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ICJ FINDS MYANMAR COMMITTED GENOCIDE AGAINST ROHINGYA PEOPLE

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)

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I. Executive Summary

1. This article addresses the landmark, and most recent, judgement of the International Court of Justice (the "**ICJ**") published on 19 November 2026, namely Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*) (the "**Judgement**") available here.

2. This is the first time that the ICJ has found a State responsible for genocide under international law. This note addresses first the background to the Judgement, second what the ICJ decided, third the reasoning underpinning the ICJ's findings, and finally how this compares with *Bosnia and Herzegovina v. Serbia and Montenegro* (the "**Bosnia Judgement**"),[1] one of just two cases where the ICJ considered on the merits whether the State was responsible under the Genocide Convention,[2] and in which McNair International acted.

II. Background to Judgement

3. On 11 November 2019, the Republic of The Gambia ("**The Gambia**") filed an application (the "**Application**") instituting proceedings against the Republic of the Union of Myanmar ("**Myanmar**") alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide (the "**Convention**") in respect of the Rohingya – a Muslim community in the Rakhine State (formerly Arakan State) of Myanmar.

4. By way of background:

   4.1 The Rohingya had historically experienced discrimination in various respects including the legal and administrative measures required to obtain citizenship in Myanmar,[3] the permissions required for marriage, the stoppage of birth certificates being issued,[4] the severe limitations on

[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment dated 26 February 2007.
[2] See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* Judgement dated 3 February 2015.
[3] Judgement, paragraphs 134-142.
[4] Ibid., paragraphs 143-147.

their movement between and within townships in northern Rakhine,[5] as well as access to livelihoods, healthcare and other services.[6] This is in addition to the hate speech propagated against the Rohingya especially in 2012 after the outbreak of intercommunal violence.[7]

4.2 In 2016 and 2017 the situation escalated as members of the Tatmadaw, the border guard police, and the police (together, the "**Security Forces**") conducted a number of missions referred to as "clearance operations" in various localities in Rakhine. Myanmar contends that the purpose of the operations was to respond to the insurgent Arakan Rohingya Salvation Army.[8] As consequence, there were causalities, extensive destruction, as well as internal and cross-border displacement, with over 100,000 Rohingya remaining in displacement persons camps in Rakhine.[9] The alleged clearance operations involved at least 10,000 deaths, sexual violence, attacks on children, attacks on Rohingya as they fled to Bangladesh, and the destructions of villages and their subsequent replacement.[10]

5. Accordingly, The Gambia applied to the Court on the basis of Article IX of the Genocide Convention, Articles 36.1 and 41 of the Statute of the Court, and Articles 73, 74 and 75 of the Rules of Court.

III. The Judgement

6. The Court, in its landmark judgment, found[11]:

6.1 By a majority of 9-6: Myanmar, acting through its security forces, committed genocide against the Rohingya and failed to prevent the commission of genocide by individuals alongside its security forces.

6.2 By a majority of 14-1: has not directly and publicly incited the commission of genocide against the Rohingya by private persons in violation of its obligations under the Genocide Convention.

6.3 By a majority of 11-4: Myanmar violated its obligation to punish genocide and other acts enumerated under Article III of the Convention.

6.4 By a majority of 14-1: Myanmar violated its obligation to enact the necessary legislation to give effect to the provisions of the Convention.

6.5 By a majority of 14-1: Myanmar must cease an ongoing violation of its obligation under article V of the Genocide Convention and enact a legislation to give effect to the provision of the Convention.

6.6 By a majority of 13-2: Myanmar must take immediate and effective steps to investigate all persons reasonably suspected of having committed acts contrary to the Genocide Convention.

[5] Ibid., paragraph 148.
[6] Ibid., paragraph 152.
[7] Ibid., paragraphs 153-168.
[8] Ibid., paragraphs 74-75, 170.
[9] Ibid., paragraphs 74, 151.
[10] Ibid., paragraphs 248-282.
[11] Ibid, paragraph 646.

6.7 By a majority of 9-6: Myanmar must provide guarantees of non-repetition and take steps to prevent further violations.

6.8 In addition to the above findings, the Court also found, with a majority vote of 10-5, that Myanmar is under an obligation to adopt measures that would provide adequate restitution to the victims and the Rohingya community generally. If adequate restitution is impossible, then Myanmar must provide compensation. The Court gave Myanmar a two-year deadline from the date of the judgment to submit a report to the Court outlining the steps taken to provide restitution and/or compensation to the victims.

IV. The ICJ's Reasoning

A. Obligation not to commit genocide under the Convention

(a) Article II (general)

7. The Court began by emphasizing that, according to Article II of the Convention, the crime of genocide has two constituent elements: 1) the *actus reus* (or material element) set out in sub-articles (a) to (e) of Article II; and 2) the *mens rea* (or mental element) of the crime of genocide provided for in the chapeau of the Article.[12]

8. The Court also noted that each material act under the Article caries its own general mental element distinct from genocidal intent.[13] Therefore, in order to establish genocide, the specific intent to destroy the group in whole or in part must be present, in addition to the general intent required for each of the individual material acts involved. It further stated that the destruction of a group "as such" may result from any of the material acts set out in Article II, whether occurring individually or in combination, when directed against at least a substantial part of the group.[14]

9. With regards to the relationship between the Genocide Convention and *jus in bello* (or international humanitarian law), the Court observed that in armed conflict, only acts that are committed with the specific intent to destroy a group in whole or in part can constitute genocide as defined by Article II of the Convention. The Court did, however, state that although it has jurisdiction in the present to case to only make a determination on whether there have been breaches of the Genocide Convention, it is not prevented from considering whether a violation of international humanitarian law has occurred, to the extent that this is relevant for the Court's determination of whether there has been a breach of an obligation under the Genocide Convention.[15]

(b) The Status of the Rohingya:

10. The Court found that the Rohingya of Myanmar are a distinct ethnic group, given that they have a "particular group identity". Since Article II of the Convention limits the scope of the prohibited acts to those directed against a "national, ethnical, racial or religious group, as such", the Rohingya qualify as a protected group for the purposes of Article II.[16]

[12] Ibid, paragraph 286.
[13] Ibid, paragraph 287.
[14] Ibid, paragraphs 288-289.
[15] Ibid, paragraphs 296-300.
[16] Ibid, paragraph 310.

(c) Article II (a): killing of members of the group:

11. According to the Court, a killing, under Article II(a), is intentional if the perpetrators meant to cause the death of a victim or acted with the knowledge that death was a likely outcome of the act or omission in question. This means that deaths resulting from negligence or gross negligence are not included in the sub-article.[17] Additionally, given the fact that the crime of genocide requires that a perpetrator intend to destroy the protected group in whole or in part, not merely one or more individual members, Article II(a) requires that the harm in question must be committed at a certain scale in order for the material element enumerated in the sub-article to be satisfied. The Court did, however, emphasize here that, other than Article II (c), the material elements under Article II do not, in and of themselves, require the demonstration of any quantitative impact on the group. What must be demonstrated is that the acts fall under one of the provisions of the Article and that one or more victims or members of the protected group in question.[18]

12. The Court found that the facts establish that Myanmar's security forces committed large-scale killings of members of the protected group during the course of the 2017 clearance operations. Myanmar's security forces intentionally killed members of the protected group on a large scale in the course of the clearance operations, and that the actus reus set forth in Article II (a) of the Convention is established.[19]

(d) Article II (b): causing serious bodily or mental harm to members of the group:

13. The Court observed that acts committed against members of a protected group would only fall within the scope of Article II(b) if they result in physical or mental harm that is "serious". The harm need not be "permanent and irremediable". Rape and other forms of gender-based and sexual violence can potentially constitute the actus reus of genocide within the meaning of Article II (b). Although forcible displacement does not in and of itself inflict serious mental harm for the purposes of the actus reus of genocide, the circumstances of such forcible displacement, taken together, can cause serious mental harm within the meaning of Article II (b). The Court found that members of the Rohingya experienced serious mental harm as a result of their forced displacement.[20]

14. Regarding the requisite general intent for Article II(b) found that, conservatively, the above-mentioned acts were committed by the security forces of Myanmar with the knowledge that they would likely lead to serious mental harm to the Rohingya. This, in the Court's view, meant that the acts in question were intentional within the meaning of Article II(b). The Court also found that, as a whole, the above-mentioned actions of the security forces of Myanmar resulted in a grave and long-term disadvantage to the ability of members of the Rohingya group to lead a normal and constructive life, amounting to serious mental harm within the meaning of Article II (b).[21]

(e) Article II (c): deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part:

[17] Ibid, paragraph 315.
[18] Ibid, paragraph 316.
[19] Ibid, paragraphs 317-318.
[20] Ibid, paragraphs 325-333.
[21] Ibid, paragraphs 334-337.

15. The material act set out in Article II(c) prohibits a State from committing acts that would deliberately inflict conditions that, objectively, are capable of causing the death, over time, of at least a substantial part of the protected group.[22] In order to determine the conditions of life relevant to the material act set out in the article in the absence of direct evidence, the Court would engage in an "overall factual assessment" that would account for all the relevant conditions of life inflicted on, at least, a substantial part of the group in question.[23]

16. The Court emphasized that the threshold for the establishment that conditions of life have been deliberately inflicted that are objectively capable of causing the death of all or a substantial part of the members of the protected group is demanding. The Court was not convinced that the evidence sufficiently established that the restrictions on movement and deprivation of access to food and medical care described by the Applicant were objectively capable of bringing about the ultimate death of a substantial part of the members of the protected. It also found that the circumstances of the 2017 clearance operations themselves, which involved extreme violence over a concentrated period of time, did not impose conditions of life of the character contemplated by Article II(c).[24]

(f) Article II(d): imposing measures intended to prevent births within the group:

17. Article II(d) encompasses measures that are intended to prevent the group in question from living and reproducing normally. Article II(d) requires a finding that the measures imposed are intended to prevent births within the group and are objectively capable of doing so. The language provided in the article, however, does not require establishing that the measures actually succeeded in reducing the birth rate of the group. Although a consideration of the scale of, or actual, impact on the birth rate could be relevant in determining the mental element included in the article, they do not form any specific requirements under Article II(d).[25]

18. The Court found that, when taken as a whole, the restrictions on marriages and births on Rohingya in Maungdaw Township, where nearly 500,000 Rohingya resided, the denial of legal registration for Rohingya children and the commission of at least 1,834 acts of rape targeting the Rohingya population during the 2017 clearance operations, when viewed in the context of the Government's messages regarding uncontrolled Rohingya population growth, established an intent to impact the capacity of members of the Rohingya community to reproduce normally and, thus, an intent to prevent births within the group.[26]

[22] Ibid, paragraph 338.
[23] Ibid, paragraph 351.
[24] Ibid, paragraph 355.
[25] Ibid, paragraph 360-362.
[26] Ibid, paragraph 363.

(g) Genocidal Intent:

(1) Meaning of "In Part":

19. The Court noted that its own jurisprudence and that of international criminal tribunals identified three elements relevant to the assessment of whether the targeted part of the group is substantial and thus comes within the meaning of the Convention[27]:
    a) *Quantitative* element: namely, the numerical size of the targeted part of the group, which "should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group".
    b) *Geographic* element: consideration of "the area of the perpetrators' activity and control, as well as the possible extent of their reach".
    c) *Qualitative* element: the "prominence" or "emblematic" nature of the targeted portion within the group.

20. It is worth noting that the conditions outlined are not exhaustive, nor do all of them need to be met in order to establish that the targeted part of the group is substantial. The Court did, however, emphasize that the quantitative criterion is "an essential starting point" and must be given priority.[28]

21. Following the establishment that the material element of genocide under Article II (a), (b) and (d), account must be taken of all members of that group who were targeted by any of the relevant material acts in order to ascertain the numerical size of the targeted part of the protected group to assess whether it is significant enough in a quantitative sense.[29]

22. The Court found that at least some of these acts can be understood as targeting the entire Rohingya population in northern Rakhine State. Thus, it found that the targeted part of the protected group is the approximately 815,000 Rohingya who lived in northern Rakhine State prior to the 2017 clearance operations. The Court therefore considered that this number is clearly significant both in absolute terms and in relation to the overall Rohingya population in Myanmar.[30]

(2) Establishing Genocidal Intent:

23. The Court noted that its jurisprudence and that of international criminal tribunals indicate that genocidal intent may be inferred from an array of different factors, without necessarily requiring a prior finding that a pattern of conduct is established. It also noted that the circumstantial evidence that it may consider in identifying the existence of genocidal intent is not limited to conduct that constitutes the material acts under Article II of the Genocide Convention.[31] Additionally, the Court would assess the evidence holistically in order to establish whether genocidal intent may be inferred from Myanmar's conduct. In cases such as the present one, where the Court drew inferences from circumstantial evidence, genocidal intent must be "the only reasonable inference" from the facts.[32]

(3) Relevant Factors in Establishing Inference of Genocidal Intent:

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[27] Ibid, paragraph 375.
[28] Ibid, paragraph 375.
[29] Ibid, paragraph 379.
[30] Ibid, paragraphs 379-380.
[31] Ibid, paragraph 387.
[32] Ibid, paragraph 389.

24. The Court based its assessment of the existence of genocidal intent in the present case on the following factors: (a) the general context, including the perpetration of other culpable acts systematically directed against the Rohingya; (b) the selective targeting of the Rohingya; (c) the perpetration of acts that violate the foundations of the Rohingya group; and (d) the systematic nature and the scale of Myanmar's actions.[33]

25. Regarding (a), the Court highlighted four elements of Myanmar's conduct that were pertinent in this respect. They include (i) the long-standing legislative and other forms of discrimination against the Rohingya; (ii) the prevalence of anti-Rohingya hate speech; (iii) military operations targeting the Rohingya prior to 2017; and (iv) the forcible displacement of the Rohingya population during and after the 2017 clearance operations. The Court considered these to constitute both part of the relevant general context and other culpable acts that were systematically directed against the Rohingya.[34]

26. Regarding (b), the Court, citing the 2015 Croatia Judgment, stated that the specific targeting of a group is an important factor when attempting to establish genocidal intent. The selective targeting of the Rohingya was manifested in two distinct ways: (i) through the selective targeting of Rohingya villages and individuals during the clearance operations; and (ii) through the selective burning and razing of Rohingya villages during and after the clearance operations, combined with the construction of other infrastructure and the organized resettlement of non-Rohingya communities in areas where Rohingya had formerly lived.[35]

27. Regarding (c), this factor includes the examination of matters relating to "the nature, extent and degree of the injuries caused" to the protected population. Under this category, the Court identified two attributes of the conduct of Myanmar's security forces that warrant particular emphasis: (i) the extent and manner of the sexual violence committed against the Rohingya; and (ii) the targeting of children.[36]

28. Regarding (d), systematic actions involve planning and organization in order to direct operations at a particular group and geographic area. The evidence established the existence of many elements pointing to a "consistent pattern of attacks" during the 2017 clearance operations. The Court, thus, found that the conduct of Myanmar's security forces during the clearance operations can be considered as systematic. Additionally, while a high relative number of deaths may well be an important factor from which to infer genocidal intent, a comparatively lower percentage of deaths does not, by itself, necessarily preclude a finding of genocidal intent. The Court noted that a reasonable inference of genocidal intent does not depend on evidence that the perpetrators made every effort to maximize the level of harm that they caused to the protected group. As such, the Court found that the fact that Myanmar did not take every opportunity it had to destroy members of the Rohingya group does not preclude an inference of genocidal intent. The Court thus concluded that on the basis of the evidence before it, there exists a reasonable inference that the security forces of Myanmar acted with genocidal intent.[37]

[33] Ibid, paragraph 397.
[34] Ibid, paragraph 399.
[35] Ibid, paragraph 410.
[36] Ibid, paragraphs 421-422.
[37] Ibid, paragraphs 423-426.

(4) "Only reasonable inference" test:

29. The Court stated that "*in order to infer the existence of dolus specialis from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question*". The "*only reasonable inference*" standard is a general test under international criminal law that is applicable in instances where inferences are drawn from circumstantial evidence. The only reasonable inference standard means that the inference drawn should be capable of explaining all of the evidence, taken together. When some elements of the evidentiary record may allow additional intentions to be inferred, but the totality of the evidence can only be explained by the perpetrator's genocidal intent, the only reasonable inference standard is met.[38]

30. In reaching such a determination, the Court considered the parties' competing interpretations of the evidence, addressing possible alternative inferences. The Court found a geographical and temporal correlation between ARSA attacks and the clearance operations that followed. The Court, however, noted that a number of characteristics of the clearance operation were inconsistent with an intent to carry out counter-insurgency operations. For example, there was no evidence before the Court that, in the conduct of the clearance operations, Myanmar distinguished between civilians and alleged ARSA fighters. Additionally, the execution of Rohingya men and boys in some locations, the widespread sexual violence, the targeting of children and babies, the methodical burning of villages and attacks on fleeing civilians are not consistent with an intent to conduct counter-insurgency operations. The Court thus concluded that the intention of conducting genuine counter-insurgency operations does not constitute an alternative reasonable inference.[39]

31. Additionally, regarding Myanmar's suggestion that it is reasonable to infer from the evidence that Myanmar's intent in carrying out the clearance operations was the forcible displacement of the Rohingya, the Court noted that it and international criminal tribunals observed that forcible displacement and genocide may occur in parallel. The Court found no evidence in the record of any effort or plan by the Myanmar Government to transfer or evacuate the Rohingya population, and Myanmar's actions also did not indicate such an intention.[40]

32. With regards to Myanmar's suggestion that an intention to punish the Rohingya population could constitute an alternative reasonable inference in this case, the Court stated genocidal intent is likely to be accompanied by an intent to punish, particularly in the context of collective punishment. The Court also found that the scale and nature of Myanmar's actions and the methods it employed went well beyond what would be required to punish the population and are instead characteristic of an intent to destroy a substantial part of the group.[41]

33. On the basis of the above, the Court was of the view that the only reasonable inference that can explain Myanmar's actions is an intention to destroy a substantial part of the protected group, namely the Rohingya population in northern Rakhine State.[42]

[38] Ibid, paragraphs 438-443.
[39] Ibid, paragraphs 450-453.
[40] Ibid, paragraphs 454-460.
[41] Ibid, paragraphs 463-466.
[42] Ibid, paragraph 467.

B. Other obligations under the Convention

34. The Gambia also contended that Myanmar had breached the Convention in respect of (i) its obligation to prevent genocide under Article 1, (ii) it having incited genocide directly and publicly contrary to Article III(c), (iii) its obligation to punish acts under Article IV, and (iv) its obligation to enact necessary legislation under Article V. The following takes each in turn.

(i) The obligation to prevent genocide under Article 1

35. The Court referred to its earlier jurisprudence in the Bosnia Judgement finding that the obligation to prevent under Article 1 applies to any act punishable under Article III with the obligation arising at the "*instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed*."[43] To determine "*serious risk*", the Court needed to determine the material and mental elements of genocide together with other elements of the relevant provisions of Article III. The obligation to prevent in particular will not arise, however, without a serious risk of the presence of genocidal intent.[44]

36. The Court found that if a State is determined to be responsible for genocide then it will "necessarily" have breached the obligation to prevent those same acts thus there is no need for a separate Court determination. The same reasoning extends to the responsibility for other offences in Article III to which the duty to prevent applies also.[45] But note that a finding that genocide has in fact occurred is not a condition in order for a State to be held responsible for breaching the duty to prevent the same.[46]

37. The Gambia contended, however, that because non-Rohingya civilians had acted alongside Myanmar's security forces, albeit not under its instruction, direction or control, this claim is not subsumed by the finding that Myanmar itself is responsible for committing genocide.[47] In this respect, the Court determined it could not conclusively determine whether the non-Rohingya civilians partaking in the clearance operations had themselves acted with genocidal intent given the limited evidence in the record. Notwithstanding this, the Court's conclusion that such civilians had partook in the clearance operations where acts of genocide were committed by Myanmar's security forces and that the acts of civilians posed a serious risk of genocide remained unaffected.[48]

38. Accordingly, the Court concluded that Myanmar had violated its obligation under Article 1 and that "*Myanmar knew or should have known of a serious risk of acts of genocide being committed by non-Rohingya civilians alongside its security forces during the 2017 clearance operations, that it had the means to take action to prevent such acts and that it manifestly refrained from using them*."[49]

[43] Ibid., paragraph 478.
[44] Ibid., paragraph 479.
[45] Ibid., paragraph 480.
[46] Ibid., paragraph 487.
[47] Ibid., paragraph 481.
[48] Ibid., paragraphs 484, 486.
[49] Ibid., paragraph 488.

(ii) Direct and public incitement to commit genocide under Article III(c)

39. As explained above, the Court's determination that the State itself is responsible for incitement of its own agents or organs to commit genocide under Article III(c) is subsumed by the finding that the State itself has committed genocide. The Gambia's contention that Myanmar may have incited private actors, whose conduct is not attributable to the State, to commit genocide is not subsumed by this finding, however. [50]

40. The Court noted that a State is responsible for direct and public incitement when a person or organ whose conduct is attributable to the State communicates in public, to an "*indeterminate group*" of persons, messages that directly prompt, encourage or provoke the commission of genocide. The mental element requires the intent to directly and publicly incite other actors to commit genocide meanwhile presupposing a genocidal intent on the speaker's part.[51] Applying this, the Court concluded The Gambia has not established that Myanmar violated its obligation under Article III(c) by directly and publicly inciting genocide against the Rohingya by private actors.[52] Specifically:

    40.1 With respect to certain speeches delivered by Senior General Hlaing, the President of Myanmar and formerly commander in chief of Tatmadaw, the Court opined that these messages were directed primarily at the Myanmar security forces and other State agents and organs, rather than to directly incite private actors.[53]

    40.2 With respect to the Facebook military network, Myanmar's most widely used social media network at the time of the clearance operations,[54] the Court opined the Facebook military network posts were made by those whose conduct is attributable to Myanmar, "*that the posts were broadly and publicly disseminated to the civilian population and the messages targeted the Rohingya as a group*." Whilst the Court considered that some messages sought to encourage the non-Rohingya population to engage in violence against the Rohingya, the Court was not persuaded, that the evidence established that the posts were specifically intended "*to destroy the group in whole or in part or constituted a direct appeal for the commission of genocide, or that the intended audience would have understood the messages as such*."[55]

(iii) Obligation to punish acts prohibited under Article III

41. The State's obligation to punish acts prohibited under Article III includes a duty to investigate, prosecute and punish. Insofar as investigation, the Court observed, *inter alia,* that this must be conducted in "*good faith in a manner designed to identify violations and bring responsible persons to justice*".[56] The duty is one of "due diligence" and arises as soon as there are "reasonable grounds" to suspect that acts punishable under Article III have been committed.[57] Insofar as prosecution and punishment, the Court observed that the obligation to investigate, prosecute and punish genocide applies to acts under Articles 2 and 3 only. Thus, unless genocidal intent is included within a State's

[50] Ibid., paragraphs 490-491.
[51] Ibid., paragraphs 497-498.
[52] Ibid., paragraph 506.
[53] Ibid., paragraph 502.
[54] Ibid., paragraph 161.
[55] Ibid., paragraph 505.
[56] Ibid., paragraph 516.
[57] Ibid., paragraph 515.

domestic criminal law, together with the other constituent elements of the crime of genocide, enforcement of the same will not satisfy this obligation.[58]

42. Moreover, the Court noted that unlike (ii) above, however, the State's duty to punish acts is not subsumed by a finding that a State has committed genocide. Equally, the obligation to punish arises when any enumerated offence in Article III occurs, not just when genocide happens, and extends to acts of private actors, with no need for genocidal intent on the State's part needing to be established.[59]

43. Applying the duties to investigate, prosecute and punish, the Court concluded "*Myanmar had failed to investigate and, if warranted, to prosecute and punish persons … under Article III in a competent tribunal, and to impose effective penalties commensurate with the severity of the crime*."[60] Amongst other things, the Court notably observed:

43.1 The various commissions established by Myanmar regarding the situation in Rakhine, some of which did not have a mandate to investigate alleged crimes or make findings of individual responsibility, were therefore not capable of fulfilling Myanmar's investigative obligation regarding the clearance operations.[61]

43.2 The various entities established by Myanmar including the Inquiry Board, the Independent Commission of Enquiry (the "**ICOE**"), and the Criminal Investigation and Prosecution Body, all of which had an investigative mandate,[62] did not conduct investigation nor prosecution of individual members of Tatmadaw. This is in contrast to the Independent International Fact-Finding Mission on Myanmar (the "**FMM**"), established by the United Nations, to investigate alleged abuses by the Myanmar security forces. This subsequently found "sufficient information" to bring genocide proceedings in respect of certain individuals. As such, at least from that point, Myanmar had cause to suspect genocide may have been committed within the territory thus triggering its duty to investigate under the Convention and conduct investigations – which it did not.[63]

43.3 The ICOE recommended that Myanmar must conduct the "necessary investigations" but the evidence established that there had been no systematic investigation into the Myanmar military's crimes including as to the military command's role.[64] Further, whilst the ICOE had stated it had investigated the presence of genocidal intent, this was not criminalized until 2021 thus there would have been no offence of genocide to investigate. There equally were no further investigations after then into punishable acts under the Convention.[65]

(iv) Obligation to enact necessary legislation under Article V

44. The State's obligation under Article V to adopt legislation criminalizing genocide as a "distinct offence" comprising all the constituent elements of Articles 2 and 3, including especially genocidal

[58] Ibid., paragraph 520.
[59] Ibid., paragraph 509.
[60] Ibid., paragraph 554.
[61] Ibid., paragraph 533.
[62] Ibid., paragraph 534.
[63] Ibid., paragraphs 545-546.
[64] Ibid., paragraph 548.
[65] Ibid., paragraph 549.

intent,[66] is an "autonomous obligation" irrespective of Article III.[67] Myanmar later enacted such legislation, the Penal Code 2021, but the Court considered this failed to meet Myanmar's obligations to enact "*the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III*".[68]

45. The Court's reasoning was as follows:

    45.1 There is a "material disparity" between the Penal Code and Article II(d) of the Convention with the Penal Code including a limitation which defines the *actus reus* of genocide as applying to whoever "*[i]mposes measures, not in accordance with any existing laws, intended to prevent births within the group*". This therefore permits Myanmar to impose measures which Article II(d) prohibits thereby creating the possibility that conduct, whilst constituting genocide under the Convention, will not be punished under the Penal Code.[69]

    45.2 The Penal Code address the *actus reus* of genocide only (Article III(a)) and does not facially implement the provisions of Article III(b) to (e) of the Convention, including conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, nor complicity in genocide.

C. Legal consequences and remedies

46. In light of the Court's determination that Myanmar had breached its obligations under the Convention, the Court addressed the legal consequences that flow and the remedies sought. It first determined that its jurisdiction extended to all of The Gambia's claims and remedies;[70] and second, that The Gambia was entitled to invoke Myanmar's obligation to (a) offer assurances and guarantees of non-repetition, and (b) make reparation in the interest of the Rohingya harmed by Myanmar's breaches.[71]

47. The Court next examined the remedies sought by The Gambia in respect of cessation, assurances and guarantees of non-repetition, and reparation.

    47.1 With respect to cessation, the Court found it could order this where the breaches were ongoing. Thus, the Court was unable to order cessation regarding Myanmar's direct and public incitement to genocide because this was subsumed by the finding of genocide with the said genocide nor incitement as to the same continuing,[72] but it was able to order cessation regarding Myanmar's failure to enact legislation and failure to investigate, prosecute and punish.[73]

    47.2 With respect to assurances and guarantees of non-repetition, the Court considered that it was appropriate in the circumstances to require that Myanmar: (i) enact legislation giving

[66] Ibid., paragraph 569.
[67] Ibid., paragraph 561.
[68] Ibid., paragraph 574.
[69] Ibid., paragraph 572.
[70] Ibid., paragraph 580.
[71] Ibid., paragraph 590.
[72] Ibid., paragraph 595.
[73] Ibid., paragraph 596.

effect to its obligations under the Convention and that its investigations and prosecutions are genuine and effective; and (ii) impose effective penalties and the restitution measure to protect the Rohingya from discrimination and persecution, including in respect of citizenship. It also referred to additional measures which may be appropriate but notably but did not order these and left these to the choice of Myanmar.[74] Notably, however, the Court considered that ordering the provision of citizenship for all members of the Rohingya group was not appropriate.[75]

47.3 With respect to reparation, the Court noted that the internationally wrongful acts which Myanmar has been found responsible for caused injury to the Rohingya thus Myanmar is obliged to make reparation.[76] But whilst a non-injured or non-affected State may pursue a claim against another for breach of a collective obligation, it may not claim reparation for itself.[77] Rather, the claim must be made in the interest of the Rohingya, the beneficiaries of the obligations breached, as a group and as individual victims.[78] Accordingly:

(a) Insofar as restitution, the Court determined that Myanmar:

> *"(1) allow and facilitate the safe, voluntary and dignified return to their place of residence and reunification of families for the Rohingya who were displaced as a result of the Respondent's wrongful acts, whether they were displaced within Myanmar or abroad;*
>
> *(2) return or replace in kind all individual and collective property of the Rohingya that has been lost or damaged as a result of the Respondent's wrongful acts;*
>
> *(3) facilitate the search for the disappeared and assist in the recovery, identification and reburial with dignity, in accordance with Rohingya traditions, of the bodies of the Rohingya who were killed as a result of the Respondent's wrongful acts;*
>
> *(4) provide for the physical and psychological rehabilitation of the Rohingya who were physically or mentally injured as a result of the Respondent's wrongful acts;*
>
> *(5) ensure the protection of the Rohingya from discrimination and persecution"*[79]

(b) Insofar as compensation, the Court noted that it had not been requested to specify the amount or the modalities of this at this stage.[80] However:

> "*…the Rohingya are entitled to adequate compensation for the injury caused by the violations of Myanmar that have been determined by the Court, in so far as such damage is not made good by restitution.*"[81]

[74] Ibid., paragraph 604.
[75] Ibid., paragraph 603.
[76] Ibid., paragraph 608.
[77] Ibid., paragraph 609.
[78] Ibid., paragraph 610.
[79] Ibid., paragraph 615.
[80] Ibid., paragraph 622.
[81] Ibid., paragraph 621.

V. Comparison with *Bosnia and Herzegovina v. Serbia and Montenegro*

48. This case marks the first time that a State has been held directly responsible for genocide under the Genocide Convention. However, it was not the first time the Court attempted to answer such a question. In the Bosnia Judgement although the Court did find that Serbia violated the Genocide Convention by failing to prevent the 1995 Srebrenica genocide and failing to punish and transfer the perpetrators of that genocide, it did not find that Serbia itself committed Genocide.

49. Bosnia and Herzegovina failed to establish genocidal intent on the part of Serbia and Montenegro. In that case, Bosnia argued that the systemic and widespread nature of the atrocities committed by Serbia demonstrated plans on the part of the latter to destroy Bosnian Muslims as a protected group. The Court considered whether the pattern of conduct presented established intent. It concluded that, on the basis of the evidence before it, the requisite intent could not be established.

50. The question of ethnic cleansing was a factor in those deliberations. Although the removal of a certain ethnic group may involve killings, persecution, and other serious international crimes, the intention to remove a certain population from a region is not identical to the intent to destroy said population as a protected group.

51. Similar to the present case, the Court noted that in order for genocidal intent to be inferred from the acts of a State, the destructive intention had to be the only reasonable inference available from the evidence. The ICJ was not persuaded that this condition had been met for the atrocities committed outside Srebrenica.

VI. Concluding Remarks

52. The Judgement is significant not only because the ICJ found for the first time a State responsible for genocide, but because there are four other pending cases before the ICJ alleging violations of the Genocide Convention including *Ukraine v. Russian Federation*,[82] *South Africa v. Israel*,[83] *Nicaragua v. Germany*,[84] and *Democratic Republic of the Congo v. Rwanda*.[85] The implications of the Judgement on these cases remains to be seen.

[82] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*).
[83] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*).
[84] Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (*Nicaragua v. Germany*).
[85] Alleged Violations of Human Rights by Rwanda on the Territory of the Congo (*Democratic Republic of the Congo v. Rwanda*).