The International Court of Justice* (Alan Perry, 1<sup>st</sup> edn, HART Publishing 2013)

<sup>35</sup> *Mavrommatis Palestine Concessions (Greece v. U.K.)* [1924] PCIJ, (ser. A) No. 2, p. 11.

the application.<sup>36</sup> The Court has sole authority over the determination of a claim on the ground of the presence of a dispute and the creation of jurisdiction.

### **3.1.1 Ratione Personae**

Unless both the applicant and the respondent are States, no disputed case can arrive before the ICJ. Only states can bring cases before the International Court of Justice. The right to be a party in a case before the Court is discussed in both Article 34, paragraph 1, and Article 35 of the Statute.<sup>37</sup> According to Article 34 of the ICJ Statute, only State has the right to enter before the Court.<sup>38</sup> Also, States party to the present Statute shall have the right to access before the Court.' Before addressing any jurisdictional and admissibility challenges, the Court must first investigate and decide the authority to enter.<sup>39</sup> Only states that are parties to the Statute are eligible for the Court's judicial functions. Here, The Gambia is a United Nations member and all members are parties to the Court. So, The Gambia has the access to the Court.

### **3.1.2 Ratione Materiae**

In any contentious proceedings, the Court's subject-matter jurisdiction can be parsed from two different perspectives. There are two kinds of subject-matter jurisdiction to be considered which are consensual jurisdiction and subject-matter jurisdiction in the limited sense of the term (material jurisdiction). The rules on subject-matter jurisdiction are established in Articles 36 and 38 of the ICJ Statute. The existence of a dispute is a requirement for filing a case. The purpose of the Court is to resolve the legal or factual disputes which are subject to the Court's subject-matter jurisdiction. The 'optional clause' (all legal disputes) is associated with unilateral statements by which States have the option of accepting the Court's jurisdiction as mentioned in Article 36(2). The 'optional clause' declares that the Court has jurisdiction in all legitimate disputes regarding the treaty interpretation, questions relating to international law, any fact which is a contravention of an international responsibility, and the type or scope of the compensation to be paid in the event of a breach of an international obligation.<sup>40</sup> The Court will only have jurisdiction under Article 36(2) if both of the parties' declarations in a dispute address the same subject. Both parties are members of the Genocide Convention in this case,

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<sup>36</sup> Nicaragua v. Columbia, [2016] ICJ Rep para. 52

<sup>37</sup> ICJ Statute 1945, art 34 and 35

<sup>38</sup> ICJ Statute 1945, art 34

<sup>39</sup> Serbia and Montenegro v. UK [2004] ICJ Rep pp. 1307, 1322 and 1326

<sup>40</sup> *ibid*

and there is a lawful controversy between them. So, The Gambia can initiate a complaint against Myanmar as Myanmar had breached its commitments under this Convention.

### **3.1.3 Ratione Consensus**

The consent of the parties establishes the Court's jurisdiction.<sup>41</sup> The Court has the jurisdiction only if all the parties give consent to it. States can express their compliance in a number of ways to decide the legal dispute by the Court. The Court's jurisdiction, according to Article 36(1) of the Statute, extends to all cases referred to it by the parties, as well as any subjects expressly allowed for in the United Nations Charter or in treaties and conventions in force.<sup>42</sup> This article deals with cases in which the party's willingness of the Court's jurisdiction is based on a written agreement (or treaty).<sup>43</sup> It means the Court can grant jurisdiction over disputes which are coming from international treaties and when such treaties have a 'compromissory clause'.<sup>44</sup> Compromissory clauses state that disputes of a particular class must or may be submitted to one or more mechanisms for resolving disputes peacefully. However, such consent must be "voluntary and irrefutable."<sup>45</sup> Compulsory jurisdiction is that each state that is a party to an agreement or the system of optional clauses that created it, and according to Article 36(2) of the Statute, a state can file a suit in opposition to the respondent in question unilaterally.<sup>46</sup> Optional jurisdiction, on the other hand, is founded on the concept that states will jointly bring their issue to the Court. Both the optional and obligatory jurisdiction are subject to the general principle of consent. In contentious cases, the Court can only practice its jurisdiction with the consent of both parties which is expressed for instance through their mutual engagement in a treaty with a compromissory clause.<sup>47</sup> Here, The Court has jurisdiction over the rights and duties of the Genocide Convention regarding the basis compromissory provision in Article IX of that Convention.

### **3.2 Admissibility of an application and Jurisdiction:**

Admissibility is concerned with some problems relating to the claim's validity, as well as some questions of private interest left to the parties to object to it, and some issues arising from international law deriving from the Statute of the Court.<sup>48</sup> The application, sometimes known

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<sup>41</sup> Nicaragua v. United States [1986] ICJ Rep pp.3, 32

<sup>42</sup> ICJ Statute 1945, art 36(1)

<sup>43</sup> *ibid*

<sup>44</sup> ICJ Statute 1945, art 40 and art 38 of the Court's Rules.

<sup>45</sup> Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), [1948] ICJ Rep, pp. 19,31

<sup>46</sup> ICJ Statute 1945, art 36(2)

<sup>47</sup> *ibid*

<sup>48</sup> R Kolb, The International Court of Justice (Alan Perry, 1<sup>st</sup> edn, HART Publishing 2013)

as legal action, is a procedure by which a state can ask the Court to enforce a right. The application's admissibility is dependent on the availability and exercise of the right to begin legal action.<sup>49</sup> The Court should not propagate adjudication in a case if there are objections to admissibility even though the Court has jurisdiction and the facts given by the applicant state are believed to be appropriate.<sup>50</sup> Before the Court may assess the merits of a matter, it must have both jurisdiction and admissibility. The Court declared in the "*Application of the Genocide Convention (Bosnia V. Yugoslavia)*" case that it has both *ratione personae* and *ratione materiae* jurisdiction to hear the matter under Article IX of the Genocide Convention and that the Application is admissible.<sup>51</sup> If there is any controversy among the parties over the explanation, application, or effectuation, including those involving a State's responsibility for genocide or any of the activities mentioned in Article III, shall be submitted to the ICJ at the solicitation of any of the parties to the dispute.<sup>52</sup> In this case, The Court also explained that it must first verify some aspects of the case presented to it, such as whether it has jurisdiction to hear the case, whether the Application is allowed, and whether the Respondent's preliminary objections are instructive in clarifying the legal position of the case or not. Here, Yugoslavia's preliminary objections served the same function in this case. The Court also noted that it must first confirm certain features of the case, such as whether it has jurisdiction to hear it.

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<sup>49</sup> Tafsir Malick Ndiaye, "Admissibility before the International Courts and Tribunals", *Journal of Law and Judicial System* 2018;1(2):21-48

<sup>50</sup> Oil Platforms case, (Iran v. USA), [2003] ICJ Rep pp. 161,177.

<sup>51</sup> Bosnia V. Yugoslavia [1996] ICJ Rep pp. 595, 615-622 on preliminary objections

<sup>52</sup> Genocide Convention, art IX

## CHAPTER FOUR

### **First and Fourth Preliminary Objections of Myanmar in detail**

Myanmar contended at the temporary measures hearing in December 2019 that the Court has no authority to hear this case and also the applicant state desiderated prima facie right to stand this case. Myanmar raised four initial objections challenging the Court's jurisdiction to deal with the case and the admissibility of the application under Article 79bis, paragraph 1 of the Rules of Court.<sup>53</sup> Myanmar also demanded that those preliminary objections be resolved before any further substantive procedures. From 21-28 February 2022, the ICJ heard the preliminary objections raised by the respondent and the applicant's response in this matter.

#### **4.1 OIC is the actual applicant:**

The first preliminary objection was that the Court has no prima facie jurisdiction, or that The Gambia's petition is not prima facie admissible because the true applicant is the Organization of Islamic Cooperation (OIC) which is an international institution.<sup>54</sup> Concerning the Court's competence, Myanmar made it quite clear that the actual standing of the case was carried out by The Gambia as head of an OIC Ad Hoc Committee, which signifies The Gambia's competence in this instance as an organ of the OIC, or as a "proxy" or an agent of the OIC.<sup>55</sup> The applicant in a matter must be a state, and when a case is ascribed to the Court by an applicant state then it fulfilled the criteria for the Court's jurisdiction.<sup>56</sup> The Court lacks the authority to hear a case presented to it by an international organization. The Gambia, the OIC, and the other OIC Member States have all affirmed that the applicant is bringing this case on behalf of the OIC, and other States, the international media, and non-governmental organizations have all openly stated this.<sup>57</sup> The determination of the true applicant, in this case, is an issue of substance, not form or procedure. When the matter of the case directs the conclusion that the original applicant in a case is not the State legally listed as an applicant in the petition then the Court's jurisdiction must be apprehended based on the true applicant's situation.<sup>58</sup> The evidence before the Court would simply demonstrate that the OIC is the true appellant, and the Court desiderated to establish jurisdiction as a result. Because an international organization cannot file a case in front of the Court using a State as a proxy

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<sup>53</sup> Rules of Court 1978, art 79bis (1)

<sup>54</sup> The Gambia v. Myanmar [2019] preliminary objections of Myanmar 2021 pp. 41-46, paras. 3-26 (Staker)

<sup>55</sup> Ibid p. 46, para. 23 (Staker).

<sup>56</sup> ICJ Statute 1945, art 34(1), 36(1)

<sup>57</sup> The Gambia v. Myanmar [2019] preliminary objections of Myanmar 2021

<sup>58</sup> *ibid*

applicant. Alternatively, the application would be dismissed since it would be an immediate violation of the Court's authority.

In reply to the preliminary objections of Myanmar, the Gambia has submitted its description of its observation and submissions of these preliminary objections in written on 20 April 2021. On Myanmar's first preliminary objection, the Gambia asserted that it met the *ratione personae* conditions for jurisdiction.<sup>59</sup> The Gambia became a state in 1965, and it is in compliance with Article 34. (1). The Gambia, on the other hand, since September 21, 1965, has been a member of the UN. As a result, it is an ipso facto member of the Court's Statute. Because the rule of the ICJ Statute applies to all members of the UN.<sup>60</sup> Myanmar and Gambia are both signatories to the Genocide Convention. Every state has the right to invoke the Court's jurisdiction under its general terms.<sup>61</sup> As a result of the Gambia's membership in the Statute and the respondent's agreement to the Court's jurisdiction under Article IX of the Genocide Convention, the Gambia has invoked that authority. Gambia sought the help of the OIC to ensure the safety of the Rohingya people and to apprehend Myanmar accountable for these crimes. Because the OIC's objective is to protect the freedom, respect, and religious or cultural identities of the Muslim populations and minorities in the states which are not members.<sup>62</sup> However, this does not imply that the applicant is OIC. The OIC's role is confined to assisting The Gambia in its legal proceedings, and it has no authority to order The Gambia to take any procedure.<sup>63</sup> As a result, the Gambia satisfies the prerequisites for jurisdiction *ratione personae*.

#### **4.2 No dispute between the Gambia and Myanmar:**

Myanmar stated in the fourth initial objection that there was no conflict between them when the applicant state filed its request to initiate the case on November 11, 2019.<sup>64</sup> A pre-existing conflict among the states at the time of submitting an application is a fundamental prerequisite. While there is a question relating to the jurisdiction of the Court, it is the applicant's responsibility to present the facts that support its claim of a dispute.<sup>65</sup> The presence of a conflict

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<sup>59</sup> The Gambia v. Myanmar [2019] written observations of the Gambia 2021, on the preliminary objections raised by Myanmar

<sup>60</sup> United Nations Charter 1945, art 93(1)

<sup>61</sup> The Gambia v. Myanmar [2019] verbatim record CR 2022/2

<sup>62</sup> Charter of the Islamic Conference, 914 UNTS 110, art. 1(16)

<sup>63</sup> The Gambia v. Myanmar [2019] written observations of the Gambia 2021, on the preliminary objections raised by Myanmar

<sup>64</sup> The Gambia v. Myanmar [2019] preliminary objections of Myanmar 2021 para. 487

<sup>65</sup> Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India) [2016] Jurisdiction and Admissibility, ICJ Rep. pp.255, 272, para. 41



among the parties is a necessary pre-action for the Court's jurisdiction to be exercised. The Court's function is to resolve any legal matter that comes before it according to international law.<sup>66</sup> For the existence of a legal disagreement, there will be an impingement among the parties regarding lawful rights and duties. The Court stated in the “*Northern Cameroons*” case that it can only issue a judgment in specific circumstances where there is a disagreement relating to the conflict of juridical interests among the parties.<sup>67</sup> A dispute must be characterized enough for the respondent and the Court to assess whether the demand made in the petition is for the same topic that was meanwhile in disagreement, or whether it creates another new demand that goes beyond the pre-existing conflict.<sup>68</sup> Myanmar argued that the breaches of the genocide convention may be a breach of the obligation of the *erga omnes* principle and that when a case is brought under Article IX of the Genocide Convention's compromissory clause, the ICJ can only have jurisdiction over the convention's rights and obligations. Myanmar further stated that because the OIC is the real applicant in the case, and because the pre-existing disagreement criterion is not satisfied, the Court has no jurisdiction to hear the claim, and The Gambia's application is inadmissible.

In reply to the fourth preliminary objection, the Gambia argued that the presence of a disagreement is a question of substance that the Court must determine objectively. The Gambia and Myanmar expressed opposing opinions on Myanmar's acceptance of the Genocide Convention's responsibilities. It was observed by the order of the Court on 23<sup>rd</sup> January 2020 that the conversations between the parties at the UN in 2019 revealed that they had distinct divergent opinions on the topic of Myanmar's guilt for its activities of genocide against the Rohingya people.<sup>69</sup> The Gambia made it plain that their issue with Myanmar came from Myanmar's failure to hold accountable for genocide and for failing to fulfill its obligations under the Convention. Myanmar publicly denied its responsibility for genocide which also proved that there was a dispute on the law. Myanmar's breach of the convention revealed the existence of a bilateral disagreement. The ongoing genocide of the Rohingya further reveals Myanmar's breach of the obligations under the Convention, according to the UN Fact-Finding Mission.<sup>70</sup> The Note Verbale further confirmed that the parties had expressly differing views

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<sup>66</sup> ICJ Statute, art 38(1)

<sup>67</sup> *Northern Cameroons*, (Cameroon v. United Kingdom), [1963] ICJ Rep on Preliminary Objections, p. 15, pp. 33-34.

<sup>68</sup> *The Gambia v. Myanmar* [2019] preliminary objections of Myanmar 2021 para. 540

<sup>69</sup> *The Gambia v. Myanmar* [2019] Provisional Measures Order 2020, para 27

<sup>70</sup> *The Gambia v. Myanmar*, Verbatim Record CR 2022/4

on whether Myanmar had fulfilled its legal commitments for genocide actions.<sup>71</sup> On the other hand, Myanmar's not responding to the verbale note also reveals Myanmar's positive objection to the Note and also proves that a conflict exists between Gambia and Myanmar.<sup>72</sup> Because Myanmar was fully aware of every factual or legal concern stated by The Gambia on its note. The Gambia declared explicitly that it was charging Myanmar with perpetrating genocide against the Rohingya people, and that the legal charges were based on the facts outlined in the Fact-Finding Mission's reports. This mainly serves as the standard for demonstrating the presence of a disagreement in accordance with the Court's doctrine. So, Myanmar's fourth preliminary objection should be dismissed by the Court.

#### **4.3 Overall justification on behalf of The Gambia:**

Contrary to the first preliminary objection, the relevant prerequisites for the Court's *ratione personae* jurisdiction are clear. Because The Gambia is a United Nations member. As a result, it is an *ipso facto* signatory to the ICJ Statute. So, the states are both parties to the ICJ Statute and the Genocide Convention. The Gambia has the right to exercise the Court's jurisdiction under Article IX of the Genocide Convention. So, as a state, the Gambia is capable of appearing as a state before the Court. The Gambia did not need to be a proxy state or an agent of the OIC or any permission to pursue the case. The question of law is clear here. The Gambia's Note Verbale declared unequivocally that it was a party to the dispute and demanded that Myanmar should receive all obligatory efforts to get along with the Genocide Convention's duties. Article IX of the Genocide Convention empowers state parties to confine and penalize genocide. So, The Gambia has the receptivity to file the case and these are also the objectives of this case.

In the fourth preliminary objection of Myanmar, I think there was a disagreement between the two parties. Because Myanmar is failed to respond to the Note Verbale and its clear knowledge of the applicant's opinions is enough to establish a disagreement between the parties. The existence of a disagreement is determined by its substance rather than its form, which is determined by an examination of the facts.<sup>73</sup> In my opinion, the Gambia fulfils the required requirements as well. Here, the parties' disagreement stays the same as it was presented in the initiation of proceedings application and it is also a legal dispute. Also, the parties were aware

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<sup>71</sup> *ibid*

<sup>72</sup> The Gambia v. Myanmar [2019] Preliminary objections of Myanmar 2021 para. 714

<sup>73</sup> Georgia v. Russian Federation [2011] ICJ Rep para.30

of each other positions, and their views are known to each other. Because beyond the Note Verbale, The Gambia's Vice President stated in a general meeting of the UNGA that The Gambia is prepared for taking the Rohingya issue to the ICJ. If it is related to the claim's subject matter, a statement can also give effect to a dispute.<sup>74</sup> Myanmar also argued that there was not enough time to respond to the Verbale Note. On the other hand, Myanmar had 30 days to answer before the submission of the Application, and I believe 30 days was enough time to respond to the Note Verbale. Also, Myanmar has the *erga omnes* character of legal obligations under the Genocide Convention. In the "*Bosnia and Herzegovina v. Serbia and Montenegro*", the Court held that Serbia has failed to fulfill its legal obligation to prevent genocide in Srebrenica by failing to take the necessary steps.<sup>75</sup> So, I think there was a dispute between them and Myanmar had disobeyed the Genocide Convention's legal obligation to prevent genocide.

#### **4.4 Myanmar's Obligations under the Responsibility to Protect Principle**

The responsibility to Protect (R2P) doctrine declares that it is the duty of the State to defend its populations from the four R2P crimes. These four R2P crimes are genocide, war crimes, ethnic cleansing, and crimes against humanity. Every state has a responsibility to defend its populations from these crimes within its territory. Sometimes the responsibility can go beyond the territory. If any state sees that in another sovereign many populations are in danger and either the sovereign authority has no power to protect or is not willing to protect the populations then one state can enter the sovereign territory and can protect those populations. The World summit report in 2005 described that there are some international obligations under the R2P principle which requires a State to restrain from any kind of acts relating to four R2P crimes.<sup>76</sup> R2P creates the lawful liability to foreclose genocide under Article 1 of the Genocide Convention. In the case of "*Bosnia and Herzegovina v. Serbia and Montenegro*", where the Court held that Serbia has failed to fulfill its legal obligation to punish genocide and more importantly when it comes to protecting others, the Court determined that Serbia was unsuccessful to fulfill its legal duty to prevent genocide in Srebrenica by failing to take the necessary steps.<sup>77</sup> This judgment established that the parties of the Genocide Convention are responsible for preventing genocide which is a distinct and direct responsibility under the

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<sup>74</sup> Marshall Islands v. India [2016] ICJ Rep para. 38

<sup>75</sup> Bosnia and Herzegovina v. Serbia and Montenegro [1996] Merits, Judgement, paras. 415, 424, and 471 (2)-(4)

<sup>76</sup> Genocide Prevention and The Responsibility to Protect World Summit 2005, paras 138, 139

<sup>77</sup> Bosnia and Herzegovina v. Serbia and Montenegro, Merits, Judgment, paras 449, 471 and 438, 471 (5)

Genocide Convention. This obligation to prevent genocide arises when the State is conscious of or knows the grave danger that genocide will occur. So, the parties of the Genocide Convention are bound by the legal duty to punish genocide and also to prevent genocide.

Here, in this case, Myanmar is bound by the legal duty to protect its population. After reviewing the decision in the “*Bosnia and Herzegovina v. Serbia and Montenegro case*”, it is proved that Myanmar also failed to protect its population from the acts of genocide. Myanmar has a legal obligation under the Genocide Convention. But Myanmar failed to prevent Genocide and also to punish genocide as Myanmar was also known for its genocidal acts.

#### **4.5 Implementation of the R2P Principle in this case and the Court’s Role**

When a state ratifies the Genocide Convention and accepts the jurisdictional clause that grants access to the ICJ. A state can call the Court to use its judicial powers to compel assistance for the protection of the affected population. However, obtaining that support through the legal system may be difficult. In this case, ICJ could play a role in the R2P framework. In the order of provisional measures, the Court decided that these measurements were designed to preserve both The Gambia's rights as a signatory to the Genocide Convention and the Rohingya's rights as a protected group under that treaty.<sup>78</sup> This is significant from the standpoint of R2P since the concept of duty to protect is focused on the protection of the relevant people rather than elevating the supposed rights of a third state. Also, there are some limitations of the Court to establish its jurisdiction. In a specific context, the Court's responsibility may thus be confined to addressing genocide as one of the four R2P crimes. Access is limited and also difficult to prove the R2P crime and it is contingent on whether the relevant states have ratified the UN Genocide Convention and whether genocide has occurred or not. So, here the Court has the jurisdiction under the R2P principle and also can use the R2P principle to establish Myanmar’s duty for its violation of the obligations under the Genocide Convention.

#### **4.6 Erga Omnes Obligations and The Gambia v. Myanmar Case:**

International obligations owed by states to the international community as a whole are known as *erga omnes* obligations. These obligations are imposed by international law's *jus cogens*, or peremptory rules, such as the prohibition of genocide. In this case, the Gambia depends on the erga omnes obligations on two bases. Firstly, *erga omnes* obligations to the entire international

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<sup>78</sup> The Gambia v. Myanmar, Provisional Measures, Order 23 January 2020, paras. 41–42

community as a whole, and secondly, any state party to the Genocide Convention owes *erga omnes* responsibilities to all other states parties to the convention. Being a party to a treaty, imposing *erga omnes* obligations is sufficient to demonstrate its legal interest and standing before the Court. When *erga omnes* requirements are violated, all states suffer harm, and all states have a responsibility for the compliance of other states.<sup>79</sup> In this case, Myanmar argued that only States who are directly impacted by an alleged breach of a treaty including obligations *erga omnes* partes have the standing to file a claim with the Court. But obligations are *erga omnes* when all treaty parties have a fundamental interest in their fulfillment, to the point that a breach actually resulted in an injury to their interests, even if no one has been directly injured by the breach. The obligations of the Genocide Convention are *erga omnes partes*. So, a breach of those commitments logically injures *omnes partes* and gives each party standing to sue under Article IX of the Genocide Convention. So, Myanmar as a member of the Genocide Convention breached its *erga omnes* obligations, and the Gambia as another member of the Genocide Convention has the right to file the case even though The Gambia was not directly affected or injured by the genocidal acts.

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<sup>79</sup> Josephine Gillingwater, 'The Role of 'Erga Omnes' Obligations in the Gambia v. Myanmar' 15 June, 2020

## CHAPTER FIVE

### CONCLUDING REMARKS

#### **5.1 Findings of the Study:**

The major goal of this research is to discover the jurisdiction of the Court and the admissibility of the application in this case. From the reviewed articles and journals, it is found that the case could take several years before the Court reaches a judgment. Getting justice for the Rohingya has far-reaching implications for everyone who has been victimized by Myanmar's military. According to the Gambia, Myanmar's objections to the genocide case are only a stalling tactic, and any additional delay in the hearings could lead to more crimes against the Rohingya. Myanmar will have to reply to Gambia's factual allegations that its security forces participated in a genocidal campaign against the Rohingya if the case goes forward.<sup>80</sup> Many victims and their families have been expecting the Court's ruling for a long time. It discovered that over 9,00,000 Rohingya are now in Bangladesh since their mass displacement from Myanmar.

On the other hand, the study shows that *The Gambia v. Myanmar* case does not include any independent entity and is not a criminal prosecution against any alleged perpetrator. The case is a 'state to state' dispute between two parties to the Genocide Convention. This case demonstrates that a country with no direct ties to the alleged crimes has used its membership in the Genocide Convention to file an application before the International Court of Justice. The Gambia brought this issue up before the UN General Assembly. Myanmar was served with a Note Verbale confirming the nature of the dispute and putting Myanmar on notice. Officials in Myanmar stated that they had been put on notice and thought the complaint to be filed a month before it was submitted. The Gambia appears before this Court to preserve its rights under the Genocide Convention and to ensure that Myanmar fulfills its *erga omnes* responsibilities under the Convention. The ICJ also ordered Myanmar to take all necessary measures, marking a critical step forward in the multifaceted effort to hold Myanmar's security forces and related institutions accountable for the Rohingya's deaths.<sup>81</sup> The Court's jurisdiction is based on Article 36, paragraph 1 of the ICJ Statute and Article IX of the Genocide Convention. The Gambia and Myanmar are both UN members and Genocide Convention signatories. Myanmar has made no objections to Article IX of the Convention, which controls the Court's seisin and jurisdiction.

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<sup>80</sup> Manny Maung, 'Gambia Calls for Justice as Rohingya Face Dire Threats' (February 28, 2022)

<sup>81</sup> Angshuman Choudhury, 'What Does the ICJ Preliminary Ruling Really Mean for the Rohingya?' (04 February 2020)

After consenting to that provision of the Convention upon ratification, both parties have recognized the Court's authority under Article IX without reservation. In the Application, it was established that there was a conflict between the parties of the case over the meaning, application, and execution of the Genocide Convention's duties. Here, The Court has jurisdiction over the rights and obligations of the Genocide Convention under the compromissory provision in Article IX, and the application is also admissible before the Court. Also, under the R2P principle, Myanmar was bound to defend its populations from Genocide which is not fulfilled by Myanmar.

### **5.2 Recommendations:**

Out of the above discussion, it can say that the ICJ has jurisdiction over the matter. The Court's jurisdictional requirements are satisfied here. 148,000 Rohingya Muslims are still remaining in Myanmar under the fear of displaced across Rakhine State.<sup>82</sup> They are still in grave danger of genocide. Myanmar is the party to the Genocide Convention; it has some obligations under this Convention. Myanmar's acts against the Rohingya people are punishable and a violation of the Genocide Convention's obligations. The Court should declare some permanent measures. Firstly, the Court should direct Myanmar that it will not commit genocide against the Rohingya people anymore. Secondly, the Court should issue an order which will direct Myanmar to prevent genocide against the Rohingya people and to punish for genocide.

### **5.3 Conclusion**

As a result of the preceding discussion, it is reasonable to argue that the jurisdiction of the Court in the 'The Gambia v. Myanmar' case is an important issue of discussion. The foundation of the Court's jurisdiction depends on the consent of the States. Under the compromissory clause of the Genocide Convention, Myanmar has some obligations. But it has violated those obligations by torturing the Rohingya people. The Gambia as a member of the UN ipso facto also as a party of the ICJ Statute has filed the case to stand by the Rohingya people. This study is being conducted to evaluate the current situation of the case, and it has been effective in identifying and completely evaluating the difficulties to ascertain the true nature of the case. As a consequence, this study reveals that there was presence of a legal disagreement among the Gambia and Myanmar and the Gambia had the capacity to file the case before the Court

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<sup>82</sup> Reuben Lim Wende, 'Young people in Myanmar's Rakhine State tackle ethnic divisions', 23 March 2022

which proves that the Court has the jurisdiction. Also, on January 23, 2020, the Court issued an interim measures order directing Myanmar to cease all genocidal activities against the Rohingya and to safeguard all legal evidence related to the case. These interim measures order also indicates that the ICJ has the jurisdiction to solve the case. As a result, we can forecast the ICJ's jurisdiction in the Gambia vs. Myanmar case. On the other hand, Myanmar did not complete its duties under the genocide convention and was also responsible for not preventing genocide and not punishing genocide according to the R2P principle. Under the *erga omnes partes* obligations, Myanmar is also responsible and the Gambia actually had the right to file the case before the International Court of Justice.



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