LAW INTERVIEW

Some Reflections on the ICJ's judgment on preliminary objections in *The Gambia* v *Myanmar*

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Emraan Azad *from Law Desk speaks to him on various aspects of The Gambia* v *Myanmar case at the ICJ.*

Law Desk (LD): ***What was your immediate reaction when you first read the ICJ's judgment on preliminary objections in The Gambia* v *Myanmar?***

Kawser Ahmed (KA): The preliminary objections judgment in *The Gambia* v *Myanmar* was not entirely unexpected in the sense that Myanmar already raised those questions before the ICJ during the provisional measures hearing. The Court also addressed those questions, albeit briefly in its order. It appears that Myanmar in one way or another reiterated the same arguments that it made during the provisional measures hearing at the preliminary objections stage. A careful reading of the preliminary objections judgment also suggests that the Court followed the same line of reasoning as it did in the provisional measures order.

LD: ***How would you compare the Court's judgment on preliminary objections with the provisional measures order?***

KA: Before the ICJ indicates provisional measures, it always checks if it has *prima facie* jurisdiction to deal with the case. Only if the Court is satisfied that it has *prima facie* jurisdiction, it may consider issuing the provisional measures order.

During the provisional measures hearing, Myanmar based its jurisdictional objections on two grounds, namely, the non-existence of any dispute and its reservation to article VIII of the Genocide Convention. Notably, Myanmar's argument that The Gambia acted as a proxy on behalf of the OIC was presented in connection with the non-existence of a dispute. On top of that, Myanmar made an additional argument that The Gambia did not have *locus standi* to bring a case before the ICJ as it was not directly affected by the alleged genocidal acts of Myanmar against the Rohingyas.

At the preliminary objections stage, the Court treated the aforesaid proxy argument as a separate preliminary objection. As a result, the total number of Myanmar's preliminary objections rose to four.

I have already pointed out that the Court followed the same line of reasoning in the preliminary objections judgment as it did in the provisional measures order. Moreover, the ICJ has dealt with Myanmar's preliminary objections more elaborately in the judgment. For example, the Court, in the provisional measures order, mainly relied on the meaning of the expression 'call upon' in article VIII of the Genocide Convention to reject Myanmar's argument that The Gambia could not seise the Court because of its reservation to the aforesaid article. Now, in the preliminary objections judgment, the ICJ has provided additional reasoning based on the expression, 'competent organs of the United Nations' to hold that the meaning of this expression does not include the Court itself.

It should be mentioned that the ICJ's judgment on preliminary objections, as opposed to its provisional measures order, has the effect of *res judicata*.

LD: ***Would you please clarify the difference between a jurisdictional objection and an objection to the admissibility of the application?***

KA: The jurisdiction of the ICJ comes from the consent of the litigant states. The distinction between a jurisdictional objection and an objection to the admissibility of the application is that while the former denotes a lack of consent of the party, the latter signifies that there are reasons for the ICJ not to proceed with a case even if it has jurisdiction.

In the case of jurisdiction, the ICJ examines if the litigant state parties have given consent to settlement of a dispute by the Court. On the other hand, a preliminary objection to the admissibility of the application informs of the existence of a compelling legal reason as to why the Court should decline to hear a case even when it has jurisdiction [*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v *Serbia)*].

It may be noticed that the Court dealt with jurisdictional objections first in this case, and when it was satisfied that it had jurisdiction, it then proceeded to address the objections to the admissibility of the application.

LD: ***What do you make of the ICJ's reasoning in the preliminary objections judgment?***

KA: On the whole, the Court has maintained a consistent and predictable approach in dealing with Myanmar's preliminary objections. However, I think the Court should have elaborated on a few points connected with the first and second preliminary objections.

For example, let's take Myanmar's first preliminary objection that The Gambia was not a real applicant and brought the case as a proxy of the OIC. While addressing this objection, the Court should have independently assessed whether there existed any dispute between the OIC and Myanmar regarding the interpretation and application of the Genocide Convention. Because Myanmar's objection only makes sense in the backdrop of such a dispute which The Gambia reportedly has taken over from the OIC. Besides, if there exists any such dispute between the OIC and Myanmar, the Court for the soundness of its decision should discuss the legal implication thereof, although it may be argued that the Court need not go this far to determine the question of jurisdiction – what matters most is the existence of a dispute between The Gambia and Myanmar. Given this context, such an exercise, if were undertaken by the ICJ, might have allowed it to consider whether the first preliminary objection of Myanmar was of exclusively preliminary character. If yes, the Court then, instead of dismissing this preliminary objection, could decide to deal with it at length later at the merits stage.

As regards the second preliminary objection, Myanmar submitted that The Gambia's Application is not admissible for lack of standing before

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the ICJ. In short, Myanmar argued that the right to invoke state responsibility under general international law and the issue of standing before the Court are not synonymous per se. As a result, a non-injured state party to the Genocide Convention (The Gambia) may have the right to invoke another state party's responsibility (Myanmar) for violations of the Convention, but this would not necessarily entitle the non-injured state to bring a claim before the Court. In Myanmar's view, only the states which are specially affected by an internationally wrongful act have standing before the Court. (¶ 94)

In response to Myanmar's submission, the ICJ opined that the responsibility for an alleged breach of obligations *erga omnes partes* under the Genocide Convention may be invoked through the institution of proceedings before the Court even in the absence of any special interest or injury suffered, otherwise in many situations no State would be in a position to make a claim. Relying on its judgment in the *Case concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal)*, the Court held that Myanmar's purported distinction between the entitlement to invoke responsibility under the Genocide Convention and standing to pursue a claim for this purpose before the Court has no basis in law. (¶ 108)

In *Belgium* v *Senegal*, the Court held that a state may invoke the responsibility of another state for the latter's failure to comply with its obligations *erga omnes partes* and make claims concerning the cessation of the alleged breach (¶ 69). On this basis, the Court concluded that Belgium had standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under the Convention against Torture (¶ 70). Hence, it appears that the Court in *Belgium* v *Senegal* took a conceptual leap overlooking the distinction among the *invocation of state responsibility*, *claiming cessation of and reparation for the internationally wrongful act*, and *standing before the Court*. Interestingly, the Court did not explicitly refer to article 48 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) in its judgment, although it borrowed therefrom some of the aforesaid expressions. A careful reading of paragraphs 1 and 2 of article 48 of ARSIWA reveals that these expressions entail different meanings and stages of the course of action. The ICJ in its judgment on the preliminary objections in *The Gambia* v *Myanmar* could have engaged with the conceptual nitty-gritty and bridged the gap.

The preliminary objections judgment in *The Gambia* v *Myanmar* gives an impression that the Court adopted a minimalist approach in analysing the legal and factual issues concerning the preliminary objections of Myanmar.

LD: ***In your opinion, how would the judgment on the preliminary objections in The Gambia v Myanmar influence the jurisprudence of the ICJ?***

KA: Compared to the preliminary objections that were raised in the previous genocide cases i.e., *Bosnia and Herzegovina* v *Serbia and Montenegro* and *Croatia* v *Serbia*, Myanmar's preliminary objections in *The Gambia* v *Myanmar* are quite different in the sense that the sustainability of these preliminary objections has not been tested earlier before the ICJ in relation to disputes concerning the interpretation and application of the Genocide Convention. Therefore, the Court's reasoning in this preliminary objections judgment will bear significance for many of the future cases before the ICJ.

For example, the proxy argument of Myanmar in the first preliminary objection is the first of its kind. If the facts of a case ever happen to allow a litigant state to raise the proxy argument as a preliminary objection in the future, the Court as well as the counsels will surely consult the preliminary objections judgment rendered in *The Gambia* v *Myanmar*. Also, the Court's interpretation of article VIII of the Genocide Convention, in particular, the reasoning that reservation to article VIII does not bar a state from seising the Court is worthy of note. One cannot but notice that the judgment sheds new light on the requirements for establishing the existence of a dispute (degree of particularity and mutual awareness) and the *locus standi* of non-injured states.

However, we have to bear in mind that any decision of the ICJ has no binding force except for the parties to a case only.

LD: ***Will Bangladesh's reservation to Article IX of the Genocide Convention constitute a bar if it decides to intervene in the case in future?***

KA: In *Legality of Use of Force (Yugoslavia* v *United States of America)*, the ICJ noted that the Genocide Convention did not prohibit reservations and accordingly, the USA's reservation to article IX thereof had the effect of excluding the application of this provision between the USA and Yugoslavia. The Court concluded that article IX did not constitute even a *prima facie* basis of jurisdiction in this case. Ultimately, the Court dismissed *Yugoslavia*'s application *in limine litis*.

At the time of acceding to the Genocide Convention on 05 October 1998, Bangladesh made a declaration on article IX- which sounds similar to the aforementioned reservation of the USA. Objectively speaking, Bangladesh's declaration is a reservation indeed. However, Bangladesh's reservation to article IX should not be an obstacle in case it wishes to intervene as a 'non-party' in *The Gambia* v *Myanmar* provided that conditions of articles 62 or 63 of the Statute of the ICJ are satisfied as the case may be.

LD: ***Thank you.***

KA: You are welcome.