INTERNATIONAL COURT OF JUSTICE
Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands
Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928
Website X YouTube LinkedIn

Summary
Unofficial

Summary 2026/3
19 November 2026

# *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 11 States Intervening)*

## Summary of the Judgment of 19 November 2026

### I. PROCEDURAL AND GENERAL BACKGROUND (PARAS. 1-77)

The Court begins by recalling that the present proceedings were instituted on 11 November 2019, by the Republic of The Gambia (hereinafter "The Gambia") against the Republic of the Union of Myanmar (hereinafter "Myanmar") concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter the "Genocide Convention" or the "Convention").

The Court notes that in its Judgment of 22 July 2022 on preliminary objections, following preliminary objections to the jurisdiction of the Court and the admissibility of the Application raised by Myanmar, it found that it had jurisdiction on the basis of Article IX of the Genocide Convention to entertain the Application filed by The Gambia on 11 November 2019, and that the said Application was admissible.

The Court further recalls that, by two orders dated 3 July 2024 and 25 July 2025, it decided that the declarations of intervention under Article 63 of the Statute submitted by 11 States were admissible in so far as they concerned the construction of provisions of the Genocide Convention.

The Court next describes the historical context in Myanmar which forms the general background of the dispute between the Parties in this case. In particular, it refers to an eruption of violence in 2016 and 2017, during which members of Myanmar's armed forces, known as the Tatmadaw, the Border Guard Police and the Police (referred to collectively as Myanmar's "security forces") conducted a number of armed missions, referred to as "clearance operations", in various localities in Rakhine State, home to a sizeable group referred to in the Judgment as the "Rohingya". According to Myanmar, these operations were necessary in order to counter an insurgency by a group known as the Arakan Rohingya Salvation Army or ARSA.

### II. QUESTIONS OF PROOF (PARAS. 78-131)

The Court observes that questions of proof assume particular significance in the present case because the Parties disagree on the relevant facts. It then considers in turn the questions of burden of proof, standard of proof and the weight of the evidence relied on by the Parties.

**A. Burden of proof** (para. 79)

The Court recalls its established jurisprudence that, "as a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact". For this reason, The Gambia bears the burden of identifying and proving facts to establish the alleged breaches of the Genocide Convention by Myanmar. However, in so far as Myanmar has invoked certain facts in support of its own contentions, it carries the burden of establishing those facts. The Court has stated that the rule that a party alleging a fact bears the burden of proof in respect of that fact "is not an absolute rule applicable in all circumstances. There are situations where 'this general rule would have to be applied flexibly . . . and, in particular, [where] the Respondent may be in a better position to establish certain facts'". While the exercise of such flexibility does not reverse the burden of proof, it may have an effect on the assessment of the evidence, for example, in circumstances where the applicant State lacks access to evidence located in the respondent State's territory owing to the latter's lack of co-operation.

**B. Standard of proof** (para. 80)

The Court must "be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III of the Genocide Convention have been committed, have been clearly established". As regards claims of violations of the obligations to prevent and punish genocide, the Court requires "proof at a high level of certainty appropriate to the seriousness of the allegation". This standard of proof also applies to the alleged violations of obligations under Articles I, IV and VI of the Convention at issue in this case. With respect to the obligation under Article V to enact the necessary legislation to give effect to the provisions of the Genocide Convention, the question for the Court concerns the interpretation to be given to national legislation and, specifically, whether the legislation in force gives effect to the requirements of the Convention.

**C. Evidence relied on by the Parties** (paras. 81-82)

The Court then turns to the evidence relied on by the Parties. In the course of the oral proceedings, the Parties called witnesses and an expert on counter-terrorism, all of whom gave oral testimony. The Parties annexed to their written pleadings several written statements of individuals, drawn from a variety of sources.

The Gambia, in addition, introduced into the record the transcripts of video testimonies of Rohingya witnesses and of persons self-identifying as former Tatmadaw soldiers and further relied on documents produced by the non-governmental organization Legal Action Worldwide (hereinafter "LAW"), and witness statements gathered by the non-governmental organization Fortify Rights. Other evidence relied on by The Gambia includes the reports of the United Nations Independent International Fact-Finding Mission on Myanmar (hereinafter the "FFM" or the "Mission") and the Independent Investigative Mechanism for Myanmar (hereinafter the "IIMM" or the "Mechanism"), reports from other United Nations bodies including the Office of the High Commissioner for Human Rights and the Special Rapporteur on the situation of human rights in Myanmar, as well as satellite images and satellite-based fire detection data from the United Nations Institute for Training and Research (UNITAR) and the United Nations Satellite Centre (UNOSAT). The Gambia also introduced more than 50 reports by non-governmental organizations.

Myanmar, for its part, relied on official documents including population lists, military operational reports and the military's rules of engagement, as well as Myanmar media reports. It also relied, to some extent, on the FFM reports and reports of non-governmental organizations to contradict The Gambia's allegations, while maintaining its reservations concerning the evidentiary value of these reports.

**D. Evidential weight** (paras. 83-131)

The Court recalls that it must make its own determination of the facts that are relevant to the legal obligations at issue. It underlines that, unlike in the 2007 *Bosnia* Judgment, where the Court was able to rely on the decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) as a basis for its own findings on alleged breaches of obligations under the Genocide Convention, in this case, the Court does not have comparable judicial decisions available to support its factual findings and can only rely on the evidence proffered by the Parties to make its own determination of the facts.

**1. Witness testimony and other statements** (paras. 85-96)

The Court recalls that "[i]n determining the evidential weight of any statement by an individual, the Court necessarily takes into account its form and the circumstances in which it was made". These considerations include whether the witness was an interested State official or a disinterested private individual, whether the statement was by a person with direct knowledge of the events and whether it was contemporaneous with the relevant events. The Court will accord evidential weight to statements that are not eyewitness accounts "only where they have been . . . corroborated by credible evidence". The Court has also indicated that the absence of the signatures of the persons who made or took the statements does not always exclude those documents, but the Court must ensure that the statements "faithfully record the evidence actually given by those individuals".

Referring to Myanmar's suggestion that the presence of ARSA in the Rohingya refugee camps in Bangladesh may have made The Gambia's witnesses reticent when giving their testimony, the Court states that, while it will take fear of reprisal into account when evaluating witness evidence, it does not consider that this factor impugns the credibility of The Gambia's witnesses generally.

**(a)** ***Oral witness testimony*** (paras. 87-88)

Concerning the witnesses called by the Parties during the oral proceedings, the Court notes that it has found The Gambia's witnesses credible in their accounts of the particular events to which they testified. Many of the witnesses' key statements were unchallenged in cross-examination. It also considered Myanmar's witness account of the attack on 25 August 2017 at Kha Maung Seik to be consistent with the evidence in the record.

**(b)** ***Written witness testimony and other written statements*** (paras. 89-96)

The Court affirms that there is a substantial difference between the evidential weight to be accorded to unsigned witness statements and that to be accorded to witness statements that were originally signed but have since had those signatures and other identifying details redacted to protect the witnesses' identity. With respect to such witness statements, the Court recognizes that, while redactions seek to protect the identity of victims, they may nevertheless limit the ability of the opposing party to contest the evidence and of the Court to assess it. These redactions may accordingly reduce the evidential weight of a statement, although they do not preclude its consideration altogether.

In this connection, the Court notes that Myanmar identified a limited number of instances where it has been shown that the same witness gave statements to more than one body. Given the large number of interviews conducted by the various organizations and the fact that identifying details were often redacted, the Court recognizes the possibility that certain accounts may have originated from the same witness. However, having carefully assessed the evidence, it does not

consider this to be a widespread characteristic of the witness statements before it. The Court has taken particular care to ascertain, based on the substance of the statements, that where facts have been corroborated by witness statements obtained from different sources, the statements came from different witnesses.

With respect to unsigned witness statements in the record, the Court notes that they represent only a very small portion of the witness statements on which the Court relies.

The Court recalls that the absence of the signatures of the persons who made or took statements does not always exclude such documents, but the Court must ensure that they are faithful records of witness evidence. The Court notes that, in the present case, unsigned witness statements were collected by a non-governmental organization, rather than by an organ of either Party, a circumstance relevant to the assessment of the weight to be accorded to such evidence. While they were unsigned, the witness statements were identified by individual codes and, in the majority of cases, indicated the first names of the witness. The Court further recognizes that some of the alleged acts referred to in the unsigned witness statements, such as sexual violence and mutilation, generally pose challenges for evidence collection. Accordingly, the Court finds that such unsigned witness statements are not without evidential weight. The Court is nevertheless cautious in relying on them, only doing so rarely and where they are corroborated by other, more reliable, evidence.

Concerning the signed written witness statements, the Court concludes that, to a large extent, the written statements are consistent with the oral witness testimony, the factual findings of the FFM's reports and other information before the Court. The Court finds the detailed witness statements that were collected by the IIMM to have considerable evidential weight in light of the IIMM's careful methodology. The Court also notes that both Parties rely on witness statements collected by the IIMM to substantiate their claims.

As the witness statements collected by LAW are less detailed, the evidential weight of these statements is lower than in the case of the IIMM's witness statements. Nevertheless, the Court considers that they generally constitute reliable evidence. The Court further notes that the written statements or affidavits of the three witnesses called by The Gambia to give oral testimony were collected by LAW and were corroborated by the witnesses' oral testimony.

**2. Third-party fact-finding** (paras. 97-120)

**(a)** ***General considerations*** (paras. 97-100)

In evaluating evidence from third-party fact-finding, the Court has generally considered the independence and qualifications of the author, the methodology used in the preparation of the evidence, and the comprehensive nature and overall quality of the evidence.

In accordance with the criteria set out in its jurisprudence, where such evidence is corroborated by other evidence, the Court will accord greater weight to it. Corroboration does not automatically establish weight or credibility, but the absence of corroboration is a factor to be considered when weighing the evidence and assessing credibility. Moreover, the fact that the Court determines that a particular report is entitled to evidential weight does not mean that all its contents have evidential value. The Court will apply its standard criteria in assessing the factual findings of the reports. However, it will not ascribe any probative value to the legal assessments contained therein.

**(b)** ***Reports of the FFM*** (paras. 101-112)

The Court explains that, following its investigations into the 2016 and 2017 events in northern Rakhine State, the FFM produced two major reports, one in September 2018 and the other in

September 2019. The Court notes that the Parties' assessment of the evidentiary value of the FFM reports differs sharply.

Considering that, in making factual determinations, the FFM applied a standard of proof that is lower than the standard of proof that the Court has identified as applicable in this case, the Court has been cautious in assessing the evidential weight of the reports prepared by the Mission. Nevertheless, the Court finds the two major reports prepared by the FFM in general to be a reliable source of factual evidence in light of the following considerations: (1) the FFM employed a rigorous methodology, conducting 1,294 interviews altogether, gathering a broad range of other information and applying appropriate factors to the assessment of the reliability and credibility of each source; (2) the reports were prepared "at the request of organs of the United Nations, for purposes of the exercise of their functions"; (3) many of the factual findings of the reports are extensively based on or corroborated by other — in some cases uncontested — evidence, such as satellite imagery and witness statements; and (4) Myanmar, despite alleging that the reports are unreliable, has not produced evidence of its own that has led the Court to question the reliability of the reports or identified any fundamental inconsistencies between the reports and other evidence on record.

Overall, the Court finds that the FFM's reports sought to provide a comprehensive account of the relevant facts, and that they are based on a rigorous methodology that enabled the FFM to carry out its mandate in an independent and impartial manner. The reports of the FFM demonstrate a level of detail and coverage that is comparable to, and in certain aspects exceeds, that of reports produced by independent fact-finding bodies relied upon by the Court in earlier cases.

**(c)** ***Reports of the IIMM*** (paras. 113-120)

The Court notes that, in accordance with the IIMM's mandate, the Mechanism's analytical reports aim to provide evidence on thematically distinct topics. For this reason, unlike the FFM's reports, the IIMM's reports are not designed to provide a holistic account of the 2017 clearance operations. The Court nevertheless considers them to have considerable evidential weight because of the demanding standard of proof and methodology applied by the Mechanism in collecting the evidence contained in the reports.

**3. Other evidence** (paras. 121-127)

The Court observes that The Gambia relies extensively on satellite imagery and satellite-based fire detection data that was obtained by the FFM with the support of UNOSAT to substantiate its claims about the burning and destruction of Rohingya villages. The Court finds this material to be of considerable evidential weight. It also corroborates other categories of evidence, such as witness accounts and facts recorded in the reports prepared by the FFM and the IIMM. Myanmar did not challenge the use of fire detection data and relied on data from the same sources, alongside satellite imagery, in support of some of its contentions.

The Gambia also relies on other United Nations reports, statements and documents, including reports of the Secretary-General, the Office of the High Commissioner for Human Rights, the Special Adviser on the Prevention of Genocide and the Special Rapporteur on the situation of human rights in Myanmar. The Court has carefully analysed these materials in accordance with the criteria it applies generally to reports from official or independent bodies and it has relied on their contents where appropriate.

Concerning the reports prepared by non-governmental organizations, in its prior judgments on the application of the Convention, the Court duly considered the reports of non-governmental organizations although it did not accept them as "conclusive proof of the facts alleged". The Court further notes that, in the present case, reports by non-governmental organizations were submitted and

referenced by both of the Parties. They were typically prepared on the basis of interviews with Rohingya survivors, as well as with experts and other relevant sources. The Court will thus take these materials into account in this case, recognizing that they generally have lower evidential weight than other categories of evidence discussed above.

Myanmar, for its part, also relies on its own governmental statements, documents and reports, including statements collected from military personnel and from people currently held in Myanmar's custody. The Court recalls that in a previous contentious case, it considered that declarations made by the authorities of a State party must be subject to "critical scrutiny". In this case, the Court notes that some features of the documents relied on by Myanmar raise concerns about their reliability as evidence. For these reasons, in the Court's view, aspects of Myanmar's governmental documents and reports are to be considered with caution, except to the extent that they are independently corroborated by credible evidence or present evidence "contrary to the interests or contentions of the State . . . or . . . relating to matters not controverted".

Finally, the Court turns to the expert evidence provided by The Gambia. The Court has considered the evidence given by the expert to the extent that the subject-matter concerned was within both his mandate and his expertise. It cannot attach any evidential weight to the expert's legal assessment and conclusions extending beyond the question whether Myanmar's actions during the clearance operations, as portrayed by the FFM, were conducted in a manner consistent with the "standards of counter-insurgency operations".

**4. Myanmar's non-co-operation** (paras. 128-131)

The Court notes that Myanmar did not co-operate with the two investigative bodies established by the United Nations Human Rights Council, refusing to allow entry into its territory for access to evidence and witnesses there, and failing to respond to requests for information.

As a general rule, a State is not obliged to grant United Nations mechanisms access to its territory. The Court has found, however, that in cases where one of the parties exercises exclusive control over a territory, rendering the other party "unable to furnish direct proof of facts giving rise to responsibility", the latter State "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence".

In the present case, neither the Applicant nor the United Nations fact-finding bodies on which The Gambia substantially relies had access to evidence within the territory where the alleged acts occurred. The Court observes that The Gambia is thus at a disadvantage with respect to direct access to certain kinds of evidence. Accordingly, in the assessment of the evidentiary record, the Court takes into account both Myanmar's failure to genuinely investigate the alleged atrocities itself and its refusal to allow access to evidence and witnesses in its territory and to respond to the requests of the fact-finding bodies established by the United Nations to investigate the matter. The Court may therefore have more liberal recourse to inferences of fact in relation to events with respect to which Myanmar has largely or wholly exclusive knowledge and for which it has not provided a satisfactory and convincing explanation.

## III. EXAMINATION OF FACTUAL EVIDENCE (PARAS. 132-282)

Much of the evidence in the record is contested between the Parties. The Court accordingly finds it appropriate to set forth its assessment of the central facts in the case, applying the criteria identified in the previous section with respect to the probative value and weight to be given to the evidence and the inferences to be drawn therefrom. The Court does not consider it necessary to examine every incident reported, nor to compile an exhaustive list of the allegations. Rather, it is sufficient to examine those facts which, viewed in their context, would elucidate whether acts

prohibited under the Genocide Convention were committed. The Court will therefore focus on the clearance operations of 2017 and related events.

## A. Historical treatment of the Rohingya in Myanmar (paras. 134-168)

### 1. Discriminatory laws and policies (paras. 134-152)

#### (a) *Citizenship* (paras. 134-142)

The Court begins by recalling that the Rohingya have been present and have maintained civil, economic, social and political connections in what is now Myanmar, including Rakhine State, for generations.

Having examined developments in the legislative framework governing the granting of citizenship in Burma/Myanmar, the Court notes that the manner of granting access to citizenship for the Rohingya through legal and administrative measures was discriminatory and contributed to the progressive erosion of the political and civil rights of the Rohingya in Rakhine State in the decades leading up to the 2017 clearance operations, leaving the group marginalized and particularly vulnerable.

#### (b) *Restrictions on marriage, births and birth certificates* (paras. 143-147)

The Court notes that the evidence establishes that in 1993, the Maungdaw Township border security force adopted a temporary regional order imposing distinct permission requirements for "Islamic" marriages. A subsequent regional order in force from 2005 to 2018 (Maung Daw Township Peace and Development Council, Regional Order 1/2005 (1 May 2005)) reiterated separate permission requirements for Islamic marriages and established additional requirements.

Regional Order 1/2005 further provided that "those who have permission to marry must limit the number of children, in order to control the birth rate". The birth restrictions were not limited to Muslims. The regional authorities, however, officially described the order's marriage and birth limitations as "Processes for Controlling Bengali Population".

The Court observes that, although the birth rate in northern Rakhine State was high, it was not the highest in the country, and Myanmar did not impose similar restrictions in other regions or on other groups.

With respect to the registration of births and the issuance of birth certificates, evidence in the record indicates that Myanmar stopped issuing birth certificates for Rohingya in the 1990s. The evidence before the Court also establishes the difficulty of having Rohingya children included on household lists, the main form of documentation for Rohingya families in Rakhine State. Such inclusion was a prerequisite for the issuance of identity documents, access to education, and permission to travel within townships and to marry.

#### (c) *Other restrictions* (paras. 148-152)

The Court finds that Rohingya were subjected to other restrictions affecting numerous aspects of their daily lives. These included severe limitations on movement for Rohingya both between and within townships in northern Rakhine State. Access to livelihoods, food, healthcare and other services for the Rohingya population was correspondingly constrained.

The Court notes that restrictions on travel between townships also applied to the Kaman Muslims, despite their being recognized as Myanmar citizens, indicating an application of the policy to Muslims generally.

Restrictions were also imposed on humanitarian aid to the region following the 2016 events.

The Court notes that the Advisory Commission on Rakhine State, established in 2016 by Myanmar and headed by former United Nations Secretary-General Kofi Annan, found in 2017 that living conditions in the internally displaced persons (IDP) camps "remain poor, with overcrowded shelters and inadequate access to services and livelihood opportunities", while "Muslim IDPs are almost entirely deprived of freedom of movement".

**2. Hate speech** (paras. 153-168)

The Court next examines the allegations relating to anti-Rohingya speech, particularly messages emanating from the Myanmar military, including a military network on Facebook. Both Parties refer to hate speech in their submissions, without defining such speech. While there is no international legal definition for hate speech, for purposes of analysing the arguments of the Parties and the record in this case, the Court considers hate speech to involve pejorative language that was derogatory towards or that dehumanized the Rohingya.

The record establishes that, following an outbreak of sectarian and intercommunal violence in 2012, discourse that disparaged and dehumanized the Rohingya increased, including in the media and in the sermons of monks. In varying ways, the messages portrayed the Rohingya community as deceitful, threatening and a legitimate target of violence. Such speech was also propagated by State authorities, as described below.

**(a)** ***Senior General Min Aung Hlaing and the Tatmadaw*** (paras. 156-160)

The then Commander-in-Chief of the military, Senior General Min Aung Hlaing, delivered a series of speeches both during and after the 2017 clearance operations.

The Court considers that the Senior General's messages, as reported, were capable of fuelling hatred against the Rohingya.

**(b)** ***Facebook military network*** (paras. 161-168)

The Court observes that Facebook was Myanmar's most widely used social media network at the time of the clearance operations, with approximately 14 million resident users in 2018. In August 2018, Facebook Inc. (known as Meta since 2021) removed 43 Pages containing public content from the platform.

The messages posted on these pages dehumanized the Rohingya, portrayed them as foreign infiltrators and as violent and existential threats to the purity and existence of other ethnic groups and to Buddhism, and at times encouraged and justified violence against them.

**B. Events of 2016 to 2017** (paras. 169-178)

The Court then turns to the facts regarding the events of 2016 to 2017 in northern Rakhine State.

**1. Arakan Rohingya Salvation Army** (paras. 170-174)

The Court observes that ARSA first emerged in northern Rakhine State in the wake of the sectarian violence in 2012, with the stated objective of "defend[ing], salvag[ing] and protect[ing] [the] Rohingya community in Arakan". ARSA's structure, including its senior leadership, is not well-documented, but evidence shows that ARSA had a network of village "cells" in northern Rakhine State, as well as a hierarchy of leadership, some of whom appear to have been based in foreign countries and may have benefited from some amount of foreign funding. ARSA's activities in 2016 and 2017 also evidence its ability to co-ordinate its members.

The Court finds that, although ARSA possessed limited weapons capabilities and to a significant extent comprised individuals with little or no military training, by August 2017 it appears to have been sufficiently organized to be capable of conducting approximately 30 co-ordinated violent attacks and mobilizing several thousand Rohingya villagers to participate.

**2. Events leading up to the August 2017 clearance operations** (paras. 175-178)

The Court accepts Myanmar's contention that on 9 October 2016, ARSA attacked three Border Guard Police headquarters, with the stated objective of acquiring weapons. Those attacks resulted in the deaths of nine police officers and eight assailants. Myanmar's first clearance operation was in response to the October 2016 attacks. The resulting violence and conflict led to the displacement and flight of approximately 87,000 Rohingya to Bangladesh. Following ARSA's 2016 attacks, at least 416 individuals suspected of involvement in the ARSA attacks were arrested, investigated, charged and prosecuted.

ARSA killed or abducted Rohingya informants both before and after 9 October 2016, and such practices increased in 2017. The Court notes that Myanmar did not declare ARSA a terrorist organization prior to 25 August 2017.

On 25 August 2017, ARSA carried out co-ordinated attacks on at least 30 security force outposts across northern Rakhine State, with further attacks occurring in the days that followed. The Court observes that, while these attacks primarily targeted police and military outposts, there is credible evidence that ARSA also carried out several attacks against civilians.

The record supports Myanmar's contention that in the days following the co-ordinated attacks of 25 August 2017, the ARSA commander-in-chief issued a message ordering the burning of non-Rohingya villages.

## C. Myanmar's clearance operations (paras. 179-282)

The Court then turns to the clearance operations launched by the Myanmar security forces in Rohingya villages in northern Rakhine State in August 2017.

The clearance operations began on 25 August 2017, the day the ARSA attacks commenced.

Both ARSA's offensive and Myanmar's response caused residents to flee into nearby villages, some of which were in turn targeted by clearance operations.

Myanmar contends that the clearance operations officially ended on 5 September 2017 but acknowledges sporadic incidents thereafter. The evidence establishes that, after that date, Myanmar continued to engage in the burning and destruction of villages targeted by clearance operations.

The Court does not examine every alleged incident, finding it sufficient to examine those facts that may elucidate whether acts prohibited under the Genocide Convention were committed. The

Court accordingly examines the events in the three locations primarily addressed by the Parties, and other locations identified as sites of grave incidents during the clearance operations, before finally assessing the broader evidence regarding the common aspects of Myanmar's clearance operations.

**1. Events in Min Gyi, Chut Pyin and Maung Nu** (paras. 186-224)

**(a)** ***Min Gyi (Tula Toli)*** (paras. 186-199)

Min Gyi was a majority Rohingya village situated in Maungdaw Township. The Court finds that on the morning of 30 August 2017, the Tatmadaw's 99th Light Infantry Division conducted a clearance operation during which it engaged in the indiscriminate and targeted killing of civilians, including children and persons fleeing; separated and executed men; committed widespread sexual violence; and burned people, bodies and homes, while leaving the settlement inhabited by the Rakhine ethnic group largely untouched.

While the Court is unable to determine the precise number of deaths at Min Gyi on 30 August 2017, the FFM found to be credible information compiled by the Rohingya refugee community that 750 people were killed. The Court finds these figures supported by the evidence.

**(b)** ***Chut Pyin (Shuap Praung)*** (paras. 200-212)

Chut Pyin was a Rohingya village situated within a village tract of the same name in Rathedaung Township. On 27 August 2017, the Tatmadaw's 33rd Light Infantry Division conducted a clearance operation in Chut Pyin. The Court finds that the operation was characterized by the encirclement of the Rohingya civilian population, indiscriminate and targeted killings, including of children, the separation and killing of men, sexual violence, shooting of villagers who were fleeing, and the deliberate burning of Rohingya homes, while the nearby Rakhine village was left intact.

Rohingya refugees in Bangladesh prepared a list indicating that 358 persons were killed, which the FFM considered consistent with the information it had received. The list also indicated that 127 children aged five or under were killed, 19 women were raped, 94 people lost limbs and 57 people remained unaccounted for. While the Court cannot confirm these estimates, they are credible in light of the evidence at the Court's disposal.

**(c)** ***Maung Nu (Monu Para)*** (paras. 213-224)

Maung Nu is a village in Buthidaung Township, situated near two military bases under the Western Command of the Myanmar military. A company of the 564th Light Infantry Regiment conducted a clearance operation in Maung Nu on 27 August 2017. The Court finds that the operation was characterized by indiscriminate shooting, the separation and execution of men and boys, sexual violence and the burning of the village.

The number of deaths in Maung Nu is difficult to estimate. A non-exhaustive list of the dead compiled by the Rohingya refugee community identified at least 82 people killed, and the FFM estimated that up to 100 people were executed in Maung Nu. The Court finds these figures supported by the evidence.

**2. Other locations** (paras. 225-247)

The Court then addresses six additional locations which the FFM identified as sites of grave incidents during the clearance operations and which it subjected to specific and detailed examination, namely Gu Dar Pyin (Gudam Para), Inn Din (Aung Dung), Koe Tan Kauk (Ko Tan Kaung) and

Chein Khar Li (Ku Lar), Kyauk Pan Du (Shitar Fawrikka), Ah Lel Than Kyaw (Hassu Rata) and Myin Hlut (May Rulla).

**3. Assessment of common aspects of the clearance operations** (paras. 248-282)

The Court then turns to assessing the broader evidence concerning Myanmar's conduct during the clearance operations. The Court observes that the manner in which the operations were carried out reveals a degree of consistency across a wide geographic area.

**(a)** ***Deaths*** (paras. 249-253)

The Court considers that the FFM's estimate of at least 10,000 deaths is supported by the record. The evidence before the Court demonstrates the pervasive and lethal nature of the violence inflicted upon the Rohingya population, and establishes that thousands of Rohingya civilians were killed by the Myanmar security forces during the clearance operations.

**(b)** ***Sexual violence*** (paras. 254-258)

Based on the record before it, the Court concludes that widespread acts of gang and mass rape and other forms of sexual violence against the Rohingya were perpetrated by the Myanmar security forces in northern Rakhine State.

**(c)** ***Attacks on children*** (paras. 259-261)

The Court finds that widespread acts of extreme violence were perpetrated by the Myanmar security forces against children in northern Rakhine State in the course of the clearance operations.

**(d)** ***Attacks on fleeing Rohingya and conditions on the flight to Bangladesh*** (paras. 262-270)

Based on the evidence before it, the Court is convinced that, in addition to the extreme hardship of the journey, the Myanmar security forces systematically shot at Rohingya as they were fleeing the clearance operations in villages, and that a significant number of Rohingya were subjected to killing, rape and other attacks or threats of attack during the flight to Bangladesh.

**(e)** ***Destruction of villages and their subsequent replacement with new infrastructure*** (paras. 271-282)

The Court concludes that the evidence demonstrates a deliberate, organized process of destroying Rohingya villages and farmland, replacing them with other permanent structures, including security force bases, and promoting resettlement by non-Rohingya ethnic groups on land on which Rohingya had formerly lived.

## IV. APPLICABLE LAW (PARAS. 283-305)

The Court then considers the definition of genocide under the Convention, followed by the relationship between international humanitarian law and the Convention.

**A. Definition of genocide** (paras. 284-295)

The Court recalls that the object and purpose of the Convention is to prevent and punish the crime of genocide which, at its core, involves "a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind". The preamble to the Convention underscores that "genocide has inflicted great losses on humanity", and that the contracting parties seek to "liberate mankind from such an odious scourge".

According to Article II of the Convention, the crime of genocide has two constituent elements: the material element or *actus reus* set forth in Article II (*a*) to (*e*); and the specific mental element or *mens rea* of genocide (*dolus specialis*) set forth in the *chapeau* of Article II.

The Court recalls that each of the material acts under Article II also carries its own general mental element (*dolus generalis*), which is distinct from genocidal intent.

In order for genocide to be established, 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.

In particular, it is the specific intent to destroy the "group as such", in whole or in part, that is the defining feature of genocide. Such destruction of the group, however, is not confined to the death or biological destruction of its individual members, or even their physical harm.

Article II of the Convention recognizes that destruction of the group "as such" may result from any of the five material acts set forth therein, whether occurring individually or in combination, when directed against at least a substantial part of the group. The Court accordingly considers that the destruction of the "group, as such", in whole or in part, as set out in the *chapeau* of Article II, refers to forms of destruction of the group in whole or in part that may result from the acts enumerated in Article II *(a)* to *(e)*.

Article I of the Convention obliges States parties to prevent and punish genocide, obligations which are further elaborated in other provisions of the Convention. Article III renders genocide as defined in Article II, as well as related acts, punishable.

The Court has recognized that a State may itself be held responsible for genocide or other acts set forth in Article III if such acts are committed by its organs or by persons or groups whose acts are attributable to it. The Court recalls that "State responsibility and individual criminal responsibility are governed by different legal régimes and pursue different aims". The Court therefore reiterates that the obligations "arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature."

**B. Relationship between international humanitarian law and the Genocide Convention** (paras. 296-305)

The claims before the Court raise questions regarding the relationship between international humanitarian law (*jus in bello*) and the Genocide Convention. Article I of the Convention confirms that genocide is a crime under international law "whether committed in time of peace or in time of war". The Convention thus applies, by its express terms, in situations of armed conflict to which international humanitarian law also applies.

The Court observes that in an armed conflict, as elsewhere, only acts committed with the specific intent to destroy the group in whole or in part can constitute genocide within the meaning of Article II of the Convention. The Court recalls that the Genocide Convention and international

humanitarian law are two distinct bodies of rules, pursuing different aims, both of which are applicable in the context of armed conflict. The Court has jurisdiction in this case to make a determination regarding breaches only of the Genocide Convention and not of international humanitarian law or any other body of international law. The Court is not prevented, however, from considering, in its reasoning, 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.

The text of Article II of the Convention does not require that the acts enumerated therein be unlawful pursuant to a distinct body of international law. The Court has observed, however, that "the rules of international humanitarian law might be relevant in order to decide whether the acts alleged by the Parties constitute genocide within the meaning of Article II of the Convention".

Accordingly, the Court concludes that although compliance with another body of international law, including international humanitarian law, may inform the identification of intent with respect to the *actus reus* of genocide, as well as genocidal intent, such compliance does not exclude conduct from the scope of the Genocide Convention.

## V. OBLIGATION NOT TO COMMIT GENOCIDE (PARAS. 306-469)

The Court then considers The Gambia's claim that Myanmar breached its obligation not to commit genocide pursuant to Articles I and III *(a)* of the Convention.

The Court notes that, for the purpose of establishing State responsibility under the Genocide Convention, both Parties accept that the acts at issue were carried out primarily by Myanmar's security forces. It is undisputed that the conduct of Myanmar's security forces and other organs of the State is attributable to Myanmar under the law of State responsibility.

### A. The Rohingya as a protected group (paras. 308-310)

Under Article II of the Genocide Convention, the prohibited acts are limited in scope to those directed against a "national, ethnical, racial or religious group, as such".

In the Court's view, the Rohingya of Myanmar constitute a distinct ethnic group. It finds that the Rohingya of Myanmar have a "particular group identity" and, as an ethnic group, qualify as a protected group for the purposes of Article II.

### B. *Actus reus* of genocide (paras. 311-372)

The Court then considers in turn whether the acts that are established by the evidence fall within the *actus reus* under Article II *(a)* to *(d)*.

#### 1. Article II *(a)*: killing of members of the group (paras. 312-319)

The Court recalls that the words "killing" and "meurtre", appearing in the English and French versions of Article II *(a)* of the Convention respectively, have the same meaning, referring to the act of intentionally killing members of the group. In the Court's view, a killing is intentional within the meaning of Article II *(a)* of the Convention where the perpetrator meant to cause the death of the victim or acted with knowledge that death was a likely consequence of the act or omission. This does not include negligence or gross negligence.

With respect to whether Article II *(a)* requires harm to be committed at a certain scale in order for the *actus reus* to be satisfied, the Court notes that the crime of genocide under the Convention requires that a perpetrator intend to destroy the protected group in whole or in part, not merely one or more individual members. The Court finds that, matters of scale with respect to victims, are considerations for the *mens rea* of genocide and not for the *actus reus*.

Regarding the other subparagraphs of Article II, the Court considers that, other than the distinctive language of 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. There is no requirement of a minimum number of victims, so long as the acts are those set forth in one of the provisions of Article II and one or more victims are members of the protected group.

Turning to the circumstances of this case, the facts as previously determined by the Court establish that Myanmar's security forces committed large-scale killings of members of the protected group during the course of the 2017 clearance operations.

The Court is fully convinced that 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. The Court is not called upon, for the purpose of establishing the *actus reus* of killing, to list the specific killings or to make a conclusive finding on the total number of victims.

**2. Article II *(b)*: causing serious bodily or mental harm to members of the group** (paras. 320-337)

The Court observes that acts committed against members of the protected group fall within the scope of Article II *(b)* only if they result in physical or mental harm that is "serious". Such harm "need not be permanent and irremediable".

The Court recalls that rape and other forms of sexual and gender-based violence are "capable of constituting the *actus reus* of genocide within the meaning of Article II *(b)*".

The Court recalls that, while 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 considers that members of the protected group experienced such circumstances in this case.

With respect to the general intent required for Article II *(b)*, the Court considers, at a minimum, that the above violent acts were committed by the Myanmar security forces with knowledge that they were likely to result in serious mental harm to the Rohingya population. They thus constitute intentional acts within the meaning of Article II *(b)*. In the Court's view, taken together, the acts of the Myanmar security forces described above have 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)*.

The Court does not consider that each of the above types of acts alone caused serious mental harm to every member of the Rohingya group who experienced them. Nevertheless, some of the acts inflicted on individual Rohingya were extreme enough to cause serious mental harm in and of themselves; for other members, serious mental harm resulted from a combination of acts. The Court therefore concludes that the 2017 clearance operations caused serious mental harm to a very significant number of members of the Rohingya group in northern Rakhine State.

The Court recalls that for the purpose of establishing the *actus reus* under Article II *(b)*, it need not set out the precise extent of the injuries suffered or make a conclusive finding on the total number of victims. The Court is fully convinced that the 2017 clearance operations caused serious bodily and mental harm to a very significant number of members of the protected group and that the *actus reus* set forth in Article II *(b)* is established.

**3. Article II *(c)*: deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part** (paras. 338-356)

The Court considers that the material act set forth in Article II *(c)* prohibits a State from engaging in conduct that deliberately inflicts conditions of life that are objectively capable of causing the death, over time, of at least a substantial part of the protected group.

In assessing the conditions of life relevant for this *actus reus* in the absence of direct evidence, the relevant inquiry is an "overall factual assessment", taking into account all the relevant conditions of life inflicted on all or a substantial part of the group.

The threshold for establishing within the meaning of Article II *(c)* 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 requirement of Article II *(c)* is not that the conditions of life must be capable of causing the death of one or more members of the group over time, but that they be capable of causing the death of at least a substantial part of the group over time. The Court is not convinced that the evidence sufficiently establishes 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 group in this manner. The Court further considers 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)*.

The Court accordingly concludes that the evidence before it does not conclusively establish the commission of the *actus reus* under Article II *(c)* of the Convention.

**4. Article II *(d)*: imposing measures intended to prevent births within the group** (paras. 357-372)

The Court observes that Article II *(d)* encompasses measures intended to bring about the failure of a group "to live and reproduce normally".

Article II *(d)* requires an applicant to demonstrate that the measures imposed are intended to prevent births within the group and are objectively capable of doing so. The language of subparagraph *(d)*, however, does not require that an applicant additionally establish that the measures were actually successful in reducing the birth rate of the group. While considerations of scale or an actual impact on the birth rate may be relevant to the determination of the mental element included in Article II *(d)*, namely whether a measure was intended to prevent births, they do not form distinct requirements under Article II *(d)*.

The Court finds that, taken together, 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, establish 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.

The Court is therefore fully convinced that Myanmar imposed measures intended to prevent births within the group and that the *actus reus* of genocide within the meaning of Article II *(d)* of the Convention is established.

In sum, the Court considers that the evidence conclusively establishes that the Myanmar security forces and other State organs committed acts falling within the *actus reus* set forth in Article II *(a)*, *(b)* and *(d)* of the Genocide Convention. The evidence does not, however, conclusively establish the commission of the *actus reus* set forth in Article II *(c)*.

### C. *Mens rea* of genocide (genocidal intent) (paras. 373-468)

Article II of the Genocide Convention provides that, in order to constitute genocide, the *actus reus* of genocide, must be "committed with intent to destroy, in whole or in part, a [protected] group, as such". The Court examines the meaning of the phrase "in part" and the requirement that the acts be committed with intent to destroy the protected group.

#### 1. Meaning of the term "in part" in Article II (paras. 374-380)

The Court recalls that where allegations of genocide are based on the targeting of a part of the protected group, the intention to destroy must relate to at least a substantial part of that group. The jurisprudence of the Court and of international criminal tribunals identifies 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.

The first, quantitative, element concerns 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". Second, a geographic element, that is "the area of the perpetrators' activity and control, as well as the possible extent of their reach", should be considered. A third, qualitative, element, the "prominence" or "emblematic" nature of the targeted portion within the group, may also be relevant. These conditions are not exhaustive, nor need all three conditions be met; however, the Court has emphasized that the quantitative criterion is "an essential starting point" and must be given priority.

The Court recalls that it has found above that the *actus reus* of genocide is established under Article II *(a)*, *(b)* and *(d)* of the Genocide Convention. In light of this, for the purpose of ascertaining the numerical size of the targeted part of the protected group in order to assess whether it is significant enough in a quantitative sense, account must be taken of all members of that group who were targeted by any of the relevant material acts. The Court observes that at least some of these acts can be understood as targeting the entire Rohingya population in northern Rakhine State. Thus, the Court finds 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 considers that this number is clearly significant both in absolute terms and in relation to the overall Rohingya population in Myanmar.

The Court concludes that, based on the numerical size of the group alone, the part of the Rohingya population targeted by Myanmar is substantial for the purposes of the Genocide Convention. Consequently, the Court does not consider it necessary to examine the geographic or qualitative elements in this case.

**2. Establishing genocidal intent** (paras. 381-389)

It is recalled that the Court and international criminal tribunals have recognized that genocidal intent may be established either through direct evidence or indirectly by relying on inferences drawn from circumstantial evidence. In the absence of direct evidence of an intent to commit genocide, The Gambia must therefore rely on circumstantial evidence to establish that Myanmar acted with genocidal intent.

With respect to The Gambia's argument that, under the category of "particular circumstances", genocidal intent can be inferred in respect of a single incident or place or in respect of a smaller subset of locations, the Court is of the view that such an approach would conflict with its finding that the part of the group that was targeted by Myanmar was substantial for the purposes of the Genocide Convention. It would not be appropriate for the Court to consider that the entire Rohingya population of northern Rakhine State was targeted by Myanmar's actions, while simultaneously inferring genocidal intent solely from evidence confined to a limited number of locations.

The Court then turns to Myanmar's argument that the inference of genocidal intent from circumstantial evidence is only possible through a pattern of conduct. As defined in the Court's jurisprudence, a pattern of conduct is "a consistent series of acts carried out over a specific period of time". It follows from the often systematic nature of acts of genocide that allegations concerning a pattern of conduct are commonly put forward in disputes under the Genocide Convention, and the factors based on which such a pattern is identified frequently form the basis of the inquiry into genocidal intent.

The jurisprudence of the Court and of international criminal tribunals indicates, however, that the inquiry into genocidal intent is not confined to determining whether certain factors reveal a pattern of conduct from which such intent may be inferred. Rather, genocidal intent may be inferred from an array of different factors, without necessarily requiring a prior finding that a pattern of conduct is established. The Court further observes 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.

Moreover, in accordance with its previous jurisprudence, the Court will 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, in which the Court draws inferences from circumstantial evidence, genocidal intent must be the only reasonable inference from the facts.

**3. Factors relevant to establishing an inference of genocidal intent in the present case** (paras. 390-437)

In identifying the factors it considers relevant to this case, the Court will take into account the factual background as well as the jurisprudence of the Court and of international criminal tribunals.

Accordingly, the Court will base 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.

**(a)** ***General context, including the perpetration of other culpable acts systematically directed against the group*** (paras. 398-409)

The Court recalls that it and international criminal tribunals have recognized that inferences concerning the existence of genocidal intent may be drawn from the general context, including the perpetration of "other culpable acts" systematically directed against the same group.

There are four distinct elements of Myanmar's conduct that are particularly pertinent in this regard. They are (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 considers these elements to constitute both part of the relevant general context and other culpable acts that were systematically directed against the Rohingya. While the Court does not consider these elements individually to constitute evidence of Myanmar's genocidal intent, taken together, they are important aspects of the broader contextual framework of the case from which inferences concerning the existence of genocidal intent might be drawn.

**(b)** ***Selective targeting of the Rohingya*** (paras. 410-415)

In the 2015 *Croatia* Judgment, the Court considered the specific targeting of a group as an important factor in the process of establishing 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.

**(c)** ***Perpetration of acts that violate the foundations of the Rohingya group*** (paras. 416-422)

The perpetration of acts that violate the foundations of the group has been considered relevant to inferring genocidal intent. 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 identifies 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.

**(d)** ***Systematic nature and scale of the relevant conduct*** (paras. 423-437)

**(i) Systematic nature of the relevant conduct** (paras. 423-426)

Systematic actions involve planning and organization in order to direct operations at a particular group and geographic area. They therefore suggest deliberation and purpose and, as such, may allow inferences of genocidal intent to be drawn, also taking into consideration other elements of the evidentiary record.

The evidence before the Court establishes the existence of many elements pointing to a "consistent pattern of attacks" during the 2017 clearance operations. For actions to be considered as systematic, it is not necessary for every identified element of a given conduct to be exhibited at each specific location. Citing its previous jurisprudence, the Court refers to the identification of a "generally similar *modus operandi*". In the current case, the Court finds that the conduct of Myanmar's security forces during the clearance operations can be considered as systematic.

**(ii) Scale of the relevant conduct** (paras. 427-437)

The Court observes that, 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. Furthermore, the relevant number to be used as a basis of comparison is the size of the targeted group. As the Court has found, the group that was targeted in this case was the Rohingya population of northern Rakhine State, numbering approximately 815,000. Thus, the estimated 10,000 Rohingya that were killed constituted 1.2 per cent of the targeted population.

Moreover, killing is not the only material act that is prohibited under the Convention. The victims to be taken into account as part of an assessment of the scale of the destruction include not only those who were killed, but also all those who were subjected to any of the acts listed in Article II of the Genocide Convention.

The Court then turns to Myanmar's argument that its "security forces had, and did not avail themselves of, opportunities to destroy the Bengali population".

In the Court's view, 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.

In the context of this case, the Court observes that the claimed purpose of Myanmar's actions was to undertake counter-insurgency operations in response to ARSA attacks, which imposed geographic and other constraints on the opportunities that were available to Myanmar. In particular, Myanmar does not claim that ARSA attacks occurred in the IDP camps and therefore, by its own account, it had no basis to carry out counter-insurgency operations there. The Court notes that the part of the Rohingya population living in IDP camps is not included in the targeted part of the group for establishing genocidal intent; therefore, Myanmar's opportunity to target them does not bear upon the Court's analysis. In any event, the Court observes that the total set of victims, and not just the victims of intentional killings, must be considered for the purposes of the assessment of the opportunity available to the perpetrator. In this case, the Court finds 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's examination of the above factors establishes that the context surrounding the 2017 clearance operations created an atmosphere that was conducive to the violence perpetrated during those clearance operations by Myanmar's security forces and formed the basis of Myanmar's intention to destroy part of the Rohingya group. The manner in which the forcible displacement of the Rohingya was conducted, together with the selective targeting of the Rohingya population for violence and the burning of their homes, which sent a clear message that they had nothing to return to, supports the inference of an intention to destroy the group. The evidence of brutal acts of sexual violence and the targeting of children for violence in Rohingya communities also supports an inference that there was a desire to destroy the foundations of the group. The systematic nature of these actions further indicates a reasonable inference that Myanmar acted with genocidal intent.

The Court concludes that all the evidence before it, taken together, supports a reasonable inference that Myanmar's security forces acted with genocidal intent.

**4. "Only reasonable inference" test** (paras. 438-443)

The Court has explained 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 does not derive from the

Genocide Convention itself but is a general test under international criminal law, applying whenever inferences are drawn from circumstantial evidence.

In this regard, both the Court and international criminal tribunals have recognized that genocidal intent may exist alongside other intentions, provided that such intentions are not incompatible with the existence of genocidal intent. 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.

**5. Whether other inferences explain Myanmar's conduct** (paras. 444-468)

The Court recalls that whether genocidal intent is the only reasonable inference to be drawn from the evidence is ultimately a matter for the Court's assessment on the basis of the evidence before it. In making that determination, the Court will consider the Parties' competing interpretations of the evidence, addressing possible alternative inferences.

The Court turns first to Myanmar's claim that the intent behind its actions was to carry out counter-insurgency operations. The Court observes at the outset that Myanmar's assessment of ARSA as a terrorist threat does not preclude the possibility that Myanmar acted with genocidal intent.

The specific locations examined by the Court where Myanmar conducted clearance operations all correspond to areas where the evidence establishes that ARSA committed attacks, or where Myanmar contends that such attacks occurred. Thus, for the Court, there is a geographical and temporal correlation between ARSA attacks and the clearance operations that followed.

Many of the characteristics of the clearance operations, however, are inconsistent with an intent to carry out counter-insurgency operations. For example, there is no evidence before the Court that, in the conduct of the clearance operations, Myanmar distinguished between civilians and alleged ARSA fighters. Further, 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. On this basis, the Court concludes that the intention of conducting genuine counter-insurgency operations does not constitute an alternative reasonable inference.

The Court then turns to 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 and international criminal tribunals have observed that forcible displacement and genocide may occur in parallel.

The question that the Court has to resolve is whether, on the totality of the evidence, Myanmar's actions can be reasonably explained by inferring that it acted with an intention to forcibly displace the Rohingya population.

For the Court, in the present case, there is 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 do not indicate such an intention.

The Court thus considers that an intent to forcibly displace the population does not explain the totality of the evidence before the Court. For this reason, in the Court's view, an intent to forcibly displace the population does not constitute an alternative reasonable inference.

The Court finally turns to Myanmar's suggestion that an intention to punish the Rohingya population could constitute an alternative reasonable inference in this case.

The Court recalls that genocidal intent may co-exist with other intentions, as long as such intentions are not incompatible with the existence of genocidal intent. In the Court's view, genocidal intent is likely to be accompanied by an intent to punish, particularly in the context of collective punishment. Genocidal and punitive intentions may often be entwined in the sense that the destruction of a protected group is an extreme form of punishment, and the two intentions may not always be capable of meaningful separation for the purpose of drawing alternative inferences.

The Court considers that, in the present case, 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. In light of the reasons set out above, the Court finds that punishment of the Rohingya population does not constitute an alternative reasonable inference on the evidence before it.

Accordingly, on the basis of all the evidence taken together, the Court is 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.

For the reasons above, the Court is fully convinced that Myanmar committed acts falling under Article II *(a)*, *(b)* and *(d)* of the Genocide Convention with an intent to destroy a substantial part of the Rohingya population of Myanmar.

### **D. Conclusion** (para. 469)

The Court finds that Myanmar breached its obligations under Article I and Article III *(a)* of the Convention.

## VI. RESPONSIBILITY FOR BREACHES OF OTHER OBLIGATIONS UNDER THE GENOCIDE CONVENTION (PARAS. 470-574)

The Court then turns to The Gambia's claims that Myanmar, in addition to committing genocide, is responsible for four breaches of obligations arising under the Convention.

### **A. Obligation to prevent genocide** (paras. 471-488)

In the view of the Court, while paragraph (1) of The Gambia's final submissions refers to conduct attributable to Myanmar, including that of "individuals acting under [its] instruction, direction, or control", the reference in paragraph (2) to acts perpetrated by "individuals alongside its security forces" shows that the claim regarding the duty to prevent only concerns acts committed by persons whose conduct is not attributable to Myanmar.

Referring to its previous jurisprudence, the Court recalls that

> "a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed".

The Court has recognized that the obligation to prevent under Article I applies to any act punishable under Article III of the Convention. The Court observes in this regard that the assessment

of a "serious risk" with respect to the obligation to prevent involves a determination on both the material and mental elements of genocide, as well as any other elements of the relevant provisions of Article III. In particular, absent a serious risk of the presence of genocidal intent, the obligation to prevent under Article I of the Convention does not arise.

The Court has held that if a State itself is found responsible for genocide, then that State has necessarily breached the obligation to prevent those same acts. The same reasoning applies to the responsibility of a State for the other offences enumerated in Article III of the Convention, to which the duty to prevent equally applies.

In the present case, however, The Gambia contends that Myanmar failed to prevent genocide committed by persons acting alongside its security forces and not under its instruction, direction or control. This claim is not subsumed by the finding that Myanmar itself is responsible for committing genocide.

Based on the record before it, the Court cannot conclude that all acts committed by non-Rohingya civilians during the clearance operations were taken in accordance with Myanmar's instructions or under its effective control, such that their conduct is attributable to the State. The Court therefore considers that at least some of the above acts of civilians during the clearance operations must be considered to be those of non-State actors whose conduct is not attributable to the Respondent.

In light of the evidence regarding the nature of the conduct of non-Rohingya civilians, the Court considers that the participation of such civilians in the clearance operations alongside the Myanmar security forces posed a serious risk of genocide of which the State should normally have been aware. The record contains no evidence that Myanmar authorities made any attempt to discourage non-Rohingya civilians from participating in the attacks on the Rohingya or otherwise sought "to employ all means reasonably available to them so as to prevent genocide so far as possible".

Given the limited evidence before it on this question, the Court is not in a position to conclusively determine whether the non-Rohingya civilians participating in the clearance operations, whose conduct is not attributable to the State, themselves acted with genocidal intent. This finding does not, however, affect the conclusion that such civilians participated 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.

In the present case, the Court concludes 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. Myanmar thus violated its obligation to prevent genocide pursuant to Article I of the Convention.

### **B. Direct and public incitement to commit genocide** (paras. 489-506)

The Court then turns to The Gambia's claims that Myanmar has directly and publicly incited genocide, in violation of Article III *(c)* of the Genocide Convention.

The responsibility of the State under Article III *(c)* for incitement of its own agents or organs to commit genocide is established and absorbed by the finding that the State itself has committed genocide. Thus, the Court need not separately address The Gambia's contention that members of the Tatmadaw and the civilian government "exhorted the military" to commit genocide.

However, the Court's finding that Myanmar itself committed genocide, in violation of Article III *(a)*, does not address The Gambia's contention that Myanmar may have incited private actors to commit genocide. The Court accordingly examines this question.

The Court observes that the prohibition on incitement to commit genocide has a preventative purpose. It is well established that incitement can be committed irrespective of whether genocide itself takes place.

A State is responsible for direct and public incitement to commit genocide pursuant to Article III *(c)* of the Genocide Convention when a person or organ whose conduct is attributable to the State communicates in public messages that directly prompt, encourage or provoke the commission of genocide. The mental element of incitement encompasses the intent to directly and publicly incite other actors to commit genocide and presupposes a genocidal intent on the part of the speaker.

The Court considers that some of the Facebook military network messages sought to encourage the non-Rohingya population to engage in violence against the Rohingya as a group. The Court is not persuaded, however, that the evidence before it conclusively establishes that the posts, even when taken in context, were made with the specific intent 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, as required by Article III *(c)*.

The Court is therefore not fully convinced that The Gambia has established that Myanmar violated its obligation under Article III *(c)* of the Convention by directly and publicly inciting genocide against the Rohingya by private actors.

### C. Obligation to punish acts enumerated in Article III (paras. 507-554)

The Court then turns to The Gambia's claim that Myanmar has failed to punish acts prohibited under Article III of the Convention.

The obligation to punish arises whenever any of the offences enumerated in Article III are perpetrated, and not exclusively when genocide itself has been committed. Furthermore, the obligation to punish extends to acts committed by private actors whose conduct is not attributable to the State and does not require a showing of genocidal intent on the part of the State. Nor is the duty to punish subsumed by a finding that a State has committed genocide.

#### 1. Duty to investigate (paras. 511-516)

Turning first to the duty to investigate, the Court notes that both Parties accept that investigation is a logical prerequisite to the imposition of punishment under the Convention.

The Court observes that the Genocide Convention expressly provides that persons committing genocide "shall be" "charged", "tried" and "punished" with "effective penalties" (Articles IV, V and VI). The Convention thus imposes on States an obligation to prosecute and punish. The Court considers that, ordinarily, an investigation is a necessary prerequisite to the fulfilment of these obligations.

The Court considers that the obligation to investigate arises as soon as there are reasonable grounds to suspect that acts of genocide or other acts punishable under Article III of the Convention have been committed in a State's territorial jurisdiction.

The Court notes that investigations must be conducted in good faith, in a manner designed to achieve their purpose of identifying violations and bringing persons responsible to justice.

Investigations must be prompt, thorough, effective, independent and impartial, and capable of grounding a fair trial.

**2. Duty to prosecute and punish** (paras. 517-525)

Articles IV and VI of the Convention further oblige a State to prosecute and punish any individuals who may be responsible for committing acts proscribed by Article III within its territorial jurisdiction, if there is sufficient evidence to do so.

The Court observes that the obligation to investigate, prosecute and punish genocide applies only to acts falling within Articles II and III of the Convention. The Convention does not require investigations into other crimes. On the other hand, as the Court concludes with regard to the duty to adopt legislation, unless a crime provided for under a State's domestic criminal law encompasses genocidal intent as well as the other elements of the crime of genocide, its enforcement will not fulfil the obligation to punish genocide. Accordingly, prosecution and punishment of crimes that do not capture all the constituent elements of the offences enumerated in Article III do not satisfy the duty to punish under the Genocide Convention.

For the Court, the obligation to punish pursuant to Articles I, IV, V and VI of the Genocide Convention obliges a State party to effectively investigate, prosecute and punish persons, including commanders, having committed offences under Article III in a competent tribunal and to impose effective penalties commensurate with the severity of the crime, in a manner consistent with the considerations set forth above.

**3. Application of the obligation to punish in the present case** (paras. 526-554)

Turning to the question of Myanmar's compliance with the obligation to punish in this case, the Court first examines the facts relating to Myanmar's efforts to investigate, prosecute and punish allegations of crimes of genocide arising from the clearance operations.

The Court observes that Myanmar established various commissions in relation to the situation in Rakhine State, a number of which predated the 2017 clearance operations. The Court notes that some of these mechanisms lacked any investigative powers and, thus, were not capable of fulfilling Myanmar's investigative obligation with respect to the 2017 clearance operations.

Regarding the entities that had an investigative mandate in relation to events surrounding the 2017 clearance operations, the Court considers in turn the Inquiry Board established by the Tatmadaw in 2017, the Independent Commission of Enquiry (hereinafter the "ICOE") established in 2018, and the Criminal Investigation and Prosecution Body established in 2020 (hereinafter the "CIPB").

The Court observes that none of the measures involved investigation or prosecution of individual members of the Tatmadaw.

The Court recalls that the FFM's September 2018 report contained extensive information regarding the conduct of the clearance operations across northern Rakhine State and found sufficient information to warrant initiation of proceedings for genocide, including with respect to named individuals. The Court therefore considers that, at least as of that date, Myanmar had both reasonable grounds to suspect that genocide may have been committed in its territory and sufficient evidence to commence an investigation. Its duty to investigate offences under the Convention was therefore engaged. The Court considers that, at that point, it was incumbent upon Myanmar to conduct a prompt, effective, thorough, independent and impartial investigation, with a view to ensuring the identification, prosecution and punishment of all persons responsible for acts of genocide.

It is clear from the record that Myanmar did not take such action, despite having the capacity to do so.

With respect to criminal proceedings involving the military, the Court considers that Myanmar has not genuinely investigated or, if warranted, prosecuted its soldiers and commanders and punished them with penalties that could be considered commensurate with the crime of genocide.

The Court further observes that Myanmar did not criminalize genocide in any form until 2021. There was thus no offence of genocide under Myanmar's domestic law for the ICOE to investigate. Moreover, there were no further investigations into the acts punishable under the Convention after that date. Based on the evidence before the Court, there appears to have been no progress in any investigations or prosecutions by the CIPB or otherwise relating to the 2017 clearance operations since 2021. While the security situation in northern Rakhine State may have hindered further on-site investigations, this does not explain why Myanmar has not been able to interview its own military personnel or Rohingya survivors in Bangladesh.

With respect to the punishment of direct and public incitement to genocide, the Court considers that the record contains sufficient information to establish that there is a reasonable basis for suspecting that a violation of Article III *(c)* of the Convention may have occurred, thus engaging Myanmar's duty, at a minimum, to investigate potential acts of incitement by both State and non-State actors. Although Myanmar contends that some penalties have been imposed on certain Buddhist monks and entities relating to "political" activities, this does not establish that Myanmar has met its obligation to investigate, prosecute and punish acts of direct and public incitement to genocide.

Turning to The Gambia's allegations regarding the destruction of evidence, the Court considers that Myanmar engaged in extensive destruction of evidence by burning or otherwise disposing of bodies, burning and bulldozing sites where clearance operations took place and erecting new infrastructure, thus materially obstructing the ability of Myanmar or any other entity to effectively investigate the 2017 events.

With respect to Myanmar's co-operation with United Nations investigative entities, the Court observes that Article VI of the Convention places an obligation on Myanmar either to itself conduct adequate and effective investigations, prosecutions and punishments, or to co-operate with such international penal tribunal as may have jurisdiction. In the present case, Myanmar has done neither. In the Court's view, Myanmar created obstacles to effective investigation and prosecution by either a competent domestic or international tribunal. It also limited the evidence available to this Court, through its destruction of evidence, denial of access to United Nations investigative entities and failure itself to adequately investigate the possibility of genocide during the clearance operations.

In light of all the above, the Court considers that Myanmar has failed to investigate and, if warranted, to prosecute and punish persons, including commanders, committing offences under Article III in a competent tribunal, and to impose effective penalties commensurate with the severity of the crime. It therefore concludes that Myanmar has failed to punish genocide under Articles I, IV and VI of the Genocide Convention.

### **D. Obligation to enact necessary legislation** (paras. 555-574)

The Court recalls that Article V is an autonomous obligation, which gives rise to international responsibility irrespective of any finding of a violation of Article III. A State that fails to adopt adequate domestic measures to prevent and punish genocide also breaches the broader duties to prevent and punish genocide set forth in Article I.

The Court observes that Article V does not require contracting parties to adopt legislation that mirrors the wording of Articles II and III of the Convention. Nevertheless, these provisions require a State to give full legislative effect to the acts prohibited under Articles II and III of the Convention.

A central purpose of the Genocide Convention is to recognize genocide as a particularly grave and distinct crime, and to secure accountability for its breach. The Court considers that the ordinary meaning of Article V, understood in light of the Convention's context, object and purpose, and taking into account the negotiating history, requires that States parties adopt legislation criminalizing genocide as a distinct offence which encompasses all the elements of Articles II and III of the Convention. This includes, in particular, incorporating the element of genocidal intent. In the Court's view, failure to enact legislation that prohibits acts of genocide as set forth in these Articles, or adopting legislation that addresses only some of those acts or applies only to some individuals, breaches Article V of the Genocide Convention. Genocide cannot be punished merely through the sanction of murder, rape or other crimes, which do not comprise all the elements of genocide. Prior to the enactment of the 2021 amendment to Myanmar's criminal code, therefore, Myanmar was in breach of its obligation to enact necessary legislation under Article V.

The Court then turns to the question whether Myanmar's enactment of legislation in 2021 satisfied its obligation under Article V.

The Court considers that a material disparity arises between the new law and Article II *(d)* of the Convention. Limitation in Section 311A of the Penal Code allows Myanmar to impose the very measures which Article II *(d)* prohibits and creates the possibility that conduct classified as genocide under the Convention escapes punishment under Myanmar's domestic law.

The Court further observes that Section 311A of the Penal Code addresses only the crime of genocide itself; and does not, on its face, implement the provisions of Article III *(b)* to *(e)* of the Convention, including, for example, conspiracy and the prohibition of direct and public incitement to genocide.

The Court considers that the above characteristics of Section 311A of the Penal Code fail to meet Myanmar's obligations under Article V 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". Myanmar is therefore in breach of the obligation to adopt necessary legislation under Article V of the Genocide Convention.

## VII. LEGAL CONSEQUENCES AND REMEDIES (PARAS. 575-626)

Having concluded that Myanmar has breached obligations under the Genocide Convention, the Court then turns to the questions of legal consequences and remedies.

The Court first addresses the preliminary questions of jurisdiction and standing raised by Myanmar.

### A. Jurisdiction to order reparation (paras. 577-580)

The Court recalls that its 2022 Judgment on preliminary objections confirmed that it had jurisdiction, on the basis of Article IX of the Convention, to entertain the Application filed by The Gambia. In that Application, The Gambia requested the Court to adjudge and declare that Myanmar, *inter alia*, must perform the obligation of reparation in the interest of the victims of genocide and provide assurances and guarantees of non-repetition. Accordingly, the Court considers that its jurisdiction encompasses all aspects of The Gambia's final submissions, including its claims for remedies.

**B. The Gambia's standing to request remedies** (paras. 581-590)

Turning to the question whether The Gambia has standing to claim remedies for Myanmar's violations of the Genocide Convention, the Court notes, at the outset, that the Parties agree that the Applicant may seek declaratory relief and an order of cessation.

With respect to the question of remedies, the Court recalls that States seeking to protect obligations *erga omnes partes* may request assurances and guarantees of non-repetition, as well as the performance of the obligation of reparation, "in the interest of . . . the beneficiaries of the obligation breached".

While the Genocide Convention protects certain groups, like other human rights treaties, individuals are also beneficiaries of the protected right — in this case, not to be subject to genocide. The Court accordingly considers that remedies in the interest of the protected group and the individual victims of genocide serve the object and purpose of the Convention and advance the collective interest of the States parties.

In the Court's view, therefore, in light of its legal interest in protecting the rights enshrined in the Genocide Convention, The Gambia is entitled to invoke Myanmar's obligation to offer assurances and guarantees of non-repetition, and to make reparation in the interest of the Rohingya, as a group and as individuals, who were harmed by acts in violation of the Genocide Convention for which Myanmar is responsible.

**C. Appropriate remedies** (paras. 591-626)

The Court then turns to the remedies sought by The Gambia.

**1. Cessation** (paras. 592-596)

The Court affirms that cessation may be ordered only in respect of breaches of Myanmar's obligations under the Convention that are continuing. With respect to The Gambia's request for cessation regarding direct and public incitement to genocide, the Court observes that its finding of genocide is limited to the period around the 2017 clearance operations and that Myanmar's violation of the prohibition on incitement is subsumed in that finding of genocide. Since neither the genocide nor the related incitement has been found to be ongoing, the Court cannot order cessation in this regard.

Myanmar's failure to enact legislation to give full effect to its obligations under the Convention and its failure to investigate, prosecute and punish persons who committed acts punishable under Article III of the Convention constitute ongoing breaches of the Genocide Convention. The Court therefore considers it appropriate to order the cessation of these continuing breaches. Myanmar is accordingly obliged to enact legislation giving full effect to its obligations under the Genocide Convention, and to take immediate and effective steps to investigate all persons reasonably suspected of having committed acts prohibited by Article III of the Convention in connection with the 2017 clearance operations and, if warranted, to prosecute and punish them.

**2. Assurances and guarantees of non-repetition** (paras. 597-604)

The Court next turns to the assurances and guarantees of non-repetition requested by The Gambia.

The Court recalls that Myanmar's obligation to offer such assurances and guarantees generally depends on the nature of the obligation breached, the gravity of the wrongful act and the risk of repetition.

With respect to the nature of the obligation breached and the gravity of the wrongful act, the Court observes that, in the present case, it is the State itself that has been found responsible for genocide. The Court considers that violations of the Genocide Convention are of exceptional gravity and that, in the present case, they also arose in a context of long-standing and deeply entrenched hostility towards the Rohingya as a group.

Turning to the likelihood of repetition, the Court considers particularly important the fact that Myanmar has failed to investigate and, if warranted, prosecute and punish persons suspected of having committed acts prohibited by Article III of the Convention, has provided no remedies to the victims, and continues to deny that the harms at issue ever occurred. The Court considers that, in view of the circumstances before it, it is appropriate to require Myanmar to provide assurances and guarantees of non-repetition, and that Myanmar is under an obligation to prevent similar violations from occurring in the future.

The Court turns next to the question of what guarantees are appropriate. The Gambia requests that Myanmar be ordered to provide full and equal citizenship to all members of the Rohingya group. The Court considers, however, that ordering the provision of citizenship for all members of the Rohingya group is beyond the scope of appropriate assurances and guarantees of non-repetition for acts of genocide in the circumstances before it.

The Court observes that other remedies ordered by the Court in the present case, including the measures of cessation requiring Myanmar to enact legislation giving full effect to its obligations under the Convention and to pursue genuine and effective investigations and prosecutions and impose effective penalties, and the restitution measure to ensure the protection of the Rohingya against discrimination and persecution, including with respect to access to citizenship, also constitute appropriate guarantees of non-repetition. The Court considers, however, that, beyond these measures, Myanmar is under an obligation to prevent similar violations from occurring in the future. In this regard, additional appropriate guarantees may include, *inter alia*, legal and institutional reform to ensure compliance with relevant international human rights law, international humanitarian law and international criminal law obligations, including adequate avenues for redress; training of security forces personnel in these obligations; and ensuring effective civilian control of the security forces. The Court considers that beyond the other measures ordered by it, the choice of additional means must be left to Myanmar.

**3. Reparation** (paras. 605-626)

With respect to the question of reparation, the Court underlines that reparation requires that a causal relationship be established between the wrongful act of a State and particular damage suffered by the injured State, group or individuals. The Court has found that the internationally wrongful acts for which Myanmar has been found responsible resulted in injury to the Rohingya, as a group and as individuals, and that this injury was caused by Myanmar. The Court thus finds that Myanmar has an obligation to make reparation.

The Court recalls that because reparation constitutes a remedy for a harm suffered, States seeking to enforce a common interest in compliance with obligations *erga omnes* or *erga omnes partes*, such as The Gambia, are in a different situation than a directly injured or a specially affected State claiming reparation. While a non-injured or non-affected State may pursue a claim against another State for breach of a collective obligation, it may not claim reparation for itself. Rather, it may only "make a claim for . . . the performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached". As noted, the Court has recognized

that the obligation to provide full reparation may extend beyond the obligation to provide reparation to injured States to encompass individuals harmed by a State's wrongful acts, including those subject to the State's own jurisdiction.

As a result, in the Court's view, while The Gambia cannot seek reparation for itself, it may make a claim for the performance of the obligation of full reparation, including restitution, compensation and satisfaction, by Myanmar, in the interest of the Rohingya, as a group and as individual victims, who are the beneficiaries of the obligation breached. Reparation should be proportional to the gravity of the violations and the harm suffered. The Gambia accordingly may seek, and Myanmar is obliged to provide, adequate, effective and prompt reparation for the harms suffered by the Rohingya population, as a group and as individuals, as a result of Myanmar's wrongful acts. The Court then turns to the question of what measures of reparation may be appropriate.

**(a)** ***Restitution*** (paras. 611-617)

In light of the harms to the Rohingya that resulted from Myanmar's wrongful acts, which resulted from the Respondent's breach of its obligations under the Genocide Convention, and considering the arguments of the Parties and the entirety of the evidence before the Court, the Court determines that the following measures of restitution by Myanmar are appropriate in this case:

(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.

The Court considers these measures necessary to adequately redress the harms suffered by the protected group.

**(b)** ***Compensation and full reparation*** (paras. 618-626)

In the Court's view, 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. Accordingly, in the circumstances of the present case, the Court concludes that, to the extent that full reparation by restitution is materially impossible, the Respondent is obliged to provide adequate compensation, in accordance with the applicable rules of international law, to all of the Rohingya, individually and as a group, having suffered any form of material damage as a result of Myanmar's wrongful acts, in an amount adequate to fully repair the injuries caused.

The Court is not requested, at this stage of the proceedings, to indicate the specific amount of compensation or the modalities pursuant to which such compensation must be made to the injured Rohingya.

Under these circumstances, the Court considers that the question of the amount and modalities of compensation or other appropriate reparation should be determined in a subsequent phase of the proceedings. To that end, Myanmar shall, within a period of two years of the delivery of the present Judgment, transmit to the Court a report setting out the measures of restitution that it has adopted and, to the extent that full reparation by restitution is materially impossible, specifying the amount and modalities of compensation. Thereafter, and after ascertaining the views of the Parties, the Court will make such orders as may be required for the further conduct of the proceedings, with a view to determining the nature, form and amount of compensation or other appropriate reparation in a manner consistent with the interests of the protected group and its members.

## VIII. MYANMAR'S COMPLIANCE WITH THE COURT'S ORDER INDICATING PROVISIONAL MEASURES (PARAS. 627-645)

The Court turns next to The Gambia's allegations that Myanmar has breached the Order of 23 January 2020 indicating provisional measures in respect of the first three measures.

### A. First provisional measure (paras. 630-633)

In its first provisional measure, the Court ordered Myanmar to "take all measures within its power to prevent the commission of all acts within the scope of Article II of the Convention".

The Court is unable to find that, on the evidence, the acts alleged by The Gambia occurring after the Order of 23 January 2020 fall within the scope of the *actus reus* of Article II. The Court finds therefore that Myanmar has not breached its obligations in respect of the first provisional measure.

### B. Second provisional measure (paras. 634-637)

In its second provisional measure, the Court ordered Myanmar to "ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence", did not commit acts described in Article II of the Convention or any acts prohibited under Article III *(b)* to *(e)* of the Convention.

The Court recalls that the evidence has not conclusively established that Myanmar's Facebook military network messages were made with the specific intent to destroy the group in whole or in part. The Court therefore finds that Myanmar has not breached its obligations in respect of the second provisional measure.

### C. Third provisional measure (paras. 638-642)

In its third provisional measure, the Court ordered Myanmar to "take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention".

The Court finds convincing evidence that, after its Order of 23 January 2020, Myanmar completed the construction of at least one government base in 2021 on the sites of former Rohingya villages in Maungdaw Township and burned and destroyed the remnants of at least five Rohingya villages in Buthidaung Township in May 2020. The Court finds that, through these acts, Myanmar breached its obligation under the Court's third provisional measure.

The Court further notes that, under the fourth provisional measure, Myanmar is obliged to submit six-monthly reports to the Court on all measures taken to give effect to the Order, until a final

decision on the case is rendered by the Court. As the present Judgment qualifies as a final decision for the purposes of the fourth provisional measure, Myanmar is no longer required to submit such reports to the Court.

**D. Remedies** (paras. 644-645)

Concerning the remedies, the Court notes that its order that Myanmar cease the continuing breach of the obligation to punish is necessarily applicable in the context of Myanmar's breach of its obligation under the Court's third provisional measure. For these reasons, the Court finds declaratory relief to be an appropriate remedy in the present case, and that no further form of remedy is required.

*

* *

The full text of the operative part (para. 646) of the Judgment reads as follows:

"For these reasons,

THE COURT,

(1) By nine votes to six,

*Finds* that the Republic of the Union of Myanmar has committed genocide against the Rohingya group in northern Rakhine State, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President* Iwasawa; *Judges* Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi, Hmoud; *Judge* ad hoc Pillay;

AGAINST: *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Xue, Nolte; *Judge* ad hoc Kress;

(2) By nine votes to six,

*Finds* that the Republic of the Union of Myanmar has violated its obligation, under the Convention on the Prevention and Punishment of the Crime of Genocide, to prevent the commission of genocide by individuals alongside its security forces;

IN FAVOUR: *President* Iwasawa; *Judges* Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi, Hmoud; *Judge* ad hoc Pillay;

AGAINST: *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Xue, Nolte; *Judge* ad hoc Kress;

(3) By fourteen votes to one,

*Finds* that the Republic of the Union of Myanmar has not directly and publicly incited the commission of genocide against the Rohingya group by private persons in northern Rakhine State in violation of its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President* Iwasawa; *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Xue, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi; *Judges* ad hoc Pillay, Kress;

AGAINST: *Judge* Hmoud;

(4) By eleven votes to four,

*Finds* that the Republic of the Union of Myanmar has violated its obligation to punish genocide and other acts enumerated under Article III of the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President* Iwasawa; *Judges* Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi, Hmoud; *Judges* ad hoc Pillay, Kress;

AGAINST: *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Xue;

(5) By fourteen votes to one,

*Finds* that the Republic of the Union of Myanmar has violated its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to enact the necessary legislation to give effect to the provisions of the Convention;

IN FAVOUR: *President* Iwasawa; *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi, Hmoud; *Judges* ad hoc Pillay, Kress;

AGAINST: *Judge* Xue;

(6) By fourteen votes to one,

*Decides* that the Republic of the Union of Myanmar must cease any ongoing violation of its obligations under Article V of the Convention on the Prevention and Punishment of the Crime of Genocide by enacting legislation giving full effect to its obligations under the Convention;

IN FAVOUR: *President* Iwasawa; *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi, Hmoud; *Judges* ad hoc Pillay, Kress;

AGAINST: *Judge* Xue;

(7) By thirteen votes to two,

*Decides* that the Republic of the Union of Myanmar must take immediate and effective steps to investigate all persons reasonably suspected of having committed acts contrary to Article III of the Convention on the Prevention and Punishment of the Crime of Genocide in relation to the 2017 clearance operations and, if warranted, to prosecute and punish them;

IN FAVOUR: *President* Iwasawa; *Judges* Tomka, Xue, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi, Hmoud; *Judges* ad hoc Pillay, Kress;

AGAINST: *Vice-President* Sebutinde; *Judge* Abraham;

(8) By nine votes to six,

*Decides* that the Republic of the Union of Myanmar must provide assurances and guarantees of non-repetition of the violations of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide and prevent similar violations from occurring in the future;

IN FAVOUR: *President* Iwasawa; *Judges* Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi, Hmoud; *Judge* ad hoc Pillay;

AGAINST: *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Xue, Nolte; *Judge* ad hoc Kress;

(9) By ten votes to five,

*Decides* that the Republic of the Union of Myanmar is under an obligation to adopt the measures of restitution defined in paragraph 615 of the present Judgment;

IN FAVOUR: *President* Iwasawa; *Judges* Tomka, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi, Hmoud; *Judge* ad hoc Pillay;

AGAINST: *Vice-President* Sebutinde; *Judges* Abraham, Xue, Nolte; *Judge* ad hoc Kress;

(10) By ten votes to five,

*Decides* that the Republic of the Union of Myanmar is under an obligation to compensate the Rohingya group and its members for the damage caused by the violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in so far as such damage is not made good by restitution;

IN FAVOUR: *President* Iwasawa; *Judges* Tomka, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi, Hmoud; *Judge* ad hoc Pillay;

AGAINST: *Vice-President* Sebutinde; *Judges* Abraham, Xue, Nolte; *Judge* ad hoc Kress;

(11) By ten votes to five,

*Decides* that the question of the amount and modalities of compensation or other reparation due to the Rohingya group and its members shall be settled by the Court, and that, to this end, the Republic of the Union of Myanmar shall, within a period of two years of the delivery of the present Judgment, transmit to the Court the report described in paragraph 625; and *reserves* for this purpose the subsequent procedure in the case;

IN FAVOUR: *Judges* Tomka, Abraham, Charlesworth, Brant, Gómez Robledo, Cleveland, Tladi, Hmoud; *Judges* ad hoc Pillay, Kress;

AGAINST: *President* Iwasawa; *Vice-President* Sebutinde; *Judges* Xue, Nolte, Aurescu;

(12) By eleven votes to four,

*Finds* that the Republic of the Union of Myanmar has violated its obligation under paragraph 86 (3) of the Order of 23 January 2020 indicating provisional measures to take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President* Iwasawa; *Judges* Tomka, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi, Hmoud; *Judges* ad hoc Pillay, Kress;

AGAINST: *Vice-President* Sebutinde; *Judges* Abraham, Xue, Nolte;

(13) Unanimously,

*Rejects* all other submissions of the Republic of The Gambia."

*

President IWASAWA appends a separate opinion to the Judgment of the Court; Vice-President SEBUTINDE appends a dissenting opinion to the Judgment of the Court; Vice-President SEBUTINDE, Judges TOMKA, ABRAHAM, XUE, NOLTE and Judge *ad hoc* KRESS append a joint dissenting opinion to the Judgment of the Court; Judges TOMKA and ABRAHAM append separate opinions to the Judgment of the Court; Judges XUE and NOLTE append dissenting opinions to the Judgment of the Court; Judge CHARLESWORTH appends a separate opinion to the Judgment of the Court; Judge BRANT appends a declaration to the Judgment of the Court; Judge BRANT and Judge *ad hoc* PILLAY append a joint declaration to the Judgment of the Court; Judge GÓMEZ ROBLEDO appends a separate opinion to the Judgment of the Court; Judge CLEVELAND appends a declaration to the Judgment of the Court; Judge CLEVELAND and Judge *ad hoc* KRESS append a joint separate opinion to the Judgment of the Court; Judge AURESCU appends a separate opinion to the Judgment of the Court; Judge TLADI appends a declaration to the Judgment of the Court; Judge HMOUD appends a separate opinion to the Judgment of the Court; Judge *ad hoc* KRESS appends a separate opinion, partly concurring and partly dissenting, to the Judgment of the Court[1].

[1] Summaries of declarations and opinions written by Members of the Court in English are appended to the English version of the Summary of the Judgment.

**Separate opinion of President Iwasawa**

In his opinion, President Iwasawa addresses three topics.

1. President Iwasawa stresses that, in the present case, the Court does not depart from the test established in its jurisprudence for inferring genocidal intent from circumstantial evidence. He explains that the factors listed by the Court to assess the existence of genocidal intent are consistent with those used by international criminal tribunals and by the Court in previous cases. The only reasonable inference standard has also been adopted by international criminal tribunals and the Court.

In the present case, the Court concludes that the only reasonable inference that can explain Myanmar's actions is an intention to destroy a substantial part of the Rohingya population in northern Rakhine State. President Iwasawa emphasizes that the Court has reached this conclusion on the basis of a careful assessment of all the evidence taken together under the test established in its jurisprudence.

2. President Iwasawa observes that the standard to prove a violation of the obligation to prevent under Article I of the Genocide Convention is high.

According to President Iwasawa, the Court finds that Myanmar has violated the obligation under Article I to prevent the commission of genocide by individuals alongside its security forces in the particular circumstances of this case. He emphasizes, in particular, that the Court concludes that acts of genocide were committed by Myanmar's security forces during the clearance operations and that non-Rohingya civilians participated in those operations. While the Court is not in a position to conclusively determine whether those civilians themselves acted with genocidal intent, the possibility that at least some of them did cannot be excluded. The acts of the civilians posed a serious risk of genocide. Nevertheless, Myanmar manifestly failed to take all measures to prevent genocide which were within its power and which might have contributed to preventing the genocide.

3. While President Iwasawa agrees that The Gambia may request the performance of the obligation of reparation in the interest of the beneficiaries of the obligation breached, he is of the view that The Gambia should not be allowed to pursue a claim concerning the amount of compensation in the subsequent phase of the proceedings.

President Iwasawa explains that The Gambia is not in a position to assess the damage suffered by the beneficiaries of the obligation breached, with the degree of accuracy required to determine the amount of compensation. It has no independent basis on which to assess the damage and does not possess sufficient information on the individual circumstances surrounding the damage caused or the amount of compensation required to make good the damage.

President Iwasawa further points out that The Gambia has not been authorized to represent the beneficiaries in the present proceedings or otherwise, and it is thus not authorized to negotiate and agree upon the amount of compensation in their interest. He notes that it is hard to see how The Gambia can make difficult choices or compromise on them in negotiations with Myanmar without any authorization from the beneficiaries.

**Dissenting opinion of Vice-President Sebutinde**

Vice-President Sebutinde agrees with the majority that Myanmar did not directly and publicly incite genocide by private persons in northern Rakhine State; that it breached Article V of the Convention by failing to enact necessary implementing legislation and must remedy that legislative

failure. She also agrees that all other submissions of The Gambia should be rejected. However, she voted against subparagraphs 1, 2, 4, 7, 8, 9, 10, 11 and 12 of the operative clause of the Judgment. Her dissent challenges the majority's finding that Myanmar committed genocide against the Rohingya, principally on the standard of proof applied, the assessment of evidence and the inference of genocidal intent from an alleged pattern of conduct. The opinion does not dispute the gravity of the atrocities or seek to excuse them. Its central contention is that proof of serious international crimes, per se, is not proof of genocide, and that weaknesses in the evidence cannot be overcome by assessing it cumulatively or by relying on Myanmar's failure to rebut it. The opinion supplements a joint dissenting opinion with five other judges on the central issue of lack of fully conclusive proof of Myanmar's genocidal intent. The distinctive focus of Vice-President Sebutinde's dissenting opinion is the evidentiary reasoning underlying the majority's conclusions.

What sets genocide apart in law from other grave international crimes and violations, including persecution, forcible displacement, war crimes and crimes against humanity, is not the gravity, scale or brutality of the underlying conduct, but the additional requirement of a specific intent (*dolus specialis*) to destroy, physically or biologically, a protected group as such, in whole or in substantial part. That distinction has a jurisdictional consequence. The opinion maintains that Article IX of the Genocide Convention does not give the Court general authority to determine violations of international humanitarian or human rights law. Such violations may provide relevant factual context, but neither their seriousness nor their cumulative weight can substitute for establishing the constituent elements of the crime of genocide.

The dissent identifies three elements that must be proved by The Gambia to the required standard in order to establish genocide, namely the commission of a prohibited act or acts under Article II (*actus reus*); the intent to commit that act (*mens rea* or *dolus generalis*); and the additional intent to destroy a protected group physically or biologically, in whole or in substantial part (*dolus specialis*).

The opinion's central criticism is that, although the majority invokes the "only reasonable inference" test where genocidal intent is inferred from a pattern of conduct, it effectively applies a lower standard. The dissent objects particularly to the majority's treatment of other inferences as capable of coexisting with genocidal intent rather than necessarily competing with it. Genocidal intent cannot merely be compatible with, or even provide the most persuasive explanation of, the conduct in question; it must remain the *only* reasonable inference after competing non-genocidal explanations have been excluded. Drawing on the joint dissent, Vice-President Sebutinde's dissenting opinion identifies three alternative objectives that she considers can reasonably be inferred from the conduct of the Myanmar military, namely suppressing the Arakan Rohingya Salvation Army (ARSA) insurgency; forcibly displacing the Rohingya from northern Rakhine State; and collectively punishing particular communities to deter wider support for ARSA. The argument is not that any one of these objectives has been proved to be Myanmar's actual or predominant purpose. Rather, their reasonable availability would prevent genocidal intent from being the only reasonable inference. The opinion also points to the comparatively limited geographical scope and scale of the relevant conduct and to opportunities for greater destruction that Myanmar's forces allegedly did not exploit.

A further difficulty with the Judgment lies in the majority's failure adequately to distinguish among the different categories of evidence before the Court, particularly witness statements and reports of investigative bodies, and to determine the probative weight accorded to each by reference to its particular credibility and reliability. Evidentiary weight derives from the quality and reliability of the material itself, not from its quantity or the institutional authority of the body from which it emanates. Sources that differ materially in character, methodology and procedural safeguards cannot simply be treated as evidentially equivalent. The dissent calls for differentiated scrutiny of provenance, direct knowledge, contemporaneity, anonymity, methodology of collection, corroboration and opportunities for adversarial testing. The dissent emphasizes that the following distinct categories of witness evidence cannot properly be accorded equivalent probative weight.

Testimony given before the Court was subject to examination and judicial scrutiny, safeguards absent from anonymous witness statements, statements of identified witnesses who did not testify, and interviewer-prepared summaries.

The Independent International Fact-Finding Mission on Myanmar and the Independent Investigative Mechanism for Myanmar, upon whose reports the majority relied extensively, were both created by the United Nations Human Rights Council for distinct institutional purposes and operated under mandates fundamentally different from that of a judicial body determining State responsibility for genocide. Commensurate with their respective mandates, those bodies applied standards of proof that are substantially lower than the "fully conclusive" standard required by the Court for proving genocide. Accordingly, the fact that material collected or analysed by those bodies is sufficiently reliable to support further investigations, or the issuance of an arrest warrant or confirmation of charges, does not establish, without an independent judicial assessment of the underlying evidence, that the same material satisfies the standard of proof governing the Court's final determination of State responsibility for genocide. The dissent therefore objects to investigative conclusions acquiring decisive weight without independent judicial examination. The same reasoning governs other investigative and non-governmental organization reports relied upon by the majority in determining that the Gambia proved Myanmar's commission of genocide to the stringent standard required by the Court.

The dissent further questions the majority's outright rejection of Myanmar's military records tendered in evidence. While the provenance of these reports may warrant caution, that provenance alone cannot determine their probative value or justify excluding those records from meaningful evidentiary consideration altogether. Their probative value must be assessed individually, by reference, *inter alia*, to their contemporaneity, purpose, internal coherence and consistency with other evidence in the record.

Regarding Myanmar's non-co-operation with The Gambia's requests for accessibility to Myanmar's territory, the opinion accepts that The Gambia's inaccessibility may justify its greater reliance on circumstantial evidence, particularly where relevant facts lie within the respondent State's exclusive control. In the Vice-President's view, however, that flexibility in the means of proof does not shift the burden of proof from the Applicant or lower the standard. By treating Myanmar's failure to undermine the investigative reports or to offer a "satisfactory and convincing explanation" for adverse evidence as affirmative support for The Gambia's case, the majority in effect shifts the burden of proof from the Applicant to the Respondent. The absence of a sufficient rebuttal cannot cure deficiencies in the Applicant's proof: it remains for The Gambia to establish to the required standard the allegations on which its claims depend.

The dissent does not dispute that, consistently with *Prosecutor* v. *Tolimir*, established facts may assume greater inferential significance when assessed together. What a "holistic assessment" cannot do, however, is manufacture reliability or cure evidentiary deficiencies. The reliability and probative weight of the evidence supporting each fact must first be assessed before those facts are considered cumulatively. Aggregation cannot transform inadequately established facts into proven ones, any more than the cumulative existence of discrimination, hate speech, displacement and violence can, without more, establish the specific intent to destroy a protected group.

Vice-President Sebutinde concludes by observing that the recent increase in cases brought under the Genocide Convention reinforces the need to preserve the Convention's distinct legal scope. Article IX should neither be artificially restricted nor permitted to become a vehicle for bringing before the Court disputes concerning other grave international wrongs under the juridical characterization of genocide. Insistence upon the Convention's demanding legal and evidentiary thresholds does not diminish the gravity of such wrongs; it safeguards the distinctive character of genocide by reserving that characterization for conduct proved to have been accompanied by the specific intent to destroy, physically or biologically, a protected group, in whole or in substantial part.

**Joint dissenting opinion of Vice-President Sebutinde and Judges Tomka, Abraham, Xue, Nolte and Judge *ad hoc* Kress**

1. The six judges who authored the joint dissenting opinion recall that the jurisdiction of the Court in the present case was based exclusively on Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Convention"). Therefore, the central question was whether the conduct of the security forces of Myanmar during the 2016 and 2017 clearance operations in northern Rakhine State amounted to genocide. The majority has answered that question in the affirmative; the six judges disagree with this conclusion. The main reason for this disagreement is that the six judges are not of the view that it has been established, under the applicable strict standard of proof, that Myanmar acted with genocidal intent at the relevant time. The joint dissenting opinion is about this question.

2. At the outset, the six judges acknowledge the terrible suffering endured by the Rohingya through violence, displacement, destruction of homes and other grave abuses. Nothing in the opinion should be understood as denying or belittling that suffering.

3. The six judges recall that, according to Article II of the Convention, genocidal intent consists of the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The six judges consider, as does the majority, that, prior to the 2016 and 2017 clearance operations, the Rohingya in Myanmar constituted an ethnical group within the meaning of the Convention. They also agree with the majority that the approximately 815,000 Rohingya who lived in northern Rakhine State at the time constituted the relevant "substantial" part of the entire group. To conclude that Myanmar acted with genocidal intent, it had to be established that Myanmar acted with the intent to destroy this "substantial part" of the group. In the view of the six judges, this has not been established.

4. The six judges recall that, under the jurisprudence of the Court, the term "destroy" in Article II of the Convention means physical or biological destruction of the relevant group (or a "substantial part" thereof) and that the international criminal tribunals have consistently adopted the same interpretation. Preventing a group, in whole or in part, from preserving its language and culture and other elements which together constitute the group's identity, does not constitute physical and biological destruction. The same is true for the destruction of the geographical unity or political cohesion that a protected group may possess. Forcible displacement cannot, by itself, amount to the physical or biological destruction of the group.

5. In this respect, the six judges consider that, while the Judgment refers to that interpretation without expressly departing from it, certain formulations give rise to concern. This is the case in particular for "the dispersal of at least a part of the group" (Judgment, para. 290). Moreover, apart from introducing uncertainty as to its faithfulness to the established interpretation of the term "destroy", the Judgment, by attaching considerable evidentiary significance to discrimination, expulsion and the destruction of the "foundations" of a group's social life in inferring genocidal intent, effectively broadens the concept of destruction through the backdoor. As a result, the distinction between the destruction of the group and its forcible removal, as established in the jurisprudence, is weakened, and the boundary between genocide and other crimes under international law is blurred.

6. Turning to the facts of the case, the six judges indicate their agreement with the majority that, in the absence of direct evidence of genocidal intent on the part of Myanmar, The Gambia can only rely on circumstantial evidence to infer such specific intent (*dolus specialis*). The six judges

recall that under the jurisprudence of the Court, "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" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 67, para. 148).

7. The six judges observe that, in the present Judgment, the Court has proceeded in two steps: it has first assessed whether genocidal intent constituted *a* reasonable inference from the pattern of conduct, and, secondly, whether this inference was *the only* reasonable one. The six judges note that the Court has not proceeded in this way in the preceding cases. In the case of *Croatia*, it has first identified a pattern of conduct attributable to the State concerned, and it has then asked whether the existence of genocidal intent was the only reasonable inference to be drawn from this pattern of conduct. In the view of the six judges, there was no compelling reason to depart from this jurisprudence. To proceed in two steps, as the Court has done in the present case, has the major downside to implicitly shift the burden on the respondent to show that the existence of genocidal intent was not the only reasonable inference, because at least one other inference is reasonable. The reasoning in the Judgment reveals how easily this possibility can materialize.

8. Having examined the way in which the Court has purported, in the present case, to establish the existence of genocidal intent by reference to four factors which it has stated in paragraph 397 of the Judgment, the six judges are of the view that the Court, while referring to the Judgment in *Croatia*, has departed from its jurisprudence.

9. In *Croatia*, the Court focused the inquiry to five indicators out of the seventeen which Croatia had proposed. Those were the scale and the systematic nature of the attacks, the fact that those attacks were said to have caused victims in excess of what was justified by military necessity, the specific targeting of Croats and the nature, extent and degree of the injuries caused to the Croat population. The Court did not establish the existence of a genocidal intent in that case.

10. The present Judgment departs from the Court's jurisprudence in *Croatia* in two significant respects. First, the factor "acts that violate the foundations of the Rohingya group", which appears in the list of factors stated in paragraph 397, is of such a high degree of generality and vagueness that it permits sweeping inferences of genocidal intent to be drawn from grave misconduct without a sufficiently rigorous explanation of how such misconduct evidences an intent to physically or biologically destroy a group, in whole or in part. Second, while the general context may assist in interpreting the significance of proven acts, it cannot dispense with the need to demonstrate, with precision, how those acts support an inference of genocidal intent. Yet the Judgment fails to demonstrate this with the required precision. Indeed, in the view of the six judges, the new method used by the Court leads to a holistic assessment that is, in reality, so indeterminate that it borders on arbitrariness.

11. The six judges do not believe that, among the factors considered relevant by the majority in the present case, Myanmar's discriminatory policies towards the Rohingya, the derogatory language employed by members of the security forces and the toleration of derogatory public speech, regrettable as they are, are capable of pointing in any meaningful way to the existence of genocidal intent.

12. The six judges agree with the majority that the restrictions on the Rohingya's access to food in northern Rakhine State, as alleged by The Gambia, should not be regarded as forming part

of the relevant pattern of conduct of Myanmar, because it has not been established that this State sought, through a policy of systematic restrictions on food, to starve the Rohingya population. Likewise, although it is true that the local authorities in the townships in northern Rakhine State had carried out measures, in certain periods of time, with a view to regulate the maximum number of births within Rohingya families, this does not as such and necessarily support an inference of an intent to biologically destroy the Rohingya group in the north of the country. There is a material distinction between an intent to limit the growth of a substantial part of a group and an intent to destroy that part biologically.

13. According to the six judges, the principal factors which constitute the relevant pattern of conduct in the present case are (i) the scale and the systematic nature of the attacks by Myanmar's security forces against the Rohingya during the 2017 clearance operations; (ii) the fact that those attacks went far beyond what was justified by military necessity; (iii) the fact that Rohingya civilians were specifically targeted; and (iv) the nature, extent and degree of the injuries inflicted upon the Rohingya population of northern Rakhine State, particularly women and children.

14. Based on that pattern of conduct, the six judges are not convinced that the only reasonable inference to be drawn from evidence is that Myanmar acted with genocidal intent.

15. The six judges have no doubt that the security forces of Myanmar committed a large number of acts constituting forms of the *actus reus* of genocide, as described in Article II of the Convention, in the three villages of Min Gyi, Chut Pyin and Maung Nu: killings and acts causing serious bodily and mental harm, including by sexual violence. But they consider that it has not been established that the conduct found to have taken place in the three locations was replicated on a significantly broader scale and concerned the entire north of Rakhine State where 509 Rohingya villages existed at the time. The precedent of Srebrenica, as articulated in the Court's Judgment in the *Bosnia* case, is not relevant in the present case. In the *Bosnia* case, Srebrenica was found to have an importance extending beyond its numerical size and to be emblematic of Muslims in Bosnia more generally. No comparable significance has been attributed in the present case to the three villages of Min Gyi, Chut Pyin and Maung Nu.

16. The six judges doubt that the 2018 report of the Fact-Finding Mission, on which the majority relies, permits to conclude that acts of the same nature were committed in six other locations. They have serious doubts about the evidentiary weight of the reports of the Fact-Finding Mission. In any event, even if the factual assertions contained in the 2018 report were accepted as proven, they would show that the security forces of Myanmar carried out physical attacks against a relatively small proportion of the Rohingya population in northern Rakhine State during the 2017 clearance operations, which does not reveal a pattern of conduct of such breadth, scale and pervasiveness across the relevant territory that genocidal intent could be reasonably inferred from it.

17. Furthermore, the six judges consider that it has not been established that the security forces of Myanmar have systematically targeted the Rohingya who tried to escape the clearance operations and to flee to Bangladesh. They are of the view that the 2018 report of the Fact-Finding Mission does not provide support for a generalized finding that the security forces of Myanmar have systematically attacked the Rohingya during their exodus.

18. The six judges accept that the evidence before the Court establishes that a significant number of Rohingya who fled from northern Rakhine State to Bangladesh experienced fear, anguish and emotional distress in circumstances of violence and insecurity. The evidence does not, however,

permit to conclude that the demanding threshold for "causing serious mental harm" within the meaning of Article II of the Convention has been reached for the vast majority of those Rohingya who fled to Bangladesh. Therefore, the six judges leave open whether a clarification of the Court's jurisprudence on genocidal intent is warranted as regards the longer-term biological consequences of serious mental harm within the meaning of Article II *(b)* of the Convention inflicted upon members of at least a substantial part of a protected group.

19. The six judges conclude that the relevant pattern in the present case consists of the commission by Myanmar's security forces of a large number of acts falling within Article II *(a)* and *(b)* of the Convention in the three above-mentioned villages, that it possibly also includes widespread killing in 12 additional locations and widespread rape in 11 additional locations, but that, whatever their exact number, the victims of those acts constituted a very small minority of the Rohingya population in northern Rakhine State. The relevant pattern of conduct is thus considerably more limited in scope and scale than The Gambia has argued and the Court has found.

20. The six judges are of the view that the existence of a genocidal intent on the part of Myanmar at the relevant time is not the "only reasonable inference" to be drawn. Apart from the relatively limited geographical scope and the relatively limited scale of the destruction within the meaning of Article II of the Convention, which do not, by themselves, preclude a finding of genocidal intent, but prima facie point away from the conclusion of the Court, the six judges, in conformity with the jurisprudence, attach great importance to two other factors: the context in which the acts constituting the *actus reus* of genocide were committed and the question whether the respondent did not use opportunities to destroy a substantial part of the protected group.

21. Concerning the first aspect, the six judges do not attribute the same importance as the majority to articles in the media reproducing three speeches delivered by the then Senior General of the armed forces of Myanmar, therein denouncing, in particular, the "Bengali terrorists" and declaring that it was necessary to "solve" the "Bengali problem". While the six judges consider certain aspects of these speeches reprehensible, they do not find therein the expression of a policy of destroying the Rohingya, whether in Myanmar generally or in northern Rakhine State in particular.

22. Furthermore, the activities of the insurgent organization ARSA at the material time must be considered as part of the context in which the relevant pattern of conduct occurred. As the Judgment states, the 2016 and 2017 clearance operations were preceded by ARSA attacks and each operation ended relatively soon after Myanmar's security forces had eliminated the threat posed by ARSA.

23. Regarding the question of opportunities, the six judges recall that the Court had indicated in *Croatia*, that the non-use of opportunities to destroy the relevant part of the protected group constitutes a factor weighing against the inference that the State possessed genocidal intent at the relevant time. In the present case, the Judgment acknowledges that Myanmar "did not take every opportunity it had to destroy members of the Rohingya group" (para. 435). In fact, the evidence even demonstrates that Myanmar's security forces did not use highly significant opportunities to destroy the Rohingya. Nevertheless, the Court holds that this does not refute the conclusion that Myanmar possessed a genocidal intent. The only reason given by the Court is that because Myanmar claimed that its objective was to conduct counter-insurgency operations, in reaction to the attacks by ARSA, this imposed constraints on the opportunities Myanmar had to destroy the Rohingya group, in particular in geographic respects.

The six judges criticize this reasoning as circular. The reasoning in question rests on the assumption that, had ARSA been in the proximity, Myanmar would have used the opportunity to destroy hundreds of thousands of Rohingya fleeing to Bangladesh, while presenting this destruction as a legitimate element of counter-insurgency operations. In other words, instead of proving genocidal intent, the Court starts from the very conclusion it seeks to establish. The Judgment's approach to the criterion of opportunity represents a further departure from the Court's prior jurisprudence.

24. Furthermore, the six judges are of the view that the relevant pattern of conduct reasonably permits two alternative inferences, each of which is incompatible with the existence of genocidal intent. In that respect, they recall that the criterion defined in the jurisprudence is the "only reasonable inference", not a "more reasonable inference".

25. The first of these alternative inferences is that the relevant pattern of conduct formed part of an effort pursued by Myanmar of forcibly displacing the vast majority of the Rohingya from northern Rakhine State. According to the six judges, the fact that this pattern of conduct included the widespread commission of acts falling within Article II *(a)* and *(b)* of the Convention in a relatively small number of Rohingya villages does not preclude such an inference. On the contrary, it is at least reasonably plausible that the widespread commission of such acts, in a small subset of locations, was intended to compel the vast majority of the Rohingya population, including in other locations, to flee northern Rakhine State. In the view of the six judges, none of the three reasons given by the majority for rejecting this inference is persuasive. The fact that a State neither facilitates nor organizes the displacement of the population does not militate against the inference that it intended to forcibly displace the population. Second, while Myanmar's security forces, on several occasions, attacked Rohingya during their flight to Bangladesh, it is not established that such acts occurred as a policy. It therefore is possible that these incidents constituted exceptions to a broader policy aimed at forcibly displacing, rather than destroying, the Rohingya population. Furthermore, to consider, as the Judgment does, that an alternative inference can only reasonably be drawn if it can explain, without any exception, the "totality of the evidence", has no basis in the Court's prior jurisprudence and, in fact, departs from it. Finally, the six judges state that the reference in the Judgment to "a number of aspects of the clearance operations", which are allegedly "not consistent with the intent to forcibly displace the population", is so vague that it is no more than an assertion. In so far as the Court meant to refer to the brutality by which the clearance operations were conducted, the reasoning would ignore the possibility that the relevant brutality may itself have been employed with the purpose of terrorizing the vast majority of the Rohingya in northern Rakhine State into leaving and preventing their return.

26. According to the six judges, the second possible inference, which the Judgment addresses only incompletely, is "collective punishment" inflicted above all to intimidate and thereby deter. In this respect, the six judges recall that the relevant pattern of conduct followed the ARSA attacks of 25 August 2017 and ended very soon after the threat posed by ARSA had been neutralized. It is thus possible that the acts attributable to Myanmar's security forces were committed with the goal of intimidating the Rohingya population throughout the region to deter them from supporting ARSA in the future.

27. In conclusion, the six judges hold that it has not been established that Myanmar committed genocide. This does not exclude the possibility that the Respondent committed other internationally wrongful acts and it in no way diminishes the terrible suffering endured by the Rohingya. The contrary conclusion in the Judgment, however, is not the result of applying the legal framework for indirectly proving genocidal intent within the meaning of the Genocide Convention, as articulated by the jurisprudence of the Court. It is rather the product of altering several components of this legal framework, by broadening the scope of considerations treated as sufficiently probative of genocidal

intent; by weakening the connection between acts of violence and the goal of physical and biological destruction; by discounting the evidentiary significance of available, unused opportunities to destroy; by artificially dividing the identification of genocidal intent into the two steps of drawing first *a* reasonable inference of the existence of such intent and then concluding that this intent is *the only* reasonable inference because of the absence of any alternative reasonable inference that could explain the "*totality* of the evidence". Each step makes a finding of genocide easier compared with the previously established test. Taken together, these steps substantially lower the standard for indirectly proving genocidal intent as articulated in *Bosnia* and *Croatia* while purporting to be faithful to those precedents. By proceeding in that way, the Judgment not only fails to convince, but also ignores the Court's previously stated principle that it will not depart from settled jurisprudence unless there are "very particular reasons" for doing so.

**Separate opinion of Judge Tomka**

On the question whether genocidal intent was established in the present case, Judge Tomka has signed the joint dissenting opinion co-authored by the six dissenting judges. In his separate opinion, he raises two additional concerns. First, he disagrees with the Court's reversal of its jurisprudence on the obligation to prevent genocide. Secondly, he examines the institutional and evidentiary difficulties that arise when the Court is called to determine, without a prior criminal judgment, whether genocide has been committed.

Judge Tomka recalls that the Court had already decided the first question in two successive judgments. In both 2007 and 2015, it held that responsibility for failure to prevent genocide depended upon genocide having occurred. The present Judgment abandons that settled jurisprudence, although the issue did not need to be decided because the majority had already found that genocide was committed and was attributable to Myanmar. The new interpretation is at odds not only with those two Judgments, but also with the work of the International Law Commission, previously relied upon by the Court, according to which breach of an obligation to prevent a given event occurs when that event occurs.

In Judge Tomka's view, the new interpretation makes the scope of State responsibility considerably less predictable. The Court may increasingly be asked to decide whether States responded adequately to alleged risks of genocide by using their diplomatic, political or economic influence. This may require retrospective judicial assessments of foreign-policy choices made by States on the basis of different and often incomplete information. The resulting indeterminacy and selectivity risk politicizing proceedings and generating more accusations and cases without necessarily producing more effective prevention. Judge Tomka also cautions against drawing the Court into the continuing management of armed hostilities, a function distinct from the judicial settlement of legal disputes.

Turning to the majority's finding that genocide was committed, Judge Tomka recalls his long-standing view that the Genocide Convention was conceived primarily as an instrument of international criminal law — concerned with a crime committed by individuals, not States. He has long questioned whether the Court, whose procedure is designed for disputes between States, is equipped to determine the commission of that crime in the first instance. That concern has now materialized. In the earlier cases concerning Bosnia and Croatia, the Court could draw upon an extensive judicial record developed by the International Criminal Tribunal for the former Yugoslavia. On that basis, the Court considered whether the acts in question were attributable to the respondent. In the present case, for the first time, the Court has made a positive finding of genocide without any prior judgment of a criminal court or tribunal establishing that the crime was committed.

The Court therefore had to determine the commission of the crime itself on the basis of a contested and uneven evidentiary record. Much of that record came from international fact-finding and investigative bodies operating under mandates, methods and evidentiary thresholds different

from those applicable before the Court. In Judge Tomka's view, the evidence did not establish that genocidal intent was the only reasonable inference available.

Finally, Judge Tomka accepts that the breaches found by the Court require reparation. The difficult question is what happens next. The compensation would belong to Rohingya victims, yet they are not parties to the case and have not authorized The Gambia to act on their behalf. The Judgment does not explain who will identify the beneficiaries, assess their injuries or ensure that any compensation reaches them.

**Dissenting opinion of Judge Xue**

Judge Xue has voted against most of the subparagraphs of the *dispositif* of the Judgment because of her principal position that The Gambia has not established its claim that Myanmar committed genocide in breach of its obligations under the Genocide Convention.

Notwithstanding that, she wishes to underscore that the measures indicated in the *dispositif* of the Judgment concerning repatriation and rehabilitation of the displaced Rohingya people to their home country should be earnestly carried out by the Myanmar authorities, irrespective of Myanmar's obligations under the Genocide Convention. She hopes that the implementation of those measures will serve as the first step commencing a national reconciliation and reconstruction process that the Myanmar people have long been wishing for. She reiterates the view that perpetrators of serious human rights violations against Rohingya civilians during the 2016-2017 clearance operations should be brought to justice by the Myanmar authorities. However, the Court is limited by the scope of its jurisdiction under the Genocide Convention and has no jurisdiction to adjudicate allegations of other crimes in the present case. This is an important point of departure for understanding this individual opinion.

Judge Xue notes that the present case concerns the most heinous crime in international law. Factual findings based on solid and credible evidence that meets the established standard of proof are the first prerequisite for the Court to deliver justice. This is not only imperative for the present case, but more fundamentally, it tests whether the Court will maintain the rule of law that it is entrusted to uphold.

She points out that, although the Judgment reaffirms the established jurisprudence of the Court in respect of evidence, the Court's fact-finding process invites serious review and questioning. The way in which evidentiary materials are selected, used and relied upon in the Judgment in many instances does not meet the judicial standards that are normally applied by the Court as well as by international criminal courts and tribunals in cases of such gravity. This is a concerning move on the part of the Court.

The joint dissenting opinion of six judges appended to the present Judgment has convincingly demonstrated that there is no conclusive evidence to prove that there existed genocidal intent on the part of the Myanmar security forces in carrying out the clearance operations in 2016 and 2017 in northern Rakhine State. Judge Xue is of the view that on the material element — *actus reus* —, the evidence relied upon by the Court is equally weak and inconclusive.

Judge Xue notes that although the Court reaffirms the well-established practices relating to the burden of proof, standard of proof and methods of proof as reflected in the jurisprudence of the Court, the Judgment does not follow them. On the burden of proof, Judge Xue points out, although lack of access to Myanmar's territory may practically increase the difficulties for The Gambia in collecting evidence, it does not provide a legal basis for the Court to bend the rules of evidence in favour of the Applicant, nor does it automatically lead to a reversal of burden of proof. She states that the Court should have given more weight to the information contained in the evidentiary materials produced by Myanmar that may facilitate the Court in ascertaining certain important facts.

Judge Xue then turns to examine the three main categories of evidence considered by the Court: witness statements, the FFM reports and the IIMM reports, and reports of non-governmental organizations. It is by relying on these materials that the Court establishes the factual findings of the Judgment.

With respect to witness statements, Judge Xue considers that a careful examination of the written pleadings of the Parties shows that the problem of duplication is much more serious than the Court describes. As most of the witness statements are anonymous, Judge Xue doubts that it is appropriate for the Court to use such statements to corroborate each other. Besides, the Court's reading of some of the witness statements is not faithful to what the witness had exactly stated.

In regard to the FFM reports, the Court finds them to be "a reliable source of factual evidence" largely because, in its view, the FFM adopted a "rigorous methodology" that enabled the FFM to carry out its mandate in an independent and impartial manner. The 2018 FFM Report admits that it applied a lower standard of proof than that required for criminal proceedings. Judge Xue considers the Court's general evaluation of the FFM reports tactfully eschews the key question of the standard of proof. By admitting the probative value of the FFM reports as a whole, its finding gives evidential weight practically to all the evidence contained therein, including those that do not meet the stringent requirement for establishing genocidal acts.

Judge Xue further points out that the FFM did not produce verbatim transcripts of the interviews. Neither the Court, nor the Respondent, has access to the underlying interview records. In other words, the Court is not aware whether witness statements were signed and confirmed by the witnesses. The Court, therefore, is not in position to ensure the accuracy of the statements.

Judge Xue considers that there is no doubt that the FFM reports provide useful information about the human rights situation in Myanmar, but many of the evidentiary materials in the reports do not meet the high standard of proof that is required of the evidence for the purpose of the Genocide Convention. She observes that factual materials and confidential statements contained in the 2018 FFM Report have been used extensively in the Judgment as established facts. The Court often refers to the 2018 FFM Report as the single or primary source of evidence. Many factual findings of that report cited in the Judgment are either entirely from anonymous sources without corroboration of other credible evidence or based on the FFM's own estimate or conclusion without supporting evidence. On some occasions, the Judgment merely adopts the FFM's conclusions without checking for inconsistent or inaccurate details of the evidence.

Judge Xue also questions the way in which the Court treats the IIMM reports. The Judgment relies heavily on two IIMM thematic reports for its fact-finding in respect of hate speech and destruction of property. The evidence analysis given by the IIMM reveals that the standard of proof applied therein is not as stringent as it claims.

In relation to the reports of non-governmental organizations, Judge Xue expresses her serious reservation about the neutrality and independence of those organizations. She observes that some organizations had long been involved in the human rights situations in Myanmar. Some had close ties with one of the Parties and some organizations prepared their reports at the request of and with the funding of a foreign government which had a particular interest in the case. Take LAW, for example: it signed a Memorandum of Understanding with the law firm representing The Gambia in the present case, according to which LAW was "engaged in providing legal services to Rohingya victims", who were characterized as LAW's "clients". LAW also agreed in the Memorandum to share witness statements it collected with The Gambia. Judge Xue doubts that, in a contentious case, such non-governmental organizations, along with some others, can be characterized or perceived as "independent" or "neutral". She states that their possible tendentious position, by itself, does not necessarily impugn the credibility of the information provided in their reports, but the Court must exercise extreme vigilance in examining and assessing the evidentiary materials contained in their reports. Unfortunately, the Court makes no difference in its treatment of such reports and accords

them considerable evidential weight. It often uses the factual description in the reports as conclusive evidence without the support of other credible evidence.

In sharp contrast, Judge Xue states, evidentiary materials adduced by Myanmar do not receive due consideration from the Court. The Judgment acknowledges that ARSA carried out co-ordinated attacks on at least 30 security force/police outposts across northern Rakhine State prior to the clearance operations but downplays the scale and impact of such attacks. It underlines ARSA's limited membership and modest armed capacity, and the small number of casualties suffered by Myanmar security forces during the clearance operations and draws the conclusion that the clearance operations were "primarily directed against civilians". The documents before the Court, however, provide much more information about ARSA's activities and its threats, which is pertinent to the present case.

On the evidential value of official documents submitted by Myanmar, the Court does not even give weight to some direct and contemporaneous documents which were prepared prior to the present proceedings, such as Myanmar's internal reporting on ARSA's attacks during the clearance operations. Judge Xue does not consider the reasons given for its dismissal persuasive and sound.

Next, Judge Xue examines the evidence relating to the genocidal acts that the Court finds Myanmar has committed. Judge Xue states that, according to the established jurisprudence of the Court, there are three elements the Court must take into account in deciding whether genocide is committed, namely the requirement of substantiality, the opportunity available for the destruction and the emblematic factors of the targeted group. Although these elements primarily apply to the mental element of the crime — genocidal intent —, they are intrinsically linked with the physical element of the crime — genocidal acts. Indeed, genocide is not a numbers game, but the scale and scope of the casualties caused by the alleged acts to the protected group are decisive factors for the determination of genocide. The crime of genocide by nature means mass killing, serious bodily and mental harm and other atrocious acts on a large scale. It is to this type of acts that the substantiality requirement refers. Targeting a substantial part of the group must be understood to mean that the alleged acts are directed at, not just affecting, that substantial part. Separating the two constitutive elements of the crime mechanically would lead to absurdity in practice; killing one person or a few people does not constitute genocide even if genocidal intent exists. In that regard, evidence relating to killing, bodily and mental harm, sexual violence and mass rape, targeting of children as well as destruction of property is crucial for the findings of genocidal acts. In the present case, there is no fully conclusive evidence to prove that those alleged acts fall within the meaning of Article II of the Convention.

Regarding the number of deaths, the requirement of substantiality does not require actual killing of all the members of a substantial part of the group. However, the number of casualties should be significant for the purposes of the Convention. Judge Xue considers that in the present case, the way in which the Court reaches its conclusion on the number of deaths is questionable and the total estimate of deaths provided by the Rohingya community volunteers to the FFM — 9,208 deaths and 1,358 presumed disappeared or killed — cannot be substantiated by evidence. In the Judgment, the Court refers to the 2018 FFM Report and accepts the FFM's estimate as an indicator of the scale of the casualties. She recalls that the Court examines, village by village, the evidence relating to the alleged acts in ten locations where the FFM considers "the gravest incidents" occurred during the clearance operations. For each village, the Rohingya refugee camp volunteers provided a list of deaths. The FFM considers these estimates of deaths in ten locations by the Rohingya community volunteers to be credible, and the Court finds them consistent with the evidence. Judge Xue points out that, if all those figures were added up, the total number of deaths would reach around 2,000. Even assuming that deaths resulting from the clearance operations in other locations are substantial, logically, the situation in those locations could not be worse than those ten locations. Besides, there is no evidence indicating occurrences of large-scale massacres elsewhere in northern Rakhine State during the clearance operations. Therefore, any adjustment of the estimates could not increase by thousands.

With regard to the Court's finding that Myanmar security forces *systematically* shot at Rohingya as they were fleeing the clearance operations in villages — a conduct that may result in a large number of deaths —, Judge Xue considers that there is no sufficient evidence to support that such acts were committed "systematically" once the Rohingya were on their way to Bangladesh. Most of the witnesses, presented by both Parties, testified that the military did not attack them, and some stated that, instead of shooting at them, the military even pointed the direction for the fleeing Rohingya to leave the country. In other words, Myanmar security forces did not use the opportunities available to it to kill the Rohingya, as claimed by The Gambia.

Judge Xue states that there is no sufficient evidence to support the Court's conclusion that "pervasive and systemic" acts of gang and mass rape and other forms of sexual violence against the Rohingya were perpetrated by the Myanmar security forces in northern Rakhine State. As regards the targeting of children, she agrees that a large number of children were killed during the clearance operations and, in many instances, with extreme cruelty, but to characterize such killing as widespread and intentional, the Court needs to show more evidence both in terms of the scale and the nature of the killing. There is a significant distinction between the killing of children and the targeting of children. Evidence before the Court shows that children were killed together with their family members but were not targeted particularly, a conduct portrayed by the Applicant for an inference of genocidal intent.

In conclusion, Judge Xue is of the view that the Court's treatment of evidence in this case significantly departs from the established practice of the Court for no compelling reasons. It lowers the standard of proof by substantially relying on evidence that is far from fully conclusive for a finding of genocide. The methods of proof the Court adopts do not reflect the settled jurisprudence it enunciates to follow. It accords considerable weight to the evidentiary materials of third parties irrespective of their status, a practice that the Court has consistently taken care to guard against. In some instances, the burden of proof is shifted to the Respondent without sound reasons.

In her concluding remarks, Judge Xue raises three issues which she believes will affect the judicial functions of the Court in the long run.

First, the methodology employed by third parties in fact-finding and the standard of proof by the Court.

In the present case, the Court attaches significant importance to the methodology applied by the FFM and the IIMM. Judge Xue considers that, technically, the Court is not able to check on the methodology employed and determine whether the methodology employed by the FFM or the IIMM is "rigorous" or "demanding" enough to ensure the evidence contained in their reports is fully conclusive. Besides, assessment of evidentiary materials by the Court is essential for the factual finding of the case. If the Court entirely relies on the third party's assessment of the factual materials, it will likely lose judicial control over the process.

Second, judicial finding of the Court and the factual finding of third party.

Judge Xue states that the Court must consider the source of the evidence and the status of the report in question. In the present case, the Court often takes what the FFM and the IIMM have found as proven facts without specifically examining whether such evidence is of probative value and corroborated by other credible evidence and, in some instances, even makes its own factual finding on the basis of the assessment or opinions of these third parties.

Judge Xue considers that deficiencies of the witness statements contained in the 2018 FFM Report and the IIMM reports are not purely technical matters. They reveal the way in which those statements were collected and the standard applied. When most of the witness statements are anonymous or redacted, it is particularly important for the Court to carefully examine the contents of the statements to ascertain the facts. Unfortunately, that is not the case here.

Third, probative value of reports of non-governmental organizations.

Judge Xue considers that reports of non-governmental organizations require strict scrutiny, as the source of the information contained therein and the process by which they were prepared are not always traceable for the Court. There are good reasons for the Court to accord less weight to such reports. The Court's approach in the present case departs from the established practice of the Court in this regard.

**Dissenting opinion of Judge Nolte**

Judge Nolte appends a dissenting opinion to the Judgment of the Court. He argues that the manner in which the Court has evaluated the evidence does not satisfy the heightened standard of proof that it has repeatedly affirmed in its jurisprudence (I), and that the Court has departed from its jurisprudence by expansively interpreting certain constituent elements of genocide (II), as well as the duty to prevent genocide (III). Judge Nolte further reflects on the genocidal intent of a State (IV) and addresses the obligation to punish (V), reparation and compensation (VI) and the provisional measure on destruction of evidence (VII). In concluding, he expresses general concerns about the implications beyond the present case of loosening the conditions for a finding of genocide (VIII).

I. *Evaluation of the evidence*

Judge Nolte first expresses concerns with regard to the evaluation of evidence by the Court. He argues that the Court has departed from the "fully conclusive" standard of proof that it has repeatedly identified in its own jurisprudence. In his view, the Court over-relied upon the findings of the Independent International Fact-Finding Mission on Myanmar (FFM), which did not hold itself to a judicial standard, and upon publications produced by non-governmental organizations (NGOs). Notwithstanding his acceptance of the independence and impartiality of the FFM, Judge Nolte takes the view that the reliability of its report has not been demonstrated, and that the majority's justifications for relying on that report are unconvincing both within the context of this case and relative to the established jurisprudence of the Court. He notes that the only FFM interview note which was placed before the Court itself demonstrates that the interviewer in question had concerns about the credibility of the witness interviewed. Judge Nolte argues that the Court cannot assume that the many undisclosed interview notes underlying the FFM report, as well as other submitted evidence, are free from such difficulties. Judge Nolte takes the overall position that while reliance upon reports such as that of the FFM may be appropriate in some situations — for example, in certain aspects of advisory proceedings, in situations concerning the United Nations itself, or where the objective nature of the report is uncontested — none of those circumstances apply here, and the special standard of proof attached to the act of genocide is such that the FFM report cannot be relied on to the extent that it is in the Judgment.

Judge Nolte expresses further far-reaching concerns regarding the reports and witness statements from NGOs, which he says do not belong in the same category for evidentiary purposes as reports by official bodies. He agrees with the Court that what matters is whether a source is "partisan, or neutral", and takes the view that, in the present case, reports by the NGOs Legal Action Worldwide and Fortify Rights cannot be regarded as neutral.

Turning to the Independent Investigative Mechanism for Myanmar (IIMM), Judge Nolte considers that, while the testimony of the four witnesses who appeared before the Court is the most reliable evidence in the present case, significant weight should be placed upon the witness statements which the IIMM has collected and that these should be distinguished from witness statements gathered by other bodies. Unlike the FFM report, which presents conclusions drawn from inaccessible witness statements, the statements recorded by the IIMM, which were read back to the witnesses and signed, could be evaluated directly by the Court. The Court was able to assess their internal coherence, compare them with other evidence and, at least to some degree, evaluate the

extent to which each witness spoke from direct knowledge. Judge Nolte takes the view that closer attention to these materials would have significantly nuanced the assessment of the evidence and the Judgment, in particular as concerns possible reasonable inferences other than genocidal intent, such as forced displacement. In his view, had these materials been properly taken into account, the Court would have had to conclude that an alternative reasonable inference from the conduct of Myanmar's security forces was the intention to expel the Rohingya population or to deter it from supporting the Arakan Rohingya Salvation Army (ARSA), a non-State armed group.

In this context, Judge Nolte also discusses the concept of "corroboration". He emphasizes that the Court uses the term corroboration in a loose sense without considering whether the respective sources of evidence both have weight of their own and derive from fully independent sources. He takes particular concern with the decision to "corroborate" unsigned witness statements with "more reliable" evidence. In his view, corroboration, rather than being used to describe an analytical process undertaken, is being used in the Judgment to describe conclusions and the concept is not deployed in an even-handed manner.

In considering possible objections to his view, Judge Nolte rejects the argument that the volume of less reliable evidence compensates for the limited probative value of individual pieces of evidence. He connects this to his view that, while the evidence available demonstrates terrible massacres in several villages and the flight of over 700,000 Rohingya to Bangladesh, the establishment of a wider pattern of conduct — to the standard of proof required for acts of genocide — is not possible on the evidence provided. The evidence relied upon to demonstrate the constituent elements of genocide to be fulfilled must be fully conclusive, and genocidal intent must be the only reasonable inference available, including where, as in the present case, it is inferred from a pattern of conduct. Overall, Judge Nolte expresses his concern that the approach taken to evidence in this case may be understood as an invitation to both argue and determine future cases on the basis of material that may be derived from mere assertions, and to discount usual evidentiary safeguards.

II. *Expansive interpretation*

Judge Nolte then explains his disagreement with the Court's interpretation and application of certain constituent elements of genocide, which he considers have resulted in a weakening of the distinction between genocide and other international crimes and wrongful acts. He questions the Judgment's assertion that "scale" is relevant only for the specific genocidal intent and not for the material acts that, in conjunction with specific intent, constitute the crime of genocide. He also holds the view that the Court has not sufficiently explained why an inference of an intent to prevent births can be taken from a combination of two very different acts — general restrictions on marriage, childbirth and birth registration, and specific instances of sexual violence — when neither category of acts, in itself, is inherently committed with the intention to prevent births within a group. He takes the view that the Judgment has weakened the distinction between genocide and the broader category of acts amounting to ethnic cleansing and that the intent to forcibly remove a group is different from the specific intention to physically or biologically destroy it.

Judge Nolte then discusses the factors relevant to inferring genocidal intent, noting that the Court has departed from the approach taken in *Croatia* v. *Serbia* in favour of emphasizing broad and imprecise factors such as the "general context" and acts violating the "foundations of the Rohingya group". Judge Nolte considers that the Court has not explained its approach, in particular why it reaches a different conclusion on questions of scale from the one it reached in a proportionally similar context in *Croatia*. He takes the overall view that the Judgment unjustifiably elevates the concept of serious mental harm as a factor and, in doing so, expands the possibilities for identifying genocidal intent.

Overall, Judge Nolte considers that the approach taken by the Court amounts to a more expansive understanding of the crime of genocide, which risks eroding the distinction between genocide and other grave international crimes, including crimes against humanity. In his view, that

approach risks diminishing rather than reinforcing the distinctive significance of genocide as the specific crime of destroying a protected group, in whole or in part, as such. For these reasons Judge Nolte considers that the Court has departed from its well-established jurisprudence without a compelling reason to do so.

III. *The duty to prevent genocide*

Judge Nolte also explains his negative vote on the finding that Myanmar failed to prevent the commission of genocide. The underlying basis for his vote is that, in his view, the conduct of all individuals who acted alongside the security forces should have been treated as attributable to Myanmar. He takes the view that these individuals, on the basis of the evidence made available to the Court, were acting under Myanmar's effective control. Such a conclusion is, in his view, in line with the jurisprudence of the Court. Effective control goes beyond the question of legal status and considers the reality of the relationship between the parties. In Judge Nolte's view, the reality of that relationship is that individuals acting alongside the security forces can only be understood as having acted under Myanmar's effective control.

Judge Nolte then expresses his concern that the Court, having found a breach of the duty to prevent genocide, has gone further: it has reversed its jurisprudence on that duty, decoupling the duty to prevent genocide from the actual occurrence of genocide. While recognizing that arguments can be made in favour of such an interpretation, Judge Nolte is not convinced. He is of the view that the Court has not provided "very particular reasons" for the reversal of its jurisprudence, instead offering a limited policy justification. He also questions the propriety of making such a reversal of jurisprudence in passing. Overall, Judge Nolte is concerned that this reversal will weaken, rather than strengthen, the duty to prevent genocide, by producing a form of legal risk for all States which may be met with resistance and rejection.

IV. *Genocidal intent of a State*

Judge Nolte then addresses the question of the possible legal significance, for the identification of the necessary genocidal intent, of the difference between the intent of an individual and that of the State as a legal person. It is conceivable that a State may be held responsible for committing genocide on two different bases: first, by way of the attribution of conduct of individuals and, second, by way of the legal construction and identification of a State's own genocidal intent. Judge Nolte acknowledges that, in the present case, it was not strictly necessary for the Court, from the perspective of the majority, to address and resolve this doctrinal question since the majority's finding that "Myanmar's security forces acted with genocidal intent" may mean both that all or most of the relevant individual members of the security forces personally acted with genocidal intent, and that the competent central decision-making organs, which include the security forces, pursued the goal through their control of and their agreement with the conduct of the forces on the ground.

Judge Nolte considers that the identification of a State's own (genocidal) intent, if such an intent is recognized, would have to be based on legal criteria. Thus, before engaging in the process of inferring a State's own genocidal intent from the evidence, the Court should explain what genocidal intent means in the case of a State, and, on that basis, determine what are the relevant indications for any inference of genocidal intent on the part of a State — beyond the customary rules on the attribution of conduct of individuals. In Judge Nolte's view, the most important such legal criterion should ordinarily be the discernible goals of the competent central decision-making organs of the State. From this perspective, he expresses certain reservations regarding the broad catalogue of factors from which the Court infers genocidal intent on the part of "Myanmar's security forces". These reservations are, first, that the expression "Myanmar's security forces" is ambiguous because it can mean the security forces as a whole and acting security forces (units in a particular situation) and, second, the lack of distinction between historical discrimination, hate speech, previous military operations, forcible displacement and selective targeting, on the one hand, and systematic violence at scale, on the other. In Judge Nolte's view, the Court should have explained how such

circumstances contributed to establishing a genocidal intention of Myanmar's competent central decision-making authorities rather than merely the intentions or motives of individual officers and soldiers participating in the operations — even if this was not strictly necessary from the perspective of attribution of conduct under the rules of State responsibility.

V. *Obligation to punish*

Judge Nolte agrees with the Court that Myanmar has violated its duty to punish genocide, a duty which he agrees is not dependent upon the actual occurrence of genocide. Myanmar had a duty to investigate at the latest from September 2018, at which point the State ought to have reasonably suspected that acts punishable under the Genocide Convention might have been committed. The investigations which were undertaken by Myanmar, including by its commission of enquiry, did not amount to a genuine investigation of the conduct of the security forces.

VI. *Reparation and compensation*

Judge Nolte explains that, because he does not consider that The Gambia has proven the claim of genocide, he voted against subparagraphs 8, 9, 10 and 11 of the operative part of the Judgment. He discusses two matters which, in his view, will be relevant during the reparations phase. The first of these is that the Court will need to carefully distinguish between harm which has been caused by violations of the Genocide Convention, and harm caused by other wrongful acts. Failure to do so would result in the Court exceeding its competence. Second, Judge Nolte considers that the Rohingya people must be meaningfully represented and involved in the reparation phase, to ensure that compensation claims can be appropriately formulated, proved and, if successful, satisfied. It is not sufficient, in his view, for The Gambia to formulate a claim and distribute possible proceeds without their meaningful participation.

VII. *Provisional measure on destruction of evidence*

Judge Nolte explains his vote on the third provisional measure of 23 January 2020. He considers that there is insufficient evidence to establish that acts occurring after 23 January 2020 led to the destruction of evidence in the sites of former Rohingya villages.

VIII. *General concerns and conclusion*

Judge Nolte concludes by stating that this is a case where the Court has departed from its settled jurisprudence, taking an impressionistic and intuitive approach to the treatment of evidence and expansively interpreting certain established legal standards, thereby considerably broadening the responsibility of States for genocide. He emphasizes that if the Court can make a finding of genocide with less doctrinal constraint, the extraordinary character of the crime is likely to be diluted and that the Court will then be expected to find that genocide has been committed in situations where it would be appropriate to find crimes against humanity or war crimes.

Finally, Judge Nolte reaffirms that the Rohingya people have suffered terrible atrocities and injustice, but that this cannot in itself justify loosening the conditions for a finding of genocide.

**Separate opinion of Judge Charlesworth**

In her separate opinion, Judge Charlesworth discusses two issues arising from the relationship between individual criminal liability and State responsibility for genocide.

First, Judge Charlesworth compares the methodology employed by the Court in the *Bosnia* and *Croatia* cases to ascertain the intent of a State with that adopted in the present Judgment. She notes that the Court's analysis in the earlier cases relied heavily on findings of the International

Criminal Tribunal for the former Yugoslavia. She explains that the methodology set out in the present Judgment for inferring State intent was informed both by the absence of a comparable body of judicial findings and by the distinct considerations involved in inferring the intent of a State, as opposed to that of individual perpetrators.

Second, Judge Charlesworth expresses reservations about the Court's application of the "fully conclusive" standard of proof in this case. In her view, the legal and conceptual foundations of that standard in the Court's jurisprudence are slender. She argues that the exceptional gravity of allegations of genocide is already adequately reflected in the stringent substantive tests applied by the Court, making it inappropriate to impose what is, in essence, a criminal law standard of proof.

**Joint declaration of Judge Brant and Judge *ad hoc* Pillay**

Judge Brant and Judge *ad hoc* Pillay wish to emphasize that Myanmar is under an obligation, as a form of guarantees of non-repetition, to ensure the protection of the Rohingya against discrimination with respect to access to citizenship, notwithstanding that such an obligation is not explicitly provided in the *dispositif*. In their view, equal access to citizenship is the cornerstone for the protection of the Rohingya's rights under the Genocide Convention and the first guarantee against the commission of genocide. They are of the view that, in the present case, there is a clear causal link between the denial of equal access to citizenship and the erosion of human rights, which facilitated systematic violations of human rights that, in their most extreme form, amount to genocide. They also hold that citizenship is an enabling right, on which many other rights rest or from which they derive; without equal access to its protection and associated rights, the measures ordered by the Court risk being deprived of substance. Therefore, they conclude that the Court should have, in the *dispositif*, explicitly ordered Myanmar to ensure protection against discrimination in access to citizenship.

**Declaration of Judge Cleveland**

Judge Cleveland generally agrees with the Court's findings of fact and legal conclusions, and writes separately to address the meaning of destruction of a group pursuant to Article II of the Genocide Convention.

She notes that the applicant in the 2015 *Croatia* case posed the question whether destruction of the "group, as such" as set forth in Article II may result from certain specific acts that are not limited to the group's physical or biological destruction. Rather than directly confront this question, the Court in 2015 concluded, based on a selective reading of the *travaux préparatoires*, that destruction of a group as set forth in the *chapeau* of Article II must be limited to physical or biological destruction and that the material acts set forth in Article II *(a)* to *(e)* of the Convention must therefore be made to conform to this understanding.

The present Judgment belatedly confronts the question raised in 2015 and persuasively concludes that the destruction of the "group, as such", as set out in the *chapeau* of Article II, refers to forms of destruction that may result from any of the material acts enumerated in Article II, when directed against at least a substantial part of the group. The Court reaches this conclusion based on application of the interpretive principles reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Judge Cleveland emphasizes that the Court's interpretation does not constitute the injection of a theory of cultural genocide into the Convention; it constitutes a very narrow clarification of the Court's jurisprudence which is faithful to the terms of the Convention and established principles of treaty interpretation.

**Joint separate opinion of Judge Cleveland and Judge *ad hoc* Kress**

Judge Cleveland and Judge *ad hoc* Kress note that they welcome the clarification of the Court's interpretation of the term "destroy" in Article II of the Convention and share the view that this does not constitute a fundamental departure from the Court's jurisprudence. They write separately to express their support for the Court's decision to revisit its prior position that the obligation to prevent genocide could be breached only when genocide is ultimately found to have occurred. They emphasize that the prior position gave rise to serious questions of internal consistency, did not well serve the object and purpose of the Convention, and was not convincingly supported by Article 14, paragraph 3, of the ILC Articles on State Responsibility, on which the Court exclusively relied in the 2007 *Bosnia* Judgment. The judges further note that while damage is relevant to the duty to provide reparation, damage is not a condition for State responsibility for an internationally wrongful act. Finally, they observe that the Court's prior position was in tension with the Court's articulation of due diligence obligations to prevent in other contexts, including the obligation to prevent transboundary harm, and was difficult to reconcile with the prevailing understanding of other similar obligations, such as positive obligations to prevent risks to the right to life and the prohibition on *non-refoulement*.

Accordingly, the judges consider that "very particular reasons" warranted the Court's departure from its prior position. They emphasize that consistency and coherence of jurisprudence are complementary values in adjudication; the present Judgment demonstrates that both may be served through the careful development of the Court's jurisprudence.

**Separate opinion of Judge Aurescu**

1. Judge Aurescu agrees with the large majority of the findings of the Court and reasoning of the Judgment. He has voted in favour of all subparagraphs of the operative paragraph, with one exception (subpara. 11). The three issues upon which he elaborates in his separate opinion are set out below.

2. *First*, with regard to compensation, Judge Aurescu agrees with the majority that The Gambia, while it cannot seek reparation for itself, may bring a claim for the performance by Myanmar of the obligation of full reparation, including compensation, in the interest of the Rohingya, and that such compensation must be effective. However, Judge Aurescu believes that the Court should not have reserved a subsequent phase of the proceedings in the case to determine the amount and modalities of compensation or other reparation due to the Rohingya.

3. In this respect, Judge Aurescu recalls that The Gambia has no mandate from the Rohingya population to represent it and to advocate for its interests on its behalf. He emphasizes that The Gambia's standing in the case stems from its own *erga omnes partes* interest as a party to the Genocide Convention, and that this legal interest has been fully addressed by the Judgment. Judge Aurescu thus considers that, because there is no mandate granted by the Rohingya population empowering The Gambia to act on their behalf in the present case, The Gambia has no standing to represent the interests of the Rohingya in a second phase of the proceedings concerning, *inter alia,* the modalities and the amount of compensation to be granted, which are outside the scope of the legal interest of The Gambia.

4. Despite the foregoing, he is of the view that the Court should aim to ensure just and effective compensation for the victims. In this regard, Judge Aurescu considers that the Court should have acknowledged the legal obligations of other organs of the United Nations in relation to the Rohingya genocide and should have evoked possible avenues to be followed by them. Judge Aurescu regrets

that the Court missed an opportunity to mention that the remedies ordered by it are without prejudice to any other further actions that the General Assembly, the Security Council or the Secretary General may take within the scope of their functions, with respect to the compliance of Myanmar with its obligations under the Genocide Convention.

5. Given the absence of a mandate provided by the Rohingya to The Gambia, Judge Aurescu also mentions alternative measures through which the obligation to compensate could be implemented, such as a register of damage and a claims commission, as independent and neutral mechanisms.

6. *Second*, with regard to the Court's reliance on third-party findings on discrimination, Judge Aurescu believes that the manner in which the Judgment, in certain parts, refers to discrimination of the Rohingya is improper. He considers that, although the Court may rely on third-party reports for fact-finding, it must remain cautious not to rely on legal assessments made in such reports and must conduct the relevant legal analysis independently. In his view, the Court should have refrained from attributing determinative or evidentiary weight to legal findings made by third-party bodies and should instead have based its conclusions on its own assessment of the relevant facts and law (which the Court eventually did, albeit briefly, in paragraph 400 of the Judgment).

7. *Third*, Judge Aurescu finds it important to emphasize that, by using the reference to the "destruction of the group's culture in its various aspects" in the reasoning leading to the conclusion of paragraph 289 of the Judgment, the Court does not seek to introduce the concept of cultural genocide within the scope of the Genocide Convention. In his view, the Court merely seeks to clarify that the destruction of the group as a functional unit cannot be conceived as being limited to the death or biological destruction of or physical harm to its individual members.

**Separate opinion of Judge Hmoud**

1. In his separate opinion, Judge Hmoud affirms that Myanmar carries the burden of establishing facts in support of its own contentions. He considers that Myanmar has a duty to co-operate in the provision of evidence that may be in its possession, including co-operation with relevant competent international institutions. Judge Hmoud concludes that Myanmar has failed to refute the evidence provided by The Gambia and that it has not fulfilled its duty to co-operate.

2. Judge Hmoud notes that the intent to destroy the group "as such", in whole or in part, concerns the destruction of the group's existence, rather than merely killing its members. Judge Hmoud endorses the Court's identification of a reasonable inference of genocidal intent through four factors: (1) the general context; (2) the selective targeting of the Rohingya; (3) the perpetration of acts that violate the foundations of the Rohingya; and (4) the systematic nature and the scale of Myanmar's actions. In addition, he considers that the genocidal intent could also have been identified through the Tatmadaw's pattern of conduct, as it supported an inference of genocidal intent. Endorsing the Court's approach of assessing the evidence in its totality, Judge Hmoud also emphasizes that the existence of other motives and goals, in addition to genocidal intent, in the commission of the *actus reus*, does not preclude a finding of genocidal intent as the only reasonable inference. In this regard, he notes that genocide may also be employed as a means of achieving counter-terrorism and that intent to forcibly displace the population does not explain the totality of the evidence or constitute an alternative reasonable inference.

3. Judge Hmoud concurs with the Court's conclusion that the duty to prevent genocide is not conditioned on a finding that genocide has occurred. He clarifies that, in addition to Myanmar's

failure to prevent genocide on the part of individuals acting alongside its security forces but not under its direct control, Myanmar breached its obligation by failing to prevent its State organs, including its senior leadership and military, from committing genocide.

4. As regards public and direct incitement, Judge Hmoud departs from the Court's conclusion and takes the view that Myanmar is responsible for directly and publicly inciting the commission of genocide.

5. Finally, Judge Hmoud agrees that the Court's two-stage approach in relation to compensation is appropriate and he particularly welcomes the Court's recognition that the repeal of the discriminatory measures and laws against the Rohingya in Myanmar constitutes both a guarantee of non-repetition and a measure of reparation.

**Separate opinion, partly concurring and partly dissenting, of Judge *ad hoc* Kress**

In his separate opinion, Judge *ad hoc* Kress underscores the wider significance of proceedings instituted in the collective interest under the Genocide Convention. Proceedings of this kind make visible that the prohibition of genocide under international law is grounded in a vision of community. For jurisdictional reasons, the Court is directly concerned with the community which the States parties to the Convention established among themselves. Beyond those jurisdictional constraints, however, the vision of an even wider community emerges. This wider perspective finds expression in the preamble of the Genocide Convention, which recognizes the "great losses" inflicted by genocide on "humanity" and invokes the need to liberate "mankind" from that scourge. Ultimately, the prohibition of genocide is embedded in an international legal order which encompasses States as its central pillars but also transcends them towards an ultimate point of reference — the international community *as a whole*, inherent in which is the notion of an elementary unity of humankind. Beginning with its Order on provisional measures of 23 January 2020 and culminating in its determination in the present Judgment to reserve a subsequent phase for the question of the amount and modalities of compensation or other reparation, the Court has developed a procedural framework governing proceedings of this kind. Judge Kress states that he is in full agreement with the Court's relevant pronouncements and considers them of great significance for the future.

Judge Kress emphasizes the terrible human suffering that genocide cases will almost by necessity involve when the Court allows them to proceed to the merits stage. He underlines that this is true also in the present case. Hundreds of thousands of Rohingya from northern Rakhine State have experienced terrible suffering, particularly though not exclusively, as a result of Myanmar's clearance operations in 2017. This terrible suffering was painfully present in the Great Hall of Justice when the three Rohingya witnesses, called by The Gambia, courageously gave their testimonies.

Judge Kress notes that a powerful but deplorable tendency has developed over recent decades. It consists in attaching immense prominence to the label "genocide" and using this word as a generic name for atrocity crimes. This tendency distorts the current state of international law and, above all, downgrades the distinct significance of crimes against humanity. Judge Kress points out that this situation entails a particular difficulty for the Court when its jurisdiction is limited to the question of genocide as in the present case. He recalls that, in previous instances, the Court's finding that the relevant respondent State had not committed genocide was gravely misunderstood by some to be akin to an overall "acquittal". Against this background, Judge Kress emphasizes that it would be a grave misunderstanding to interpret as something akin to an overall "acquittal" the conclusion of six judges that it has not been established in this case that Myanmar committed genocide.

Judge Kress points out that the particular difficulty which results from the Court's limited jurisdiction does not, however, justify that the Court approaches the interpretation and the application

of the Genocide Convention with any less judicial rigour than it brings to the application of international law generally. Together with the other judges in the minority — and as explained in the joint dissenting opinion — Judge Kress is of the view that the way in which the Court purports to have indirectly established a genocidal intent on the part of Myanmar constitutes a significant and unacknowledged departure from the previously established jurisprudence of the Court. He regrets that the Court has thereby opened the door for a "holistic assessment" of great indeterminacy. Judge Kress is of the view that the Court, by giving an unduly light treatment to the legal conditions for indirectly proving genocidal intent in the present case, has not done justice to the fundamental importance of the prohibition of genocide and has also not done justice to Myanmar and its people.

Judge Kress recalls that almost 80 years ago, the International Military Tribunal stated in its judgment delivered at Nuremberg that "[c]rimes against international law are committed by men, not by abstract entities". He points out that, in the present Judgment, the Court, by finding for the first time that a State committed genocide, gives life to its earlier recognition that the International Military Tribunal's famous pronouncement does not contain the entire truth. By its finding that Myanmar "committed" genocide, the Court recognizes the other part of the truth: that States may also commit genocide, alongside individuals.

Judge Kress would have welcomed a clearer articulation by the Court in the present Judgment of the genuinely complementary function in contemporary international law of the prohibition of genocide, as addressed to States, alongside the twin prohibition addressed to individuals. In his view, the complementary function of the prohibition of genocide addressed to States is due to the fact that international criminal law faces inherent difficulties in comprehensively accounting for collective action. Properly understood, the law on State responsibility for genocide is capable of closing an accountability gap situated at the collective level, which the law on individual criminal responsibility must, to a certain extent, leave open. In practical terms, this is perhaps most evident with respect to the question of reparation to the benefit of the victims of genocide.

Judge Kress is of the view that this complementary function is best served by a genuinely collective understanding of genocide as an internationally wrongful act of a State. While such a collective understanding constantly shines through the Court's reasoning, it is not explicitly spelled out in the Judgment. This would have required the Court, most importantly, to clearly set out a genuinely collective conception of genocidal intent for the purposes of State responsibility for genocide. In the view of Judge Kress, the meaning of genocidal intent on the part of a State is distinct from, but complementary to, the genocidal intent of an individual for the purposes of criminal responsibility. The requisite genocidal intent on the part of a State consists of a genuine State purpose embodied in a policy formed or adopted at a level capable of directing the conduct of the State. Conversely, the genocidal intent of an individual State organ does not, merely because that organ's conduct is attributable to the State, suffice to establish genocidal intent on the part of the State.

In the view of Judge Kress, the genuinely collective nature of genocide as an internationally wrongful act of a State is grounded in the same basic structure as the prohibition of genocide applicable to individuals. In particular, he agrees with the Court that, except under Article II *(c)*, a single enumerated act, such as one single act of killing a member of a protected group, may suffice for the commission of genocide by a State, provided that the relevant act is attributable to the State concerned. In addition, and crucially, the relevant act must also have been committed pursuant to a genocidal policy of the State concerned. To the extent that this genocidal State policy is implemented through a multitude of acts within the meaning of Article II of the Genocide Convention, all those acts together constitute the commission of one single genocide by the State concerned. For all practical purposes, genocide therefore requires at least the prospect of collective action. Judge Kress underscores that the same is also true for genocide as a crime under international law committed by an individual. The genocidal intent of an individual must likewise be realistic and, for all practical purposes, requires at least the prospect that the act of the individual concerned will form part of a genocidal campaign carried out through collective action. Only in such a case will there be a real

threat to the continued existence of the protected group, in whole or in substantial part, of the kind that the prohibition of genocide is designed to prevent.

Judge Kress notes that the present case has given the Court an occasion to deal with an unprecedented number of legal questions under the Genocide Convention, many of which had not received the Court's detailed attention before. He states that he is in almost entire agreement with the Judgment in those respects and that he considers the Judgment's contribution to the elucidation of numerous provisions of the Genocide Convention to be of great value. This is true not only for the interpretation of many elements of the prohibition of genocide, but also for the detailed analysis of the conditions for incitement to genocide and the meaning of the duty to punish genocide. As set out in detail, together with Judge Cleveland in their joint separate opinion, Judge Kress also supports that the Court has resolved to depart from one element of its previous jurisprudence with respect to the duty to prevent genocide, the main reason being to thereby better serve the object and purpose of the Genocide Convention.

Regarding the elements of the definition of genocide, Judge Kress welcomes, in particular, the Court's clarification that "destruction", for the purposes of genocidal intent, encompasses the forms of destruction capable of resulting from the cumulative effect of acts enumerated in Article II, when directed against at least a substantial part of a protected group, while remaining tied to those acts and not extending to the mere dissolution or dispersal of a group. He regrets, however, that the Court has, through its overbroad holistic assessment of genocidal intent, opened an evidentiary backdoor to effectively go beyond the proper understanding of "destruction" in the present case.

Although Judge Kress does not consider it established that Myanmar committed genocide, he agrees that Myanmar breached its obligation to investigate. The obligation to punish includes an antecedent duty to investigate, arising where reasonable grounds exist to suspect that genocide or another act punishable under Article III may have been committed, independently of a prior finding that genocide occurred. In his view, such grounds existed by September 2018 at the latest, but Myanmar did not conduct investigations satisfying the Convention's requirements, including in relation to possible direct and public incitement to genocide. He also notes that Myanmar could accept the jurisdiction of the International Criminal Court under Article 12 (3) of the Rome Statute, thereby rendering the Court relevant to the fulfilment of its investigative and, where warranted, punitive obligations.

Because Judge Kress rejects the finding that Myanmar committed genocide, he votes against the specific orders of restitution and compensation. He nevertheless agrees, as a matter of legal principle, that where responsibility for breach of an obligation *erga omnes partes* has been established, any State party entitled to invoke that responsibility may seek reparation for the benefit of the protected group and its affected members, including through a subsequent procedure to determine the amount and modalities of such reparation. He also agrees that Myanmar breached the obligation arising from the third provisional measure concerning the preservation of evidence, understanding it as an autonomous obligation of due diligence requiring effective implementation and enforcement.

_____