

**Before the
INTERNATIONAL COURT OF JUSTICE**

WRITTEN OBSERVATIONS OF THE REPUBLIC OF MALDIVES

In the case of

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

THE GAMBIA v. MYANMAR

28 February 2025

Table of Contents

I.	Introduction	4
a.	Principles of construction	6
II.	Article I.....	9
a.	Article I requires the punishment of all genocidal acts set out in article III of the Convention, including conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.....	10
b.	A State party can breach its duty to punish genocidal acts under article I regardless of whether it is responsible for the underlying genocidal acts, and the Court is not required to find any intent to commit genocide on the part of a State in order to find a breach of that State’s duty to punish.....	11
c.	The obligation on States parties to “employ all means reasonably available” to prevent genocide does not apply to the duty to punish.	12
d.	The Convention stipulates minimum requirements for States parties to satisfy their obligation to punish genocide acts under article I, and these are set out in articles IV, V and VI.	14
III.	Article IV	17
a.	States parties must punish perpetrators of genocidal acts if there is sufficient evidence to do so, subject to prosecutorial discretion exercised independently, impartially and in good faith.	17
b.	The obligation under article IV for States parties to punish perpetrators of genocidal acts does not exclude persons bearing command responsibility for genocidal acts from the scope of “persons” who must be prosecuted.....	23
IV.	Article V.....	26
a.	Article V sets out an aspect of the duty to punish, and a State party cannot fulfil its duty to punish genocide under article I without satisfying article V.....	26
b.	To comply with the requirement to enact legislation to “give effect” to the Convention under article V, the legislation enacted by a State party must allow for the prosecution of all acts committed in its territory that are punishable under the Convention and ensure that all potential perpetrators of genocidal acts committed in its territory can be prosecuted in accordance with article IV.	27
c.	Legislation that is incompatible with the Convention can be a breach of article V based on its terms, not just its application.	29
d.	For a penalty to be “effective” for the purposes of article V, it must be proportionate to the gravity of the crime of genocide and sufficient to deter future perpetrators.	32

V.	Article VI	37
a.	The triggers for a State party to investigate and prosecute persons charged with genocidal acts before a competent tribunal	38
i.	A State party’s duty to punish genocidal acts under article VI of the Convention encompasses a duty to investigate as soon there are reasonable grounds to believe that genocidal acts have been committed in its territory.....	39
ii.	A State party’s duty to punish genocide under article VI of the Convention encompasses a duty to prosecute without delay as soon as there is sufficient evidence that genocidal acts have been committed in its territory.	41
b.	The procedural standards applicable to the duty to investigate and prosecute persons charged with genocide	42
i.	States parties must carry out good faith investigations that are prompt, effective and thorough, independent and impartial.....	42
ii.	States parties must exercise prosecutorial discretion independently, impartially and in good faith.....	47
iii.	States parties must try persons charged with genocidal acts before a competent tribunal that complies with international fair trial standards, including the requirement that the tribunal be independent and impartial, in both civilian and military courts.	47
c.	States parties may discharge their duty to punish under article VI by accepting the jurisdiction of and cooperating with an “international penal tribunal” that meets international fair trial standards.	52
d.	States parties may be ordered to prosecute specific individuals under certain circumstances if found in violation of the duty to punish genocide under the Convention.	55
VI.	Conclusion	57

I. Introduction

1. The Republic of Maldives (“Maldives”) intervenes in this case as a State party to the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).¹ The International Court of Justice has found the Maldives’ declaration of intervention admissible under article 63(2) of the Statute of the Court and has invited the Maldives to submit written observations on the subject matter of its intervention.² A second declaration of intervention filed by six other States parties (“Joint Interveners”) has been admitted on the same basis.³
2. In accordance with the role of an intervening State under article 63, the Maldives’ observations focus on the construction of certain provisions of the Genocide Convention, in particular articles I, IV, V and VI of the Convention, which concern the duty to punish genocide. In summary, the Maldives argues that the Court should adopt the following construction:
 - a) Article I of the Genocide Convention:
 - i. requires the punishment of genocide or any of the other acts enumerated in article III⁴ (“genocidal acts”). A State party can breach its duty to punish genocidal acts under article I regardless of whether it is responsible for the underlying genocidal acts, and the Court is not required to find any intent to commit genocide on the part of a State in order to find a breach of that State’s duty to punish.
 - ii. The obligation in article I for States parties⁵ to punish genocidal acts is different from the obligation of States parties to prevent genocide, and the Court’s holding that the obligation on States parties is to “employ all means

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (“*The Gambia v. Myanmar*”), Declaration of intervention of the Republic of Maldives, 15 November 2023 (“Maldives’ Declaration”).

² *The Gambia v. Myanmar*, Admissibility of the Declarations of Intervention Order, 3 July 2024 (“ICJ Admissibility Order”), para. 46; *The Gambia v. Myanmar*, Letter from the Registrar of the Court to the Maldives, 30 December 2024.

³ *The Gambia v. Myanmar*, Joint declaration of intervention by Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland dated 15 November 2023 (“Joint Declaration”); ICJ Admissibility Order, para. 46; *The Gambia v. Myanmar*, Letter from the Registrar of the Court to the Joint Interveners, 30 December 2024.

⁴ Genocide Convention, art. III (referring to the acts of “[g]enocide”, “[c]onspiracy to commit genocide”, “[d]irect and public incitement to commit genocide”, “[a]ttempt to commit genocide” and “[c]omplicity in genocide”).

⁵ Given that these proceedings concern the obligations of a State in the territory of which the alleged genocidal acts were committed, the Maldives does not exhaustively address the construction of the duty to punish insofar as other States parties are concerned.

reasonably available”⁶ to prevent genocide does not apply to the duty to punish. Rather, the Convention stipulates minimum requirements for States parties to satisfy their obligation to punish genocidal acts under article I, and these are set out in articles IV, V and VI.

- b) Article IV of the Genocide Convention requires States parties to punish perpetrators of genocidal acts, subject to prosecutorial discretion exercised independently, impartially and in good faith. If there is sufficient evidence that a person committed genocidal acts, and the State fails to prosecute this person, the burden falls on the State party to justify the failure to prosecute in line with its obligations under the Convention. The obligation under article IV for States parties to punish perpetrators of genocidal acts does not exclude persons bearing command responsibility for genocidal acts from the scope of “persons” who must be prosecuted.
- c) Article V sets out an aspect of the duty to punish, and a State party cannot fulfil the duty to punish genocide under article I without satisfying article V. To comply with the requirement to enact legislation that will “give effect” to the Convention under article V, the legislation enacted by a State party must allow for the prosecution of all acts committed in its territory that are punishable under the Convention, and ensure that all potential perpetrators of genocidal acts committed in its territory can be prosecuted, in accordance with article IV. Legislation that is incompatible with the Convention can be a breach of article V based on its terms, not just its application. For a penalty to be “effective” for the purposes of article V, it must be proportionate to the gravity of the crime of genocide, and sufficient to deter future potential perpetrators.
- d) The duty to punish in article VI of the Genocide Convention encompasses a duty to investigate as soon as there are reasonable grounds to believe that genocidal acts may have been committed in its territory, and a duty to prosecute without delay as soon as there is sufficient evidence of their commission, subject to prosecutorial discretion exercised independently, impartially and in good faith. The duty to punish under article VI encompasses a duty to conduct investigations in good faith that are prompt, effective and thorough, and independent and impartial. The duty to punish encompasses a duty to prosecute persons charged with genocidal acts before a “competent tribunal” that complies with fair trial standards defined in international law, including the right to an independent and impartial tribunal, in both civilian and military courts. States parties may discharge their duty to punish under article VI by accepting the jurisdiction of and cooperating with an “international penal tribunal” that meets international fair trial standards. And States may be ordered to

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (“*Bosnia v. Serbia* (ICJ Judgment)”), para. 430.

prosecute specific individuals under certain circumstances if found in violation of the duty to punish.

a. Principles of construction

3. It is common ground between the Parties to this case and the Joint Interveners that when construing the provisions of the Genocide Convention, the Court will have recourse “not only to the Convention itself, but also to the rules of general international law on treaty interpretation”.⁷ But the Parties disagree about the sources that the Court can refer to in determining the proper construction of the Convention.
4. Myanmar suggests that the Court must ignore the jurisprudence of international criminal courts and decisions of national courts.⁸ This is because, according to Myanmar, “customary international law that has developed since 1948” cannot “alter the content of the Genocide Convention”.⁹ The Gambia rejects this argument, and points to the Court’s “established approach” to interpretation of drawing on “other relevant sources of law” and legal developments that occurred after a treaty is concluded, such as its consideration in *Croatia v. Serbia* of “the rules of international humanitarian law” and the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) when construing the Genocide Convention.¹⁰
5. The Maldives agrees with The Gambia that the Court has endorsed a broader approach to treaty interpretation than Myanmar suggests, in line with established principles of international law.
6. The rules of general international law on treaty interpretation are reflected in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (“Vienna Convention”), which the Court has confirmed represent customary international law.¹¹ They make clear that a treaty should be interpreted in accordance with the terms’ ordinary meaning, in the light of the treaty’s object and purpose, in context and by “tak[ing] into account”, among other sources, any “subsequent practice” of the States parties that “establishes [their] agreement” on the treaty’s construction; “any relevant rules of international law applicable in the relations between the parties”; and the “preparatory work of the

⁷ *The Gambia v. Myanmar*, Counter-Memorial of the Republic of the Union of Myanmar, 24 August 2023 (“Counter-Memorial”), para. 4.10; *The Gambia v. Myanmar*, Reply of the Republic of The Gambia, 23 May 2024 (“Reply”), para. 3.3 (both citing *Bosnia v. Serbia* (ICJ Judgment), para. 149). See also Maldives’ Declaration, para. 24; Joint Declaration, para. 21.

⁸ See Counter-Memorial, paras. 4.6-4.7.

⁹ *ibid.*, para. 4.7; *The Gambia v. Myanmar*, Rejoinder of the Republic of the Union of Myanmar (“Rejoinder”), 30 December 2024, para. 4.14. See generally Rejoinder, paras. 4.7-4.11.

¹⁰ *The Gambia v. Myanmar*, Memorial of the Republic of The Gambia (“Memorial”), 23 October 2020, para. 4.5; Reply, paras. 3.3, 3.5-3.7. The Gambia cites *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3 (“*Croatia v. Serbia* (ICJ Judgment)”), paras. 148, 153 (in which the Court refers to the ICTY Trial Judgment in *Prosecutor v. Zdravko Tolimir* and considers “the rules of international humanitarian law”).

¹¹ *Bosnia v. Serbia* (ICJ Judgment), para. 160.

treaty”.¹² And article 38(1) of the Statute of the Court requires that the Court apply, in addition to international custom and relevant treaties, “the general principles of law recognized by civilized nations”, as well as “judicial decisions” and the writings of expert commentators “as subsidiary means for the determination of rules of law” by the Court.

7. The Court has confirmed that “in accordance with the customary rules as reflected in the Vienna Convention”, it will take into account “references to other rules and principles of international law outside the Genocide Convention ... in so far as they may be relevant for the construction of the Convention’s provisions”.¹³
8. The Court has found that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”¹⁴ and that terms in treaties are “likely to evolve over time” and must be presumed “to have an evolving meaning”.¹⁵ The Court has concluded that its construction of treaty terms “cannot remain unaffected by the subsequent development of law”, including “by way of customary law”.¹⁶
9. The Court has referred to other treaties,¹⁷ customary international law¹⁸ and its own jurisprudence on the construction of “comparable” clauses in other treaties¹⁹ when determining the construction of treaty terms. And when interpreting the obligations under international and regional human rights treaties, the Court has reviewed the jurisprudence of the human rights courts and bodies established under those treaties as well as the interpretation by regional human rights courts of treaty provisions “being close in substance” to those at issue in the case, noting that “[t]he point [was] to achieve the necessary clarity and the essential consistency of international law”.²⁰ Specifically, when

¹² Article 32 describes the “preparatory work” as a “supplementary means of interpretation”.

¹³ ICJ Admissibility Order, para. 45.

¹⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 (“*Namibia* (ICJ Advisory Opinion)”), para. 53.

¹⁵ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Report 2009, p. 213, para. 66 (considering the construction of the term “comercio” in a treaty concerning navigational rights some 150 years after its conclusion). See also Reply, para. 3.6. Cf. Rejoinder, paras. 4.9-4.11.

¹⁶ *Namibia* (ICJ Advisory Opinion), para. 53.

¹⁷ E.g., *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 3, para. 89.

¹⁸ E.g., *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161, paras. 40-41.

¹⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70 (“*Georgia v. Russian Federation* (ICJ Preliminary Objections Judgment)”), paras. 136-140.

²⁰ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, I.C.J. Reports 2010, p. 639 (“*Republic of Guinea v. Democratic Republic of the Congo* (ICJ Merits Judgment)”), paras. 66-68 (referring to the jurisprudence of the U.N. Human Rights Committee and the African Commission on Human and Peoples’ Rights when considering the obligations under the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights at issue in the case and referring to decisions by

considering the terms of the Genocide Convention, the Court has confirmed that it would “take account, where appropriate, of the decisions of international criminal courts or tribunals, [including] the ICTY”.²¹

10. The requirement under article 31(3)(c) of the Vienna Convention to take into account “any relevant rules of international law applicable in the relations between the parties” must be construed broadly. According to commentators, “[s]ince no restrictions are contained in that phrase, and its meaning is even widened by the word ‘any’, it must be taken to refer to all recognized sources of international law the emanations of which can in principle be of assistance in the process of interpretation”, with “[t]he implicit reference” being to the sources listed in article 38(1) of the Statute of the Court.²²
11. The Maldives will therefore refer to the principles of construction and sources enumerated in articles 31 and 32 of the Vienna Convention and article 38 of the Statute of the Court, in line with the Court’s previous jurisprudence, in setting out its arguments on the construction of the Genocide Convention in this case.

the European Court of Human Rights and the Inter-American Court of Human Rights on treaty provisions under the European Convention on Human Rights and the American Convention on Human Rights).

²¹ *Croatia v. Serbia* (ICJ Judgment), para. 129.

²² Oliver Dörr and Kirsten Schmalenbach (eds.), *The Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018), pp. 604-605.

II. Article I

Article I of the Genocide Convention states that:

The States parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

12. The Maldives addresses four questions of construction of article I of the Genocide Convention that are relevant to these proceedings: (a) what acts trigger States parties' duty to punish; (b) whether a State party's responsibility for failure to punish genocidal acts is predicated on a finding of responsibility for genocidal acts by that State; (c) the nature of the duty to punish as compared with the duty to prevent genocide; and (d) the requirements necessary to satisfy the duty to punish.
13. For the reasons set out below, the Maldives contends that the Court should adopt the following construction of article I in relation to these questions:
 - a) Article I requires the punishment of all genocidal acts set out in article III, including conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.
 - b) A State party can breach its duty to punish genocidal acts under article I regardless of whether it is responsible for the underlying genocidal acts. The Court is not required to find any intent to commit genocide on the part of a State in order to find a breach of that State's duty to punish.
 - c) The obligation in article I for States parties to punish is different from the obligation of States parties to prevent genocide. The Court's holding that a State party's obligation is to "employ all means reasonably available"²³ to prevent genocide does not apply to the duty to punish.
 - d) The Convention stipulates minimum requirements for States parties to satisfy their obligation to punish genocidal acts under article I and these are set out in articles IV, V and VI.

²³ *Bosnia v. Serbia* (ICJ Judgment), para. 430.

a. **Article I requires the punishment of all genocidal acts set out in article III of the Convention, including conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.**

14. The Court has made clear that the obligation to punish genocidal acts is one of the underlying purposes of the Genocide Convention. As stated by the Court:

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as “a crime under international law” involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations.²⁴

15. The obligation to punish genocidal acts is owed *erga omnes partes*, and forms part of customary international law.²⁵
16. Myanmar concedes that the duty to punish arises once genocide has been committed.²⁶ The Gambia agrees but further argues that “a State Party cannot evade the obligation to punish by turning a blind eye to sufficient evidence of genocidal acts”.²⁷
17. While it is clear that commission of genocide triggers a State party’s responsibility to punish, the Maldives submits that this is not the only circumstance giving rise to States parties’ duty to punish genocide under article I. States parties must also punish the acts in article III(b) – (e) of the Convention, i.e. conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. A failure to do so constitutes a breach of article I of the Convention, which, as the Court has recognized, gives rise to State responsibility.²⁸
18. This construction of article I is supported by the ordinary meaning of articles III, IV, V and VI, all of which refer to the duty to punish.²⁹ Article III stipulates that the “*following acts shall be punishable*”;³⁰ article IV requires that “[p]ersons committing genocide *or*

²⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 15 (“*Reservations to the Convention on Genocide (ICJ Advisory Opinion)*”), p. 23 (citations omitted).

²⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595, para. 31.

²⁶ See Counter-Memorial, para. 4.90.

²⁷ Memorial, para. 4.70.

²⁸ *Bosnia v. Serbia (ICJ Judgment)*, para. 383.

²⁹ See Vienna Convention, art. 31(1) (requiring treaties to be construed in accordance with their ordinary meaning).

³⁰ Emphasis added.

any of the other acts enumerated in article III shall be punished”;³¹ article V requires States parties to “enact ... necessary legislation” and “provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III”;³² and article VI requires that “[p]ersons charged with genocide or any of the acts enumerated in article III shall be tried”.³³

19. This construction of the Convention has been endorsed by the Court. In *Croatia v. Serbia*, the Court dismissed Serbia’s counter-claim that Croatia had failed to punish genocide, and in doing so noted that “[s]ince Serbia has failed to prove the existence of an act of genocide or any of the other acts mentioned in article III of the Convention, committed against the Serb population living in Croatia, its subsidiary submissions [that the Court find that Croatia has violated its obligation to punish] must also necessarily be rejected”.³⁴ The Court has therefore acknowledged that failure to punish the conduct set out in articles III(b) – (e) of the Convention can give rise to State responsibility.
 - b. **A State party can breach its duty to punish genocidal acts under article I regardless of whether it is responsible for the underlying genocidal acts, and the Court is not required to find any intent to commit genocide on the part of a State in order to find a breach of that State’s duty to punish.**
20. The Maldives contends that if the Court finds that genocidal acts have occurred, it can find a State party in breach of its obligation to punish under article I regardless of whether it finds that the State bears responsibility for such acts. As The Gambia argues, and Myanmar does not dispute, a “[f]inding that Myanmar failed to punish genocide is independent from any finding of responsibility under Article III or of responsibility for the failure to prevent genocide under Article I”.³⁵
21. This position is consistent with the Court’s interpretation of the duty to punish. As the Court noted in *Bosnia v. Serbia*, “[i]t is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility”.³⁶
22. Since State responsibility for failure to punish is not dependent on a finding of intent to commit genocidal acts, the Maldives also agrees with The Gambia’s argument that the

³¹ Emphasis added.

³² Emphasis added.

³³ Emphasis added.

³⁴ *Croatia v. Serbia* (ICJ Judgment), para. 519.

³⁵ Reply, para. 9.101.

³⁶ *Bosnia v. Serbia* (ICJ Judgment), para. 383.

Court is not required to make any finding of *dolus specialis* on the part of Myanmar to determine that it has breached its duty to punish.³⁷ This conclusion is consistent with the way in which the Court has identified a breach of the duty to punish in past cases. Nowhere in the Court’s consideration of whether Serbia had breached its obligation to punish genocide did the Court consider Serbia’s intent, let alone *dolus specialis*.³⁸ This contrasts with the requirement of special intent in articles II and III.³⁹

c. The obligation on States parties to “employ all means reasonably available” to prevent genocide does not apply to the duty to punish.

23. According to Myanmar, the duty to punish is a “duty of conduct” and “Contracting Parties are not under an obligation to succeed in prosecuting and punishing suspected perpetrators of acts of genocide whatever the circumstance, but rather are under a duty to employ all means reasonably available to them to do so”.⁴⁰ Myanmar suggests that States parties are required only to exercise “due diligence” in order to discharge their obligation to punish, and that “[r]esponsibility for failing to punish genocide will only arise where a Contracting State has *manifestly* failed to take all measures to punish genocide that were within its power”.⁴¹ Because of this, Myanmar argues, “[t]he question whether this obligation has been breached ... will depend on all of the circumstances of that case”, “including the capacity and the resources of the Contracting Party in question”.⁴²
24. Myanmar relies on the Court’s judgment in *Bosnia v. Serbia* to support the construction of the duty to punish as a “duty of conduct”.⁴³ But the Court in that case only characterized the duty to *prevent* genocide as a duty of conduct.⁴⁴ The duty to punish genocide is dealt with separately by the Court in its judgment, and the Court did not make a similar finding regarding that duty.⁴⁵ Indeed, although it noted “clear links between the duty to prevent genocide and the duty to punish its perpetrators”, the Court has

³⁷ See Reply, para. 9.101.

³⁸ See *Bosnia v. Serbia* (ICJ Judgment), paras. 439-450.

³⁹ Cf., e.g., *Bosnia v. Serbia* (ICJ Judgment), para. 187; *Croatia v. Serbia* (ICJ Judgment), para. 441. See also Guénaél Mettraux, *International Crimes Law and Practice: Volume I: Genocide* (OUP 2019) (“G. Mettraux”), p. 24 (“according to the Court, state responsibility for a failure to prevent or punish genocide does not require proof that the state itself possessed that special intent. ... [T]he Convention provides that a state could be held responsible for acts of genocide even where it does not share the perpetrator’s special intent”).

⁴⁰ Counter-Memorial, para. 12.22.

⁴¹ *ibid* (emphasis in original).

⁴² *ibid*, para. 12.23.

⁴³ *ibid* (citing to *Bosnia v. Serbia* (ICJ Judgment), para. 430).

⁴⁴ *Bosnia v. Serbia* (ICJ Judgment), para. 430.

⁴⁵ See *ibid*, paras. 439-450.

recognized that these are “two distinct ... obligations”.⁴⁶ The principles applicable to the construction of one duty are therefore not automatically applicable to the other.⁴⁷

25. Unlike the duty to prevent, the content of the duty to punish is set out extensively in the Convention itself: of the seven articles in the Convention that impose substantive duties on States parties, six of them mention the imperative to punish perpetrators of genocidal acts.⁴⁸ As the Court notes, although “the Convention includes fairly detailed provisions concerning the duty to punish (Articles III to VII), it reverts to the obligation of prevention, stated as a principle in Article I, only in Article VIII”.⁴⁹
26. The standard articulated by the Court for the duty to prevent is also based on factors that do not apply to the duty to punish. In *Bosnia v. Serbia*, the Court applied the “employ all means reasonably available” standard because it recognized that the ability of States parties to prevent genocide may be limited by certain factors specific to the nature of the duty to prevent, including “the capacity [of the State] to influence effectively the action of the persons likely to commit, or already committing, genocide”, “the geographical distance of the State concerned from the scene of the events”, and “the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events”.⁵⁰ But none of these factors apply with respect to a State party’s obligation to punish acts of genocide occurring within its territory. The State itself has the duty to punish, so the question of its “capacity to influence effectively the action”⁵¹ of others does not arise. Similarly, the “strength of political links ... between the authorities of [the State] and the main actors in the events”⁵² is irrelevant for the duty to punish, as the State is itself the main actor when it comes to punishing perpetrators. And while “geographical distance” could indeed be a barrier for a State to prevent acts of genocide occurring in another State, a State could hardly rely on this as a reason for

⁴⁶ *ibid*, para. 425.

⁴⁷ The Gambia argues that “[u]nlike the duty to prevent, the duty to punish is a result-focused duty: to comply with it, States must actually have the necessary legislation in place, and they must actually try perpetrators regardless of constitutional status and impose effective penalties for their crimes”: Memorial, para. 4.70. The Court has at times described various treaty obligations as duties of result or duties of conduct: see, e.g., *Request for Interpretation of the Judgment of 31 March 2004 in the case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2009, p. 3, para. 27; cf. *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 499 (“*LaGrand* (ICJ Judgment)”), para. 111. But, as the International Law Commission has commented, this “distinction ... is not exclusive” and is not always relevant or helpful: International Law Commission, *Report of the Commission to the General Assembly on the work of its fifty-third session*, Yearbook of the International Law Commission 2001, Vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), p. 56 (Commentary to Article 12 of the Articles on Responsibility of States for Internationally Wrongful Acts).

⁴⁸ The only article that does not refer to the duty to punish is article II, which defines genocide. See also Vienna Convention, arts. 31(1), 31(2) (requiring treaty terms to be interpreted in their context, which includes the treaty text, its preamble and annexes).

⁴⁹ *Bosnia v. Serbia* (ICJ Judgment), para. 426.

⁵⁰ *ibid*, para. 430.

⁵¹ *ibid*.

⁵² *ibid*.

failing to exercise criminal jurisdiction within its own territory.⁵³ As a result, while the “employ all means reasonably available” standard is justified for the duty to prevent genocide, it does not apply to a State party’s duty to punish. Rather, the Convention sets out clearly what States parties are required to do to comply with their obligation to punish genocidal acts under article I.

d. The Convention stipulates minimum requirements for States parties to satisfy their obligation to punish genocide acts under article I, and these are set out in articles IV, V and VI.

27. The Maldives submits that while the obligation to punish in article I is a “distinct obligation”, it encompasses, at a minimum, the obligations in articles IV, V and VI. This is consistent with how The Gambia and the Joint Interveners construe the duty to punish in article I,⁵⁴ but is disputed by Myanmar.⁵⁵
28. The Court has on various occasions described the duty to punish in article I by reference to the other provisions of the Convention, applying a contextual interpretation.⁵⁶ In *Bosnia v. Serbia*, the Court described articles V, VI and VII as “provisions regulating punishment”,⁵⁷ and in commenting on the scope of article I, it stated that “in subsequent Articles, the Convention includes fairly detailed provisions concerning the duty to punish (Articles III to VII)”.⁵⁸ The Court further described the obligation to punish as “stemming from Article I and the other relevant provisions of the Convention”.⁵⁹ Similarly, in *Croatia v. Serbia*, the Court found that “[t]he provisions requiring States to punish acts of genocide (Articles I and IV) are necessarily linked to the obligation (in Article V) for each State party to enact legislation for the purpose of giving effect to the provisions of the Convention”.⁶⁰ And in *Bosnia v. Serbia*, the Court found that Serbia had “failed in its duty to co-operate fully with the ICTY”, a duty mandated under article VI of the Convention, and that this resulted in a breach both of articles I and VI.⁶¹

⁵³ Cf. Vienna Convention, art. 29.

⁵⁴ Memorial, 4.70 (“While the duty to punish is primarily located within Article I, the content of this obligation is supplemented by the provisions of Articles IV, V and VI of the Convention ... [e]ach of these specific duties informs the scope of the general duty to punish”); Joint Intervention, para. 77 (“The Declarants contend that the duty to punish outlined in Article I must be construed in light of Articles IV to VI of the Genocide Convention”).

⁵⁵ Counter-Memorial, para. 14.43 (arguing that “the duty to enact legislation [in article V] is separate to the duty to punish”). The Maldives discusses this further in paras. 55-56 below.

⁵⁶ Vienna Convention, arts. 31(1), 31(2).

⁵⁷ *Bosnia v. Serbia* (ICJ Judgment), para. 159.

⁵⁸ *ibid*, para. 426.

⁵⁹ *ibid*, para. 439.

⁶⁰ *Croatia v. Serbia* (ICJ Judgment), para. 96. See also *Gambia v. Myanmar*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3, para. 51 (“The obligation to prevent and punish genocide set out in Article I of the Convention is supplemented by the distinct obligations which appear in the subsequent articles, especially those in Articles V and VI”).

⁶¹ *Bosnia v. Serbia* (ICJ Judgment), para. 449.

29. In line with this, the Maldives submits that the proper construction of the duty to punish in article I is that a State party must, at a minimum, comply with its obligations under articles IV, V and VI. The Maldives has set out its proposed construction of each of these articles in the remainder of these observations.
30. Myanmar argues that “[t]he question whether [the duty to punish] has been breached in a particular case will depend on all of the circumstances of that case” and that “[t]his will turn on matters including the capacity and the resources of the Contracting Party in question”.⁶² But it is a settled rule of international law applicable between States parties that they are not entitled to rely on provisions of their internal laws to justify non-compliance with their treaty obligations.⁶³ While a State party’s capacity may affect the manner in which they undertake these obligations, the principles articulated by the Maldives in these observations represent the minimum standard required of States, based on the terms of the Convention. And the Convention itself provides an option for States parties that may face capacity and resource constraints in fulfilling their duty to punish by permitting, in article VI, territorial States to either try perpetrators in their domestic courts or allow for them to be prosecuted in an international penal tribunal with jurisdiction over the genocidal acts in question.⁶⁴
31. The Court has already held, in the context of the obligation to punish torture contained in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”), that financial constraints cannot justify a failure to punish.⁶⁵ The Maldives submits that the Court should take a similar approach to construing the duty to punish under article I of the Genocide Convention as it has taken to the duty to punish under the Convention Against Torture. “[J]udicial decisions” are a “subsidiary means for determination of rules of law”,⁶⁶ and the Court can look to its decisions on “comparable” clauses in other treaties to construe the treaty provision in

⁶² Counter-Memorial, para. 12.23.

⁶³ Vienna Convention, art. 27. See also para. 6 above; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422 (“*Belgium v. Senegal* (ICJ Judgment)”), para. 113 (in the context of the duty to prosecute torture, the Court held that “Senegal cannot justify its breach of the obligation provided for in Article 7, paragraph 1, of the Convention against Torture by invoking provisions of its internal law, in particular by invoking the decisions as to lack of jurisdiction rendered by its courts in 2000 and 2001, or the fact that it did not adopt the necessary legislation pursuant to Article 5, paragraph 2, of that Convention until 2007”); *Prosecutors v. Nuon Chea et al.*, 002-19-09-2007/ECCC/TC, Decision on Ieng Sary’s Rule 89 Preliminary Objection (Ne bis in idem and Amnesty and Pardon), 3 November 2011, paras. 1, 39 (in rejecting the argument by a defendant accused of genocide and other international crimes that a “Royal Decree ... granted him a valid amnesty and pardon”, the Extraordinary Chambers in the Courts of Cambodia found that as Cambodia was “under an absolute obligation to ensure the prosecution or punishment of perpetrators of grave breaches of the 1949 Geneva Conventions, genocide and torture, the ... Royal Decree [could] not relieve it of the duty to prosecute these crimes or constitute an obstacle thereto”). On the Extraordinary Chambers in the Courts of Cambodia, see fn. 181 below. See further paras. 6-10 above (setting out the Court’s approach to treaty interpretation).

⁶⁴ See paras. 121-126 below. See also Vienna Convention, arts. 31(1), 31(2).

⁶⁵ *Belgium v. Senegal* (ICJ Judgment), para. 112 (“The Court is of the opinion that the financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré”).

⁶⁶ Statute of the Court, art. 38(1).

question.⁶⁷ The Court has already recognized the “comparable” and “similar” nature of the provisions regarding the duty to punish under the Convention Against Torture and the Genocide Convention,⁶⁸ and it has already referred to its case law under the Convention Against Torture in construing the Genocide Convention.⁶⁹ The Maldives submits that the same approach to construction is warranted here.

⁶⁷ *Georgia v. Russian Federation* (ICJ Preliminary Objections Judgment), paras. 136-140.

⁶⁸ *Belgium v. Senegal* (ICJ Judgment), para. 68 (in describing the *erga omnes* character of the obligation to ensure “that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity”, the Court has recognized that “[i]n this respect the relevant provisions of the Convention against Torture are similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide”). See also *Croatia v. Serbia* (ICJ Judgment), para. 98 (in discussing the duty to punish under the Genocide Convention, the Court recalled its judgment in *Belgium v. Senegal* and referred to the “comparable provisions of the Convention against Torture, which require each State party to submit to their prosecuting authorities the cases of persons suspected of torture”). Like the duty to punish under the Genocide Convention, the duty to punish under the Convention Against Torture is set out in various articles, namely articles 4-7 and 12.

⁶⁹ See, e.g., *Croatia v. Serbia* (ICJ Judgment), para. 98 (referring to the Court’s decision in *Belgium v. Senegal* under the Convention Against Torture in considering whether the provisions of the Genocide Convention are retroactive).

III. Article IV

Article IV of the Genocide Convention states that:

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

32. The Maldives addresses two questions of construction of article IV that are relevant to these proceedings: (a) the scale of prosecutions required in order for a State party to comply with its duty under article IV; and (b) whether article IV requires punishment of persons bearing command responsibility for genocidal acts.
33. As explained below, the Maldives submits that the Court should adopt the following construction of article IV in relation to these questions:
- a) The obligation under article IV for States parties to punish perpetrators of genocidal acts is subject to prosecutorial discretion exercised independently, impartially and in good faith. If there is sufficient evidence that a person committed genocidal acts, and the State fails to prosecute this person, the burden falls on the State party to justify the failure to prosecute in line with its obligations under the Convention.
 - b) The obligation under article IV for States parties to punish perpetrators of genocidal acts does not exclude persons bearing command responsibility for genocidal acts from the scope of “persons” who must be prosecuted.
- a. States parties must punish perpetrators of genocidal acts if there is sufficient evidence to do so, subject to prosecutorial discretion exercised independently, impartially and in good faith.**
34. A question of construction at issue in the proceedings is the scale of prosecutions that a State party must conduct to discharge its obligation to ensure that “[p]ersons committing genocide ... shall be punished” under article IV of the Convention. The Gambia argues that the scale of the atrocities committed and the number and rank of perpetrators involved is relevant to the determination of whether Myanmar has satisfied the duty to punish.⁷⁰ According to The Gambia, Myanmar has violated the duty to punish as there have been only two prosecutions for crimes committed against the Rohingya,⁷¹ both of

⁷⁰ Memorial, paras. 11.17, 13.10 (The Gambia argues that the “massive character of Myanmar’s genocidal acts dwarfs the few instances of prosecution”).

⁷¹ Memorial, para. 13.10. According to The Gambia, the first case involved four officers and three soldiers, who were each sentenced to ten years in prison with hard labour for the summary execution of ten Rohingya men in the village of Inn Din: Memorial, para. 11.21. Seven months later, the perpetrators were pardoned and released by Senior-General Min Aung Hlaing: Memorial, para. 11.21. The second case involved members of the

which were “sham”⁷² prosecutions targeting “junior, low-level military personnel”,⁷³ and neither of which charged genocide.⁷⁴ Myanmar acknowledges that it has provided “very little information” about these prosecutions,⁷⁵ but argues that “the burden of proof [is] entirely with The Gambia to prove the breach of international law that it alleges”.⁷⁶

35. The Maldives notes that the Court has not yet had the opportunity to consider the scale of prosecutions required under article IV of the Convention but agrees with The Gambia that the scale and nature of prosecutions relates to whether the duty to punish in article IV has been discharged in good faith, particularly given that the crime of genocide by its very nature is of a scale that tends to involve a significant number of perpetrators and command structures.⁷⁷
36. The starting point for construing article IV is that its wording imposes no limitations on the scale of punishment that States parties must undertake, requiring simply the punishment of “persons” who commit genocidal acts. The duty to punish applies regardless of rank or official position,⁷⁸ and explicitly covers “rulers, public officials or

Tatmadaw, Myanmar’s military, who were prosecuted for a mass killing of Rohingya in Gu Dar Pyin: Memorial, para. 11.23. The Gambia notes that “very little information about the case has been provided” by Myanmar, but documents on the record indicate that the Tatmadaw announced in June 2020 that “a court martial had convicted two officers and a soldier for ‘weakness in following instructions’ during the Gu Dar Pyin incident in Bathidaung in 2017”: Memorial, para. 11.25; U.N. Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, U.N. Doc. A/HRC/45/5 (3 September 2020) (attached as Annex 56 to the Memorial), para. 23. The Maldives notes that Myanmar states that the “details of action taken in both the civilian and military justice systems have been given in Myanmar’s Provisional Measures reports”: Counter-Memorial, para. 12.69. The Maldives has not been provided with these reports.

⁷² Memorial, para. 13.10

⁷³ Memorial, para. 11.17.

⁷⁴ Memorial, para. 12.135. The Gambia alleges that the Tatmadaw committed genocidal acts, including “widespread and systematic acts of killing, rape and gang rape, torture, infliction of other serious bodily and mental injuries, burning of homes and villages and confiscation of property”: Memorial, para. 1.2. According to the 2018 U.N. Fact-Finding Mission report relied upon by The Gambia, an “estimate of up to 10,000 deaths is conservative” for just the 2017 “clearance operations”: see U.N. Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/39/CRP.2 (17 September 2018), para. 1008 (attached as Annex 40 to the Memorial). The Gambia also argues that these operations were conducted by “hundreds of Tatmadaw soldiers”, and planned “by the most senior military officers”, six of whom were named in the 2018 Fact-Finding Mission report on which The Gambia relies: Memorial, paras. 10.53, 10.1, 10.8.

⁷⁵ Counter-Memorial, para. 12.68 (citing Memorial, para. 11.25).

⁷⁶ Counter-Memorial, para. 12.68. See also Rejoinder, para. 5.20.

⁷⁷ Cf. International Residual Mechanism for Criminal Tribunals, *Letter dated 17 May 2017 from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council*, U.N. Doc. S/2017/434 (17 May 2017), paras. 57-60 (noting that Serbia’s efforts to prosecute were “unsatisfactory” in light of the fact that “the number of prosecutions initiated in the past year remains very low in absolute terms” and because “no senior-level and only a very small number of mid-level officials have been indicted and prosecuted for the crimes committed”).

⁷⁸ See, e.g., U.N. Ad Hoc Committee on Genocide, *Commentary on the Articles Adopted by the Committee (Continuation)*, U.N. Doc. E/AC.25/W.1/Add.1 (27 April 1948), p. 4 (“The Committee agreed unanimously that the authors of genocide should be punished, whatever their status”). See also Vienna Convention, art. 32.

private individuals”.⁷⁹ This stands in contrast to other obligations to prosecute in international instruments where the scale of who must be punished is limited, for example, to those “who bear the greatest responsibility” for genocide and other international crimes.⁸⁰

37. The *travaux* confirm that article IV was intended to ensure that no person who committed genocide could escape punishment.⁸¹ For instance, the representative of the Soviet Union remarked during the drafting process that “the fundamental idea of article [IV] of the draft Convention was to proclaim that all those committing genocide, no matter who they were, should be punished”.⁸² And the representative for Belgium stated that “Belgium was in complete agreement with the delegation of the Soviet Union on the fact that all persons guilty of genocide should be punished”.⁸³
38. Indeed, the Convention’s drafters expressly considered and rejected efforts to limit the obligation to punish to rulers. In rejecting a proposal by the French delegation to define genocide as only crimes that are “committed, encouraged or tolerated by the rulers of a State”,⁸⁴ many delegates pointed out that this contradicted the requirement that “private” individuals “shall be punished”⁸⁵ — language that was present in the earliest draft of the Convention and remained largely unchanged throughout the drafting process, ultimately being contained in article IV.⁸⁶ The Soviet delegate also noted that “[i]f it were really desired to combat genocide, it would have to be made clear that *any person*, whether

⁷⁹ This inclusion of “private individuals” was present in General Assembly Resolution 96(I) in 1946 and remained unchanged in the final text of the Convention: see U.N.G.A., *General Assembly Resolution 96(1)*, U.N. Doc. A/RES/96(I) (11 December 1946).

⁸⁰ See, e.g., Statute of the Special Court for Sierra Leone, art. 1(1) (granting the court the “power to prosecute persons who bear the greatest responsibility”). See also U.N.S.C., *Security Council Resolution 1503 (2003)*, U.N. Doc. S/RES/1503(2003) (28 August 2003), preamble (where the U.N. Security Council “reaffirm[ed] in the strongest terms” the ICTY’s strategy of “concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction”); International Criminal Court, The Office of the Prosecutor, *Policy paper on case selection and prioritization* (15 September 2016), para. 42.

⁸¹ Vienna Convention, art. 32.

⁸² U.N.G.A., 41. *Continuation of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633]*, U.N. Doc. A/C.6/SR.92 (5 November 1948), p. 302.

⁸³ *ibid.*

⁸⁴ U.N.G.A., 23. *Continuation of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633]*, U.N. Doc. A/C.6/SR.78 (19 October 1948), p. 145.

⁸⁵ U.N.G.A., 25. *Continuation of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633]*, U.N. Doc. A/C.6/SR.79 (20 October 1948), pp. 155-156 (comments from the representatives of Egypt and Venezuela). See also, U.N.G.A., 27. *Continuation of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633]*, U.N. Doc. A/C.6/SR.80 (21 October 1948), pp. 165-166 (comments from the representative of the Philippines).

⁸⁶ See U.N. Secretary-General, *Draft Convention on the Crime of Genocide*, U.N. Doc. E/447 (26 June 1947), p. 7 (stating that “[t]hose committing genocide shall be punished, be they rulers, public officials or private individuals”). The Secretariat Draft was the first of two drafts of the Convention (the second being the Ad Hoc Committee Draft) and was distributed to all Member States of the United Nations for comment: U.N. Secretary-General, *Draft Convention on the Crime of Genocide: Note by the Secretary-General*, U.N. Doc. E/476 (18 July 1947).

ruler or private individual, who had taken part in any way whatsoever in genocide, *would be held criminally responsible*".⁸⁷

39. This does not mean that the duty to punish perpetrators of genocidal acts under article IV is boundless.⁸⁸ The Maldives submits that the Court should construe the obligation to punish in article IV as subject to prosecutorial discretion, exercised independently, impartially and in good faith.
40. The Court has recognized that States can exercise prosecutorial discretion in fulfilling the duty to punish serious international crimes. Considering the equivalent duty to punish contained in the Convention Against Torture,⁸⁹ the Court held that "[t]he obligation to submit the case to the competent authorities for the purpose of prosecution ... was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems".⁹⁰
41. But the Convention should not be construed in a way that suggests that this discretion is unfettered: to comply with article IV of the Convention, States parties must perform their obligation to punish perpetrators of genocidal acts in good faith.⁹¹ As the Court has previously held, the principle of good faith "obliges the Parties to apply [a treaty] in a reasonable way and in such manner that its purpose can be realized".⁹² States parties must therefore ensure that the exercise of prosecutorial discretion does not hamper the underlying purpose of the Convention to "confirm and endorse the most elementary principles of morality"⁹³ and "to condemn and punish genocide".⁹⁴ This requires prosecutors to act independently and impartially in the exercise of their discretion,⁹⁵ including being "free from political interference" and "act[ing] with objectivity".⁹⁶ As noted by one commentator, "a state would fail to fulfil its international obligations where

⁸⁷ U.N.G.A., 25. *Continuation of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633]*, U.N. Doc. A/C.6/SR.79 (20 October 1948), p. 157 (emphasis added).

⁸⁸ See e.g. *Prosecutor v. Zejnil Delalić et al. ("Čelebići Case")*, IT-96-21-A, Appeals Judgement, 20 February 2001, para. 602.

⁸⁹ See para. 31 above.

⁹⁰ *Belgium v. Senegal* (ICJ Judgment), para. 90. See also *Prosecutor v. Zejnil Delalić et al. ("Čelebići Case")*, IT-96-21-A, Appeals Judgement, 20 February 2001, para. 602 ("It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments").

⁹¹ Vienna Convention, art. 26.

⁹² *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, para. 142.

⁹³ *Reservations to the Convention on Genocide* (ICJ Advisory Opinion), p. 12.

⁹⁴ *ibid*, p. 23.

⁹⁵ See also paras. 95-120 below (explaining that the requirements of independence and impartiality apply from the investigation through to the trial of perpetrators).

⁹⁶ International Association of Prosecutors, *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (1999), arts. 2.1, 3.3.

its prosecutors systematically or demonstrably exercise their discretion in an unreasonable fashion in order to evade its responsibility to punish ... acts of genocide”.⁹⁷

42. Similarly, the exercise of prosecutorial discretion cannot be inconsistent with a State party’s obligations under other articles of the Convention,⁹⁸ in particular, the obligation under article VI to ensure that persons charged with genocide should be prosecuted. As explained further below,⁹⁹ the Maldives submits that article VI requires territorial States to conduct prompt, effective and thorough, independent and impartial investigations in good faith as soon as there are reasonable grounds to believe that genocidal acts have been committed. The Maldives submits that where, as a result of such State investigations or otherwise, there is sufficient evidence that a person has committed genocidal acts, and a State party fails to prosecute this person, the burden falls to that State party to justify its failure to prosecute in line with its obligations under the Convention.¹⁰⁰
43. This construction of the duty in article IV to punish genocidal acts is consistent with the Court’s construction of the duty to punish under the Convention Against Torture, which requires that “[t]he State Party in the territory under whose jurisdiction a person alleged to have committed [torture] is found shall ..., if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”.¹⁰¹ In *Belgium v. Senegal*, the Court emphasised that while “competent authorities ... remain responsible for deciding whether to initiate a prosecution”, this decision must be taken “in light of the evidence before them”.¹⁰² The Committee Against Torture¹⁰³ has taken a similar approach to the

⁹⁷ G. Mettraux, p. 83.

⁹⁸ Article 31(1) of the Vienna Convention requires the terms of a treaty to be interpreted “in their context”, and article 31(2) clarifies that the context includes the text of the treaty, “including its preamble and annexes”.

⁹⁹ See paras. 84-89, 95-105 below.

¹⁰⁰ See Committee Against Torture, *Guengueng et al. v. Senegal*, CAT/C/36/D/181/2001, 19 May 2006, para. 9.8. See further fn. 103 below. The Court has recognized on several occasions that the burden of proof can shift where “the Respondent may be in a better position to establish certain facts”: see, e.g., *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment, I.C.J. Reports 2022 (I), p. 13 (“*Democratic Republic of the Congo v. Uganda* (ICJ Reparations Judgment)”), para. 116; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Reports 2012 (I), p. 324, para. 15. See also European Court of Human Rights, *Aslakhanova et al. v. Russia*, Apps. nos. 2944/06; 8300/07; 50184/08; 42509/10, 18 December 2012, para. 97 (noting in relation to Russia’s alleged failure to conduct an effective investigation into detained persons’ disappearances, that while it was for the applicants “to make a *prima facie* case”, if “the Government then fail[ed] to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation, strong inferences may be drawn”). See further paras. 6-10 above. States parties’ obligations under article IV are inextricably linked to those under article VI. If a State party has failed to carry out a prompt, effective and thorough, independent and impartial investigation, it cannot justify a failure to prosecute by claiming that it does not have “sufficient evidence”: see paras. 95-105 below (on standards for investigations under article VI of the Convention).

¹⁰¹ Convention Against Torture, art. 7(1). See para. 31 above.

¹⁰² *Belgium v. Senegal* (ICJ Judgment), para. 90.

¹⁰³ The Court has had regard to decisions from the Committee Against Torture in past cases: see, e.g., *Democratic Republic of the Congo v. Uganda* (ICJ Reparations Judgment), para. 188 (referring to decisions from the Committee Against Torture as well as other international human rights bodies). The Court has

construction of the duty to punish, finding in *Guengueng et al. v. Senegal* that Senegal could not “invoke ... reasons stemming from domestic law to justify its failure to comply” with its obligations under the Convention Against Torture and that it “was obliged to prosecute Hissène Habré for alleged acts of torture unless it could show that there was not sufficient evidence to prosecute, at least at the time when the complainants submitted their complaint”.¹⁰⁴

44. This is also how the duty to punish under the Geneva Conventions has been construed. Like the Genocide Convention¹⁰⁵ and the Convention Against Torture,¹⁰⁶ the Geneva Conventions create a “duty to investigate, prosecute and punish”¹⁰⁷ perpetrators and require that “[e]ach Contracting Party shall be under the obligation” to bring “persons alleged to have committed ... grave breaches [of the Convention], ... regardless of their nationality, before its own courts”.¹⁰⁸ The purpose of the obligation to prosecute in the Geneva Conventions, like the equivalent obligation in the Genocide Convention, is “to provide a watertight mechanism that would ensure the effective prosecution of alleged perpetrators of serious violations of the Conventions”, as the International Committee of the Red Cross has noted.¹⁰⁹ The Red Cross has also observed that:

The obligation to bring alleged offenders before national courts [means] that if the competent authorities have collected sufficient evidence to bring a criminal charge, they cannot rely, for example, on national rules of prosecutorial discretion and decide not to press charges. In those circumstances, they must prosecute the case.¹¹⁰

recognized that consideration of case law from international bodies like the Committee Against Torture is useful “to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled”: *Republic of Guinea v. Democratic Republic of the Congo*, (ICJ Merits Judgment), paras. 66-68. See also paras. 6-10 above.

¹⁰⁴ Committee Against Torture, *Guengueng et al. v. Senegal*, CAT/C/36/D/181/2001, 19 May 2006, para. 9.8.

¹⁰⁵ See Genocide Convention, arts. IV-VI.

¹⁰⁶ See Convention Against Torture, arts. 4, 7, 12.

¹⁰⁷ *Democratic Republic of the Congo v. Uganda* (ICJ Reparations Judgment), para. 390.

¹⁰⁸ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949), art. 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949), art. 50; Convention (III) relative to the Treatment of Prisoners of War (12 August 1949), art. 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949), art. 146. These provisions also require States to “search for” such persons.

¹⁰⁹ International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary* (2nd ed., 2016), art. 49, para. 2819. See further paras. 6-10 above.

¹¹⁰ International Committee of the Red Cross, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War: Commentary* (2020), art. 129, paras. 5127-5128. See also Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (OUP 2015), p. 631 (observing that “the obligation under the grave breaches regime, to bring persons suspected of grave

45. Given the similarities between the obligations to punish under the Geneva Conventions, the Convention Against Torture, and the Genocide Convention, the Maldives submits that the Court should adopt a consistent approach in construing the duty to punish perpetrators of genocidal acts under article IV of the Genocide Convention.
- b. The obligation under article IV for States parties to punish perpetrators of genocidal acts does not exclude persons bearing command responsibility for genocidal acts from the scope of “persons” who must be prosecuted.**
46. The Gambia has sought orders that Myanmar *inter alia* take “immediate ... steps to submit to trial” the “members of its armed forces, police and other security forces ... suspected on probable grounds of having committed acts of genocide ..., notably Senior-General Aung Min Hlaing, Vice Senior-General Soe Win, Lieutenant-General Aung Kyaw Zaw, Major-General Maung Maung Soe, Brigadier-General Aung Aung and Brigadier-General Than Oo”.¹¹¹
47. One of the objections that Myanmar raises to this proposed order is that the duty to punish under the Genocide Convention excludes punishment of persons who bear command responsibility for genocide.¹¹² The Gambia disagrees, arguing that “[c]ommand responsibility for senior officials is a form of State responsibility that falls within ... the [Genocide] Convention”.¹¹³
48. The Maldives contends that the correct construction of article IV does not exclude persons with “command responsibility” for the crime of genocide.¹¹⁴ Article IV clearly envisages that no perpetrator of genocide should be shielded from prosecution,¹¹⁵ and it would depart from the ordinary meaning of the terms in article IV¹¹⁶ to construe this as excluding from the article’s scope senior leaders who likely bear the greatest responsibility for the crimes.

breaches before the courts of the state, means that these persons must stand trial if the prosecutorial authorities have collected sufficient evidence to bring a criminal charge. If sufficient evidence is gathered, the prosecutor cannot rely on the national rules on prosecutorial discretion and must prosecute the case”).

¹¹¹ Memorial, Submissions, para. 2(A)(ii).

¹¹² Counter-Memorial, paras. 12.45-12.47; Rejoinder, paras. 12.36-12.37. Myanmar also argues that “The Gambia ... cannot request the Court to declare that Myanmar is required to prosecute specific named individuals for genocide”: Counter-Memorial, para. 12.42. The Maldives addresses this argument at paras. 127-130 below.

¹¹³ Reply, para. 8.14. The Gambia states that “[c]ommand responsibility for senior officials is a form of State responsibility that falls within Article IX of the Convention”: Reply, para. 8.14. While the Maldives agrees with this, it focuses on the preliminary question — whether command responsibility is punishable under the Convention — which raises issues of construction under article IV. This is a prerequisite to determining whether a State can incur responsibility under article IX for failing to punish commanders.

¹¹⁴ Although in some documents the terms “command” and “superior” responsibility refer to military and civilian leaders respectively, in these observations the term “command responsibility” should be understood as encompassing both military and civilian leaders.

¹¹⁵ See paras. 36-37 above.

¹¹⁶ See Vienna Convention, art. 31(1).

49. Indeed, contrary to Myanmar’s suggested construction, the duty to punish under article IV is clearly not limited to direct or low-level perpetrators. Article III of the Convention criminalizes acts including “conspiracy to commit genocide” and “direct and public incitement to commit genocide” — neither of which require the perpetrator to have directly participated in genocidal acts. Similarly, article IV of the Convention envisages punishment of “constitutionally responsible rulers” and “public officials”, who are also unlikely to have directly participated in genocidal acts.
50. The *travaux*¹¹⁷ confirm the drafters’ intention to ensure that punishment was not limited to direct or low-level perpetrators of genocidal acts. As explained in the U.N. Secretariat’s comments to their draft of the Genocide Convention,¹¹⁸ “[t]he perpetration of genocide can indeed be the act of statesmen, officials or individuals” and “[t]he heaviest responsibility is that of statesmen or rulers in the broad sense of the word, that is to say, heads of state, ministers and members of legislative assemblies, whose duty it is to abstain from organizing genocide personally and from provoking it and to prevent its commission by others”.¹¹⁹
51. The Court has itself recognized that command responsibility is one of the forms of liability that require punishment under the Genocide Convention. In *Bosnia v. Serbia*, the Court found that Serbia had breached its obligation to punish genocide under the Convention because it failed to transfer General Ratko Mladić, who had been charged with genocide by a U.N. prosecutor on the basis of his role as a commander,¹²⁰ to the ICTY.¹²¹ In considering the duty to punish under the Genocide Convention, the Court found that Serbia “has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide, in order to comply with its obligations under articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić”.¹²² It ultimately ordered Serbia to “immediately take effective steps to ensure full compliance with its obligation under the Convention ... to punish acts of genocide ... and to transfer individuals accused of genocide ... for trial by the [ICTY]”.¹²³ By finding Serbia in

¹¹⁷ See *ibid*, art. 32.

¹¹⁸ See fn. 86 above describing the two draft Conventions that were prepared. The views expressed by the Secretariat that punishment should not be limited to direct perpetrators was echoed by States in subsequent discussions: see, e.g., U.N. Ad Hoc Committee on Genocide, *Summary Record of the Seventh Meeting*, U.N. Doc. E/AC.25/SR.7 (20 April 1948), pp. 3-5 (recording comments by the French representative that “his delegation considered that not only the perpetrators of acts of genocide but also the governing authorities who were their accomplices should be punished” and the endorsement by the representative of the Soviet Union of the principle that “governing authorities would be prosecuted in the same manner as the authors of acts of genocide if those authorities had tolerated or supported such acts”).

¹¹⁹ U.N. Secretary-General, *Draft Convention on the Crime of Genocide*, U.N. Doc. E/447 (26 June 1947), p. 35.

¹²⁰ See *Prosecutor v. Ratko Mladić*, IT-95-5/18-I, Amended Indictment, 10 October 2002, paras. 16-19, 27-28. The indictment included charges based on “command responsibility” as well as “joint criminal enterprise” (paras. 32-35) and noted that “[b]y using the word ‘committed’ in this indictment, the Prosecutor does not suggest that the accused physically committed any of the crimes charged personally” (para. 20).

¹²¹ See *Bosnia v. Serbia* (ICJ Judgment), para. 471(6).

¹²² *ibid*, para. 465.

¹²³ *ibid*, para. 471(8).

breach of its duty to punish under the Convention because of its failure to transfer Mladić, and ordering the transfer to comply with this duty, the Court has therefore recognized that command responsibility is a form of individual liability that is punishable under the Convention.

52. Other international courts have also explicitly found that the duty to punish under the Genocide Convention extends to a duty to punish individuals who did not directly physically perpetrate the crime. For instance, the ICTY¹²⁴ has held that “under customary international law, superior criminal responsibility extended to the crime of genocide” and that “the absence in the Genocide Convention of explicit reference to superior criminal responsibility is not fatal to th[is] determination”.¹²⁵

¹²⁴ The ICTY was established by the United Nations Security Council to prosecute persons responsible for genocide and other serious violations of international law: see U.N.S.C., *Security Council Resolution 827 (1993)*, U.N. Doc. S/RES/827(1993) (25 May 1993). Its statute defines genocide in the same terms as the Genocide Convention: see ICTY Statute, art. 4. Article 38(1)(d) of the Statute of the Court provides that the Court shall apply “judicial decisions” as a subsidiary means of interpretation. The Court has expressly recognized that it will “take account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of the ICTY, ... in examining the constituent elements of genocide”: *Croatia v. Serbia* (ICJ Judgment), para. 129. Consistent with this, the Court has referred to jurisprudence from the ICTY on various occasions to aid its interpretation of treaty provisions: see, e.g., *Croatia v. Serbia* (ICJ Judgment), para. 148 (considering an ICTY judgment in construing genocide under the Convention); *Bosnia v. Serbia* (ICJ Judgment), paras. 195-196 (referring to the ICTY Appeals Chamber’s findings in *Prosecutor v. Milomir Stakić* in determining what constitutes a “group” under the Convention). See also paras. 6-10 above.

¹²⁵ *Prosecutor v. Brđanin*, IT-99-36-T, Trial Judgment, 1 September 2004, para. 712. Contrary to Myanmar’s suggestion that “[i]t is an academic question whether or not command responsibility for genocide exists today under customary international law” (Counter-Memorial, para. 12.46), there is no question that command responsibility exists under customary international law. As the ICTY has held, “the principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in convention and customary law”: *Prosecutor v. Zejnil Delalić et al. (“Čelebići Case”)*, IT-96-21-A, Appeals Judgment, 20 February 2001, para. 195. See also G. Mettraux, p. 373 (“The *ad hoc* Tribunals have made it clear that, as a mode of liability recognized under customary international law, command or superior responsibility may be applicable where the underlying crime committed by a superior’s subordinates is genocide. The fact that the Genocide Convention does not provide for this mode of responsibility is irrelevant. Command responsibility has developed into a generally applicable mode of liability outside and independently of the Convention and may apply in principle to any international crime”). See further fn. 114 above.

IV. Article V

Article V of the Genocide Convention states that:

The States parties undertake to enact, in accordance with their respective Constitutions, 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.

53. The Maldives addresses four questions of construction of article V that are relevant to these proceedings: (a) the link between article V and article I of the Convention; (b) the scope of the duty under article V to enact legislation that “gives effect” to the Convention; (c) when a breach of the duty to enact legislation occurs; and (d) the meaning of “effective penalties” in article V.
54. For the reasons set out below, the Maldives argues that the Court should adopt the following construction of article V in relation to these questions:
- a) Article V sets out an aspect of the duty to punish, and a State party cannot fulfil the duty to punish genocide under article I without satisfying article V.¹²⁶
 - b) To comply with the requirement to enact legislation that will “give effect” to the Convention under article V, the legislation enacted by a State party must allow for the prosecution of all acts committed in its territory that are punishable under the Convention, and ensure that all potential perpetrators of genocidal acts committed in its territory can be prosecuted, in accordance with article IV.
 - c) Legislation that is incompatible with the Convention can be a breach of article V based on its terms, not just its application.
 - d) For a penalty to be “effective” for the purposes of article V, it must be proportionate to the gravity of the crime of genocide, and sufficient to deter future potential perpetrators.
- a. Article V sets out an aspect of the duty to punish, and a State party cannot fulfil its duty to punish genocide under article I without satisfying article V.**
55. The Gambia takes the view that article V forms part of the duty to punish, noting that the “obligation to punish acts of genocide can only be properly fulfilled if the State has enacted legislation which has the specific purpose of giving effect to provisions of the

¹²⁶ See also paras. 27-31 above (explaining that satisfaction of article I of the Convention requires at a minimum compliance with articles IV, V and VI).

Convention”.¹²⁷ Myanmar by contrast argues that “the duty to enact legislation is separate to the duty to punish”.¹²⁸

56. The Maldives agrees with The Gambia that article V forms part of the duty to punish and submits that a State party cannot satisfy its general duty to punish under article I without fulfilling article V. Article V is also integral to the ability of a State party to satisfy other aspects of the duty to punish under the Convention, because, as the Court has found, “the provisions requiring States to punish acts of genocide (Articles I and IV) are necessarily linked to the obligation (in Article V) for each State party to enact legislation for the purpose of giving effect to the provisions of the Convention”.¹²⁹ In other words, a State party cannot comply with articles IV and VI if it has not also complied with article V, and a failure to comply with all three articles constitutes a violation of the duty to punish genocide set out in article I.¹³⁰
- b. To comply with the requirement to enact legislation to “give effect” to the Convention under article V, the legislation enacted by a State party must allow for the prosecution of all acts committed in its territory that are punishable under the Convention and ensure that all potential perpetrators of genocidal acts committed in its territory can be prosecuted in accordance with article IV.**
57. There is a dispute between the Parties regarding the correct construction of the requirement in article V that States parties enact legislation that “gives effect” to the Convention.
58. The Gambia argues that at the time it filed its Memorial, Myanmar did not have any provision in its criminal code criminalizing genocide and therefore failed to “give effect” to the Convention, as States parties cannot rely “on the general provisions of [their] existing domestic criminal law” to fulfil article V, but must enact “specific legislation to give effect to the provisions of the Convention as such”.¹³¹ The Gambia also argues that although amendments introduced in 2021 establish genocide as a crime under Myanmar’s municipal law,¹³² this still does not “give effect” to the Convention under article V because the amendments define genocide “as including only measures intended to prevent births within the group” that are “*not in accordance with any existing laws*”.¹³³

¹²⁷ Reply, para. 9.103.

¹²⁸ Counter-Memorial, para. 14.43.

¹²⁹ *Croatia v. Serbia* (ICJ Judgment), para. 96. See also Reply, para. 9.103.

¹³⁰ See also paras. 27-31 above.

¹³¹ Reply, para. 9.103. See also Memorial, paras. 12.138-12.140.

¹³² See Counter-Memorial, para. 4.117.

¹³³ Reply, para. 9.105 (emphasis in original). The Gambia also argues that the new legislation is deficient because crimes defined in the Penal Code “would not apply to members of the Tatmadaw” as Myanmar’s Constitution provides that the Tatmadaw are only subject to crimes defined in Myanmar’s 1959 Defence Service Act, not the Penal Code: Reply, para. 9.106. However, Myanmar denies this: Rejoinder, paras. 14.30-14.32. It is beyond the scope of the Maldives’ intervention to comment on whether the Tatmadaw are indeed subject to the

Myanmar disagrees on the basis that “a State can discharge its obligations under [article V] of the Convention through reliance on its ordinary domestic criminal laws”,¹³⁴ such as those “dealing with offences including murder, grievous hurt, rape, [and] promotion of enmity or hatred between different classes of persons”.¹³⁵ And it argues that the 2021 amendments fall within the requirements of article V because “the Convention does not require the definition of [the crime of genocide] to be identical to the terms of the Convention”.¹³⁶

59. The Maldives submits that the proper construction of the requirement in article V that States parties enact legislation that “gives effect” to the Convention is that the legislation enacted by a State party must allow for the prosecution of all acts committed in its territory that are punishable under the Convention, and ensure that all potential perpetrators within its territory can be prosecuted in accordance with article IV.¹³⁷ States parties are not permitted to rely on their internal laws to justify a failure to comply with article V,¹³⁸ and it is undisputed that “every Contracting Party to the Genocide Convention must comply with its provisions, no matter what its domestic constitutional arrangements may be”.¹³⁹ Legislation that prevents the prosecution of the acts set out in articles II and III of the Convention, or that limits the scope of persons who can be prosecuted under article IV, would therefore constitute a breach of article V of the Convention.
60. The Maldives’ proposed construction of article V is in line with the ordinary meaning of the term “give effect”, interpreted in good faith.¹⁴⁰ It is also consistent with the obligation to interpret article V in the context of the broader Convention,¹⁴¹ something that is explicitly required in the text of article V itself, which refers to giving effect “to the provisions of the present Convention”. This means that the legislation that is enacted must, at a minimum, ensure that the acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide “shall be punishable” (article III); ensure that “persons committing genocide or any of the other acts enumerated in article III shall be punished” regardless of their rank or status (article IV); and ensure that “persons charged with genocide or any of the acts enumerated in article III shall be tried” (article VI).

Penal Code, or whether the measures that The Gambia identifies as imposing limits on the ability of the Rohingya to reproduce do in fact have this effect.

¹³⁴ Counter-Memorial, para. 14.31.

¹³⁵ *ibid.*, para. 14.34. See also *ibid.*, paras. 4.104-4.114, 14.30-14.36.

¹³⁶ Rejoinder, para. 14.30.

¹³⁷ This includes those bearing command responsibility for genocidal acts, see paras. 46-52 above.

¹³⁸ Vienna Convention, art. 27.

¹³⁹ Rejoinder, para. 12.31. See also Memorial, para. 13.9.

¹⁴⁰ Vienna Convention art. 31(1).

¹⁴¹ *ibid.*

61. This construction of the phrase “give effect” is further supported by the *travaux*.¹⁴² In its commentary to the U.N. Secretariat’s Draft of the Convention, the Ad Hoc Committee¹⁴³ noted that “[w]hen a State becomes Party to a Convention, it is under [an] obligation to take every measure necessary for the performance of its obligations under the Convention. Especially in the case of a Convention dealing with repression of crimes, it must revise its domestic criminal law, if necessary, *so that criminals defined by the Convention may be prosecuted and sentenced by its domestic courts*”.¹⁴⁴ Commentators agree that, at a minimum, this means that the legislation contemplated under article V must allow the prosecution of the acts prohibited by the Convention and ensure that any person who commits genocide can be prosecuted.¹⁴⁵

c. Legislation that is incompatible with the Convention can be a breach of article V based on its terms, not just its application.

62. Another issue in dispute between the Parties relates to the circumstances in which a breach of the duty to legislate in article V may occur. In particular, the Parties disagree about whether the proper construction of article V means that breach of the duty to legislate can occur at the time the legislation is enacted, or only at the time the legislation is applied.¹⁴⁶

63. The Gambia notes, and Myanmar does not dispute, that “under the Constitution of Myanmar, the Commander-in-Chief’s decision in the adjudication of military justice matters is final and conclusive”.¹⁴⁷ But Myanmar argues that “the mere existence of this provision in the Constitution hardly establishes a breach of the duty to punish under the Convention” because it is “well established that the enactment of provisions of municipal legislation ... cannot amount to a breach of international law, and that it is only when legislation is applied in practice to the circumstances of a particular case that there may be a breach”.¹⁴⁸

¹⁴² See *ibid*, art. 32.

¹⁴³ The Ad Hoc Committee on Genocide was established by the U.N. Economic and Social Council in 1948 to prepare a draft of the Convention. The Committee was comprised of representatives from China, France, Lebanon, Poland, the United States of America, the Union of Soviet Socialist Republics and Venezuela: U.N. Ad Hoc Committee on Genocide, *Ad Hoc Committee’s Terms of Reference: Note by the Secretary-General*, U.N. Doc. E/AC.25/2 (1 April 1948), p. 1.

¹⁴⁴ U.N. Ad Hoc Committee on Genocide, *Commentary on Articles Adopted by the Committee (Continued): Article 5*, U.N. Doc. E/AC.25/W.1/Add.2 (28 April 1948), p. 1 (emphasis added).

¹⁴⁵ G. Mettraux, p. 102 (stating that the obligation in article V “means that a state must have the legal, procedural, and institutional tools necessary to effectively investigate, combat, and, as the case may be, prosecute such acts when under an obligation to do so, even if under other legal labels”).

¹⁴⁶ The Gambia also argues that even if the 2021 legislation enacted by Myanmar satisfied article V of the Convention, any acts of genocide perpetrated prior to the entry into force of Myanmar’s new legislation would remain inadequately punished: Reply, para. 9.104.

¹⁴⁷ Counter-Memorial, para. 12.58. See also Memorial, para. 11.12.

¹⁴⁸ Counter-Memorial, para. 12.58. Although Myanmar argues that this point is “well established”, it points to no authority for this proposition. The Gambia does not directly address this point.

64. The Maldives disagrees with the construction proposed by Myanmar and submits that the opposite is true: it is well established that the enactment of legislation can itself amount to a breach of international law under certain circumstances.
65. The Court has recognized that “there is no general rule applicable to the question of whether a State engages its international responsibility by the enactment of national legislation” and that “[t]he question depends on the specific terms of the obligation concerned and the circumstances of the case”.¹⁴⁹ In making this finding, the Court cited the Commentary to the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, which explains that:

The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down ... *Certain obligations may be breached by the mere passage of incompatible legislation.* Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State ... In other circumstances, the enactment of legislation may not in and of itself amount to a breach, especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.¹⁵⁰

66. The Court has in the past found that legislation on its terms can constitute a breach of international law, without being applied in practice. In *Nicaragua v. Colombia*, the Court examined a Presidential Decree issued by Colombia which Nicaragua alleged established an “integral contiguous zone” that violated Nicaragua’s sovereign rights.¹⁵¹ Nicaragua argued that the Decree “violate[d] customary international law and that its mere enactment engage[d] Colombia’s international responsibility”.¹⁵² But Colombia disputed this, arguing that “the enactment of the Decree would not *ipso facto* constitute an internationally wrongful act” because lawfulness “must be evaluated on the basis of

¹⁴⁹ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, p. 266, (“*Nicaragua v. Colombia* (ICJ Judgment)”), para. 191.

¹⁵⁰ International Law Commission, *Report of the Commission to the General Assembly on the work of its fifty-third session: Yearbook of the International Law Commission 2001, Vol. II, Part Two*, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2001), p. 57 (Commentary to Article 12 of the Articles on Responsibility of States for Internationally Wrongful Acts) (emphasis added).

¹⁵¹ *Nicaragua v. Colombia* (ICJ Judgment), para. 29.

¹⁵² *ibid.* See also *ibid.*, para. 189.

whether its ‘application’ has failed to comply with the ‘due regard’ obligation owed to Nicaragua”.¹⁵³

67. The Court first determined that the “integral contiguous zone” established by Colombia’s Presidential Decree was “incompatible with rules of customary international law” and infringed Nicaragua’s sovereign rights.¹⁵⁴ It then proceeded to hold that even though Colombia had made amendments to provide “that the Decree will be applied in compliance with international law”, the Court “[did] not consider that this additional provision is sufficient to address” Nicaragua’s concerns.¹⁵⁵ Accordingly, the Court found that Colombia’s “responsibility is thereby engaged” and that Colombia “has the obligation, by means of its own choosing, to bring the provisions of Presidential Decree 1946 into conformity with customary international law”.¹⁵⁶
68. The Court also considered whether legislation on its terms violated international law in the case of *LaGrand*.¹⁵⁷ There, the Court examined whether the United States’ “procedural default rule”, which a domestic court had applied to deny a *habeas corpus* application, violated the United States’ obligations under the 1963 Vienna Convention on Consular Relations to ensure that its “laws and regulations” gave “full effect” to the rights afforded to individuals under that treaty.¹⁵⁸ Although the Court in that case ultimately found that the breach arose at the time of application, not enactment,¹⁵⁹ the Court noted that “it can hold that a domestic law has been the cause”¹⁶⁰ of a violation of an international obligation.
69. Accordingly, Myanmar’s claim that the enactment of non-compliant legislation cannot of itself give rise to breach of the duty to punish under article V, and that breach is only possible when such legislation is applied, is inconsistent with the Court’s prior practice. Such a construction of article V would also lead to absurd consequences because a State party could, for instance, enact legislation legalizing genocide or stating that it was only a civil offence, or that it was an offence that could only be committed by individuals of a particular religion or race, without incurring international responsibility. Nor would this

¹⁵³ *ibid*, para. 190.

¹⁵⁴ *ibid*, paras. 193-194.

¹⁵⁵ *ibid*, para. 193.

¹⁵⁶ *ibid*, para. 194.

¹⁵⁷ *LaGrand* (ICJ Judgment).

¹⁵⁸ *ibid*, paras. 88-91.

¹⁵⁹ *ibid*, para. 125 (the Court held that it “has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention. In the present case, the violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such”).

¹⁶⁰ *ibid*.

align with what the Court has recognized as the deterrent value of legislation in preventing criminal acts,¹⁶¹ which is one of the purposes of the Genocide Convention.¹⁶²

70. The Maldives therefore submits that the Court should reject Myanmar’s construction of article V.¹⁶³ Rather, in construing article V, the Court should assess the legislative and constitutional provisions in question to determine whether they fail to “give effect” to the Convention either in their enactment or their application, or both, as it has done in its jurisprudence to date. In making this assessment, the Court should consider whether the legislative or constitutional provisions at issue are “inherently inconsistent with the obligations undertaken”¹⁶⁴ by States parties to the Convention. And as the Court made clear in *Nicaragua v. Colombia*, claims by States that legislative provisions “will be applied in compliance with international law”¹⁶⁵ are not sufficient to avoid international responsibility when the terms of the law itself give rise to the violation of a treaty (or customary international law).

d. For a penalty to be “effective” for the purposes of article V, it must be proportionate to the gravity of the crime of genocide and sufficient to deter future perpetrators.

71. The other issue of construction that arises in relation to article V of the Genocide Convention relates to the obligation to provide “effective penalties” for genocidal acts.

72. The Gambia alleges that Myanmar has failed to “provide effective penalties” for persons guilty of genocidal acts¹⁶⁶ and notes that the only two prosecutions that have been conducted relating to crimes committed against the Rohingya demonstrate impunity rather than effective penalties for the Tatmadaw.¹⁶⁷ Myanmar admits that in the first case, the perpetrators who were found guilty of killing Rohingya men in Inn Din were pardoned and released after serving less than a year of their ten-year sentence.¹⁶⁸ Little

¹⁶¹ *Bosnia v. Serbia* (ICJ Judgment), para. 426 (“It is also true that one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent”).

¹⁶² *ibid.*, para. 159 (recognizing that the provisions of the Convention regulating punishment “also have a deterrent and therefore preventative effect or purpose”). See also *Reservations to the Convention on Genocide* (ICJ Advisory Opinion), p. 23 (recognizing that the object of the Convention “is to safeguard the very existence of certain human groups and ... to confirm and endorse the most elementary principles of morality”); Vienna Convention, art. 31(1).

¹⁶³ Cf. Counter-Memorial, para. 12.58.

¹⁶⁴ *LaGrand* (ICJ Judgment), para. 125.

¹⁶⁵ *Nicaragua v. Colombia* (ICJ Judgment), para. 193.

¹⁶⁶ Memorial, Submissions, para. 1(E).

¹⁶⁷ Memorial, paras. 11.16-11.17. See also fn. 71 above. See further Memorial, para. 1.2 (“Myanmar’s military [is] known as the ‘Tatmadaw’”).

¹⁶⁸ Counter-Memorial, para. 12.67. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Verbatim record of the public sitting held on 11 December 2019, pp. 16-17.

information has been provided about the sentence imposed in the second case,¹⁶⁹ a fact that Myanmar acknowledges.¹⁷⁰

73. The Court has previously recognized that a State party incurs responsibility when it fails to comply with its obligation to enact legislation providing effective penalties for persons guilty of genocidal acts.¹⁷¹ But the Court has not yet had occasion to address what constitutes an “effective penalty” for the purposes of article V. Nor does the Convention explicitly spell this out. The intent of the drafters was “to leave some freedom of action to States” in implementing this provision so long as “the penalties should be sufficiently rigorous to make punishment effective”.¹⁷²
74. The starting point for the correct construction of this provision in article V is the language of the Convention itself.¹⁷³ The Convention refers to genocide as “a crime under international law”, and recognises that throughout “history genocide has inflicted great losses on humanity” and that, “in order to liberate mankind from such an odious scourge”, States parties must undertake to prevent and punish it.¹⁷⁴ In describing article I of the Convention, the Court has highlighted the deterrent purpose of penalties, stating that “one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent”.¹⁷⁵ International courts and commentators agree that genocide is one of the most serious crimes, if not the most serious crime, in international law.¹⁷⁶ The constituent crimes of genocide, such as killing, usually attract the highest penalties under domestic law,¹⁷⁷ and killing as an act of genocide generally attracts the highest penalties in domestic legislation.¹⁷⁸

¹⁶⁹ See fn. 71 above.

¹⁷⁰ Counter-Memorial 12.68 (Myanmar argues that “the burden of proof is on The Gambia ... to prove the breach of international law that it alleges”).

¹⁷¹ *Bosnia v. Serbia* (ICJ Judgment), para. 159.

¹⁷² U.N. Secretary-General, *Draft Convention on the Crime of Genocide*, U.N. Doc. E/447 (26 June 1947), p. 37.

¹⁷³ Vienna Convention, arts. 31(1), 31(2).

¹⁷⁴ Genocide Convention, preamble, art. I.

¹⁷⁵ *Bosnia v. Serbia* (ICJ Judgment), para. 426. See also Vienna Convention, art. 31(1).

¹⁷⁶ See, e.g., *Prosecutor v. Jean Kambanda*, ICTR-97-23-S, Trial Judgment and Sentence, 4 September 1998, para. 16 (“the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence”). See also William A. Schabas, *Genocide in International Law: the Crime of Crimes* (2nd ed., CUP 2009), pp. 10-11; fn. 191 below.

¹⁷⁷ See *The Economist*, “As the death penalty becomes less common, life imprisonment becomes more so” (6 July 2021) (noting that life imprisonment is most frequently imposed for murder and rape in domestic law).

¹⁷⁸ See Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (OUP 2009), pp. 73-74 (“There is variation in the penalties for the five different acts of genocide in Article II(a)–(e) of the Convention (with killing generally attracting the highest penalties), and variation in the different forms of criminal participation (with attempt, conspiracy and direct and public incitement to genocide sometimes attracting lesser penalties, the latter particularly due to concerns about the impact on freedom of expression”). The Court may consider these penalties as examples of State practice: Statute of the Court, art. 38(1)(b); Vienna Convention, art. 31(3).

75. In the absence of jurisprudence from the Court as to what constitutes an “effective penalty” under the Convention, it is helpful to have regard to the decisions of other international and national criminal courts, in particular the three international courts that have entered convictions for genocide: the ICTY,¹⁷⁹ the International Criminal Tribunal for Rwanda (“ICTR”)¹⁸⁰ and the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).¹⁸¹
76. International criminal courts have generally recognized the importance of proportionality in imposing effective penalties, and the role of penalties in creating a deterrent effect. For example, the ICTY Appeals Chamber confirmed that the “litmus test for the appropriate sentence ... is the gravity of the offence” and that a “sentence proportional to the gravity of the criminal conduct will necessarily provide sufficient retribution”.¹⁸² The ICTY Appeals Chamber has also noted that penalties should be able to “dissuade the convicted person from re-offending” and “ensure that those who would consider committing similar crimes will be dissuaded from doing so”.¹⁸³ In a genocide case, the ICTR Appeals Chamber also held that sentences must “reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender”.¹⁸⁴ The ECCC has reached a similar conclusion.¹⁸⁵ Commentators have also

¹⁷⁹ See paras. 6-10 above; fn. 124 above (explaining that the Court can have regard to jurisprudence from the international criminal tribunals in interpreting the Genocide Convention).

¹⁸⁰ *ibid.* Similar to the ICTY, the ICTR was established by the U.N. Security Council to prosecute persons responsible for genocide and other serious violations of international human rights law (U.N.S.C., *Security Council Resolution 955 (1994)*, U.N. Doc. S/RES/955(1994) (8 November 1994)), and its statute defines genocide in the same terms as the Genocide Convention (ICTR Statute, art. 2).

¹⁸¹ See paras. 6-10 above; fn. 124 above. The ECCC was created by agreement between the Royal Government of Cambodia and the U.N. General Assembly, and was established to prosecute those “most responsible for crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia”, including “crimes of genocide as defined in the [Genocide Convention]”: Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, arts. 1, 4.

¹⁸² *Prosecutor v. Zejnir Delalic et al. (“Čelebići Case”)*, IT-96-21-A, Appeals Judgment, 20 February 2001, para. 731; *Prosecutor v. Momčilo Krajišnik*, IT-00-39-A, Appeals Judgment, 17 March 2009, para. 777 (cited in *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016, para. 6025).

¹⁸³ *Prosecutor v. Momčilo Krajišnik*, IT-00-39-A, Appeals Judgment, 17 March 2009, paras. 805, 776 (cited in *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016, para. 6026).

¹⁸⁴ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Appeals Judgment, 1 June 2001, para. 414. See also *Prosecutor v. Jean de Dieu Kamuhanda*, ICTR-99-54A-A, Appeals Judgment, 19 September 2005, para. 359; *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-A, Appeals Judgment, 8 April 2015, para. 626; ICTY Statute, art. 24; ICTY Rules of Procedure and Evidence, IT/32/Rev.50, 8 July 2015, rule 101(B); ICTR Statute, art. 23; ICTR Rules of Procedure and Evidence (as amended on 13 May 2015), rule 101(B).

¹⁸⁵ See *Prosecutors v. Nuon Chea et al.*, 002/19-09-2007/ECCC/TC, Case 002/02 Judgment, 16 November 2018, paras. 4348-4349. The International Criminal Court has not yet convicted any person of genocide, but its jurisprudence provides guidance regarding the proportionality of sentences for serious international crimes. The ICC Appeals Chamber said that the court’s “main task is to weigh the relevant factors in order to determine a sentence that reflects the culpability of the convicted person” and impose “a sentence that is proportionate to the crime”: *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the “Decision on Sentence pursuant to Article 76 of the Statute”, 1 December 2014, para. 40. See also ICC Rules of Procedure and Evidence, rule 145. The disproportionality of a sentence is a basis for

observed that “any form of penalty that is neither intended nor designed to deter the commission of genocide cannot be classified as ‘effective’”, and that “any form of punishment less than imprisonment cannot be considered an effective sanction”.¹⁸⁶

77. In practice, the ICTY has imposed penalties ranging from 35 years to life imprisonment for persons convicted of genocide.¹⁸⁷ For perpetrators who ordered, planned or committed genocide under article 6(1) of the ICTR Statute, the ICTR has typically imposed life sentences.¹⁸⁸ And in its single genocide conviction, the ECCC sentenced the defendants to life imprisonment.¹⁸⁹

appeal at the ICC: Rome Statute, art. 83(3). See also Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (OUP 2020), (“A. Clooney and P. Webb”), pp. 31-32.

¹⁸⁶ Christian Tams, Lars Berster and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Beck/Hart, 2014), (“C. Tams et al.”), pp. 229-230.

¹⁸⁷ The sentencing range depends on the convicted person’s mode of participation, the scale and scope of their criminal acts, their role and seniority, their commission of other serious crimes, and other mitigating or aggravating circumstances. See, e.g., *Prosecutor v. Radislav Krstić*, IT-98-33-A, Appeals Judgment, 19 April 2004 (where the Appeals Chamber reduced the sentence of 46 years to 35 years after it reversed Krstić’s conviction for committing genocide and entered a conviction for aiding and abetting genocide. Krstić was also found guilty of crimes against humanity and war crimes). See also *Prosecutor v. Radovan Karadžić*, MICT-13-55-A, Appeals Judgment, 20 May 2019; *Prosecutor v. Radko Mladić*, MICT-13-56-A, Appeals Judgment, 8 June 2021; *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-A, Appeals Judgment, 8 April 2015; *Prosecutor v. Vujadin Popović, et al.*, IT-05-88-A, Appeals Judgment, 30 January 2015 (sentences of Popović and Beara): in these cases, the Appeals Chamber sentenced the defendants to life imprisonment for the commission of genocide in conjunction with crimes against humanity and war crimes.

¹⁸⁸ See, e.g., *Prosecutor v. Callixte Kalimanzira*, ICTR-05-88-T, Trial Judgment, 22 June 2009, para. 744. See also *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Appeals Judgment, 1 June 2001; *Prosecutor v. Sylvestre Gacumbitsi*, ICTR-2001-64-A, Appeals Judgment, 7 July 2006; *Prosecutor v. Ildephons Hategikimana*, ICTR-00-5 5B-A, Appeals Judgment, 8 May 2012; *Prosecutor v. Jean Kambanda*, ICTR-97-23-A, Appeals Judgment, 19 October 2000; *Prosecutor v. Jean de Kamuhanda*, ICTR-99-54A, Appeals Judgment, 19 September 2005; *Prosecutor v. Edouard Karemera*, ICTR-98-44-A, Appeals Judgment, 29 September 2014; *Prosecutor v. François Karera*, ICTR-01-74-A, Appeals Judgment, 2 February 2009; *Prosecutor v. Clément Kayishema*, ICTR-95-1-A, Appeals Judgment, 1 June 2001; *Mikaeli Muhimana v. Prosecutor*, ICTR-95-1B-A, Appeals Judgment, 21 May 2007; *Prosecutor v. Alfred Musema*, ICTR-96-13-A, Appeals Judgment, 16 November 2001; *Emmanuel Ndingabahizi v. Prosecutor*, ICTR-01-71-A, Appeals Judgment, 16 January 2007; *Eliézer Niyitegeka v. Prosecutor*, ICTR-96-14-A, Appeals Judgment, 9 July 2004; *Callixte Nzabonimana v. Prosecutor*, ICTR-98-44D-A, Appeals Judgment, 29 September 2014; *Tharcisse Renzaho v. Prosecutor*, ICTR-97-31-A, Appeals Judgment, 1 April 2011; *Georges Rutaganda v. Prosecutor*, ICTR-96-3-A, Appeals Judgment, 26 May 2003; *Prosecutor v. Athanase Seromba*, ICTR-01-66-A, Appeals Judgment, 12 March 2008: in these cases, the penalty of life imprisonment was imposed either solely for the crime of genocide or in conjunction with other crimes. In some cases, the penalty was lowered from life imprisonment to imprisonment ranging from 40 to 47 years, due to a finding of fair trial violations: see e.g. *Prosecutor v. Pauline Nyiramasuhuko et al. (Butare)*, ICTR-98-42-A, Appeals Judgment, 14 December 2015; *Jean-Baptiste Gatete v. Prosecutor*, ICTR-00-61-A, Appeals Judgment, 9 October 2012.

¹⁸⁹ *Prosecutors v. Nuon Chea et al.*, 002/19-09-2007/ECCC/TC, Trial Judgment, 16 November 2018; *Prosecutors v. Khieu Samphân*, 002/19-09-2007-ECCC/SC, Appeals Judgment, 23 December 2022 (involving a conviction of genocide as well as crimes against humanity and grave breaches of the Geneva Convention). One of the accused, Nuon Chea died after the Trial Chamber judgment, barring any appellate review of his conviction and sentence.

78. Although domestic courts should weigh a number of factors in determining the specific penalty appropriate to the specific perpetrator and circumstances of the case,¹⁹⁰ the Maldives submits that, consistent with the jurisprudence of other international courts, when construing the term “effective penalties” in article V of the Convention, the Court should find that penalties for genocide must be proportionate to the gravity of the crime of genocide¹⁹¹ and sufficiently rigorous to deter future perpetrators.

¹⁹⁰ This is consistent with the sentencing practices of international criminal tribunals. For example, the ICTR Appeals Chamber has acknowledged that sentencing requires consideration of “the particular circumstances of the case”, “the form and degree of the participation of the accused”, as well as an evaluation of “any other factor they deem pertinent”: *Prosecutor v. Akayesu*, ICTR-96-4, Appeals Judgment, 1 June 2001, paras. 413, 416. Similarly, the ICTY Appeals Chamber has held that penalties should reflect “the individual circumstances of the accused and the gravity of the crime” as well as the “individual facts of the case”: *Prosecutor v. Zejnil Delalić et al. (“Čelebići Case”)*, IT-96-21-A, Appeals Judgement, 20 February 2001, para. 717.

¹⁹¹ See *Prosecutor v. Kambanda*, ICTR-97-23-S, Trial Judgment and Sentence, 4 September 1998, para. 16. See also *Prosecutor v. Krstić*, IT-98-33-A, Appeals Judgment, 19 April 2004, para. 36 (noting that “[a]mong the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium”).

V. Article VI

Article VI of the Genocide Convention states that:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

79. The Maldives addresses four questions of construction of article VI that are relevant to these proceedings: (a) what is required to trigger a State party's duty to investigate and prosecute persons charged with genocidal acts before a competent tribunal; (b) what procedural standards apply to the duty to investigate and prosecute such persons; (c) what are the alternatives to trial before a competent tribunal for a State party to discharge its duty to punish; and (d) what forms of reparation may States parties be required to make for breach of the duty to punish under article VI.
80. For the reasons set out below, the Maldives argues that the Court should adopt the following construction of article VI in relation to these questions:
- a) a State party's duty to punish under article VI encompasses a duty to investigate as soon as there are reasonable grounds to believe that genocidal acts may have been committed in its territory and a duty to prosecute without delay as soon as there is sufficient evidence that such acts have been committed.
 - b) a State party's duty to punish under article VI encompasses a duty to conduct investigations in good faith that are prompt, effective and thorough, and independent and impartial. The duty to punish under article VI is subject to prosecutorial discretion that must be exercised independently, impartially and in good faith. Article VI also encompasses a duty to prosecute those who are charged with genocidal acts before a "competent tribunal" that complies with fair trial standards defined in international law, in both civilian and military courts.
 - c) States parties may discharge their duty to punish under article VI by accepting the jurisdiction of and cooperating with an "international penal tribunal" that meets international fair trial standards.
 - d) States parties may be ordered to prosecute specific individuals under certain circumstances if found in violation of the duty to punish under the Convention.

a. The triggers for a State party to investigate and prosecute persons charged with genocidal acts before a competent tribunal

81. The Maldives agrees with the Parties and the Joint Interveners that the requirement in the Genocide Convention that “[p]ersons charged with [genocidal acts] shall be tried by a competent tribunal” means that States parties are required both to investigate and prosecute genocidal acts under the Convention.¹⁹² As a commentator has noted, given that “the territorial state is required to exercise its jurisdictional competence over genocide suspects”, the “duty to investigate and prosecute ... arises from the Convention itself and from customary law”.¹⁹³ The Parties disagree, however, about what is required to trigger these duties.
82. Myanmar suggests that a State party’s duty to investigate is not triggered until the relevant authorities have “receive[d] information of such a nature that calls for an investigation into whether genocide has been committed”.¹⁹⁴ According to Myanmar, receiving “information of a large number of killings” of “victims who happen to be members of a protected group” would not be sufficient to trigger the duty to investigate genocide if the State party had “no information that the killings were committed with intent to destroy physically or biologically a protected group as such”.¹⁹⁵ It dismisses the findings of U.N. fact-finding missions as mere “expression[s] of opinions” with no “evidential weight” and concludes that The Gambia has failed to discharge the burden of proving that “Myanmar had information ... sufficient to trigger the duty to punish”, which only arises “if, and when, the authorities have obtained sufficient evidence to satisfy the evidential threshold under municipal law”.¹⁹⁶
83. The Gambia disagrees, arguing that the duty to punish “is engaged as soon as there is sufficient basis for knowledge that genocide has occurred”.¹⁹⁷ According to The Gambia, Myanmar has received evidence that genocide has been committed “in the form of the two voluminous and well-documented [U.N.] Fact-Finding Mission Reports” based on “over 600 interviews with victims and eyewitnesses as well as over 250 consultations with stakeholders”, in addition to other evidence provided by U.N. bodies, further witness and expert testimony, satellite imagery, Myanmar’s own documents, and reports from

¹⁹² Memorial, paras. 11.2-11.3, 12.135; Counter-Memorial, para. 12.24; Joint Declaration, para. 78 (“The Declarants submit that [article VI] presupposes an obligation on the part of the State to conduct an investigation prior to the commencement of a prosecution”).

¹⁹³ G. Mettraux, p. 103. See also Human Rights Committee, *General Comment No. 20, Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 March 1992), para. 14. On the Human Rights Committee, see further para. 98 below.

¹⁹⁴ Counter-Memorial, para. 12.24.

¹⁹⁵ *ibid.*, para. 12.30-12.31; Rejoinder, para. 12.13. Myanmar suggests that it is “striking” how few materials cited by The Gambia refer to genocide: Counter-Memorial, para. 12.75.

¹⁹⁶ Counter-Memorial, paras. 12.24, 12.31, 12.44.

¹⁹⁷ Memorial, para. 4.70.

foreign governments, the media and NGOs.¹⁹⁸ The Gambia concludes that Myanmar's failure to take any "meaningful action to investigate, much less prosecute and punish, the perpetrators of acts of genocide" constitutes a breach of the Convention.¹⁹⁹

- i. A State party's duty to punish genocidal acts under article VI of the Convention encompasses a duty to investigate as soon there are reasonable grounds to believe that genocidal acts have been committed in its territory.
84. The Maldives submits that a State party's duty to investigate genocidal acts under article VI is engaged as soon as there are reasonable grounds to believe that genocidal acts may have been committed in its territory, and that the alternative construction put forward by Myanmar sets the bar too high. Myanmar effectively suggests that a duty to investigate is triggered only when there is certainty that genocide has been committed, but the purpose of an investigation is to establish whether genocide has in fact been committed and, if so, who is responsible.
 85. The Maldives' position reflects the requirement that terms must be construed in the context of the entire treaty.²⁰⁰ Article I obliges States parties to recognise genocide as a "crime" and article IV requires them to "punish [p]ersons committing" this crime. According to commentators, article VI refers to "the procedure through which punishment is to be determined".²⁰¹ The requirement in article VI that "[p]ersons charged with genocide ... *shall be tried*"²⁰² "does not mean ... that Article VI only becomes applicable once a charge has been brought. In order to produce effects, it requires states to conduct investigations with a view to assessing *whether* a charge is to be brought. Such a duty to investigate arises whenever there are reasonable grounds to believe that a crime in the sense of Articles II, III has been committed".²⁰³
 86. Investigations, including any assessment of the evidence gathered, must be carried out in good faith.²⁰⁴ As a commentator has observed, a State party cannot simply "evade its obligation to punish ... by denying that acts of genocide have been committed. In that respect, an international tribunal finding that such acts have been committed, a commission of inquiry's determinations to the same effect, a court's provisional measures, a Security Council resolution alerting a state to the fact that acts of genocide

¹⁹⁸ *ibid*, para. 5.9; Reply, para. 8.19. See Reply, paras. 4.35-4.71. See also Reply, paras. 4.9-4.11.

¹⁹⁹ Memorial, para. 12.135. It is beyond the scope of the Maldives' intervention to comment on whether the materials and evidence which The Gambia has submitted in these proceedings, including reports by the U.N. Independent Fact-Finding Mission, in fact triggered Myanmar's duty to investigate alleged genocidal acts and prosecute those suspected of having committed them.

²⁰⁰ Vienna Convention, arts. 31(1), 31(2).

²⁰¹ C. Tams et al., p. 241.

²⁰² Emphasis added.

²⁰³ C. Tams et al., p. 239 (emphasis in original).

²⁰⁴ Vienna Convention, art. 26. See also paras. 39-45 above on prosecutorial discretion as part of States' obligations under article IV and para. 106 below for prosecutorial discretion as part of their article VI obligations.

might have been committed or other credible indications to that effect would put the state on sufficient notice of its obligation to act”.²⁰⁵ The Maldives agrees, and submits that article VI, properly construed, requires a State party to investigate as soon as there are reasonable grounds to believe that such acts may have been committed.

87. The Maldives’ position is consistent with the standard set out in international instruments such as the U.N. Minnesota Protocol on the Investigation of Potentially Unlawful Death, a manual that codifies States’ obligations under international law when conducting investigations of “potentially unlawful deprivations of life”.²⁰⁶ The principles underlying the Minnesota Protocol were endorsed by the U.N. General Assembly²⁰⁷ and U.N. human rights bodies have recognised the Protocol as setting out the “relevant international standards” for investigations.²⁰⁸ The Protocol provides that:

A State’s duty to investigate is triggered where it knows or *should have known* of any potentially unlawful death, including where *reasonable allegations* of a potentially unlawful death are made. The duty to investigate does not apply only where the State is in receipt of a formal complaint.²⁰⁹

88. The Maldives submits that this standard should be taken into account when construing the duty to investigate applicable to States parties under article VI of the Genocide Convention, consistent with the Court’s practice of construing and applying international instruments “within the framework of the entire legal system prevailing at the time of the interpretation”.²¹⁰
89. The Maldives’ position is also consistent with the trigger for the duty to investigate serious international crimes under other U.N. treaties. The Convention Against Torture requires a State to conduct a prompt and impartial investigation “wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction”.²¹¹ The Committee against Torture has observed that once “there

²⁰⁵ G. Mettraux, p. 98.

²⁰⁶ Office of the U.N. High Commissioner for Human Rights, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, New York/Geneva 2017 (“U.N. Minnesota Protocol”).

²⁰⁷ The U.N. Minnesota Protocol is an updated version of the U.N. Manual on the Effective Prevention of Extra-legal, Arbitrary and Summary Executions, which was originally drafted to supplement the U.N. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions endorsed by the U.N. General Assembly in 1989: see U.N.G.A., *General Assembly Resolution 44/162*, U.N. Doc. A/RES/44/162 (15 December 1989).

²⁰⁸ See, e.g., Human Rights Committee, *General Comment No. 36 on article 6: right to life*, U.N. Doc. CCPR/C/GC/36 (3 September 2019), para. 27. On the Human Rights Committee, see para. 98 below.

²⁰⁹ U.N. Minnesota Protocol, para. 15 (emphasis added).

²¹⁰ *Namibia* (ICJ Advisory Opinion), para. 53. See Vienna Convention, art. 31(3)(c). See also paras. 6-10 above.

²¹¹ Convention Against Torture, art. 12(1). See also International Convention for the Protection of All Persons from Enforced Disappearance, art. 12(2) (requiring States to investigate “[w]here there are reasonable grounds

are reasonable grounds for believing that an act of torture has been committed”, the decision whether to investigate is no longer discretionary.²¹² The Maldives submits that the Court should adopt the same approach when construing the duty to investigate under the Genocide Convention.

ii. A State party’s duty to punish genocide under article VI of the Convention encompasses a duty to prosecute without delay as soon as there is sufficient evidence that genocidal acts have been committed in its territory.²¹³

90. The requirement in article VI of the Genocide Convention that perpetrators “shall be tried by a competent tribunal of the State in the territory of which the act was committed” does not expressly address *when* alleged perpetrators against whom evidence has been uncovered must be charged. The Court has confirmed that “Article VI obliges the Contracting Parties ... [to] arrest persons accused of genocide who are in their territory”²¹⁴ but has not had occasion to address the issue of the time frame for performance of the obligations under article VI.
91. Myanmar suggests that “the duty to punish cannot arise instantaneously at the very moment in time that acts of genocide are committed”²¹⁵ and that “the necessary evidence may come to light only very many years after the commission of the crimes in question, such that prosecutions take place many years after the event”.²¹⁶
92. The Maldives submits, however, that the correct construction of article VI is that when there is sufficient evidence that an individual committed genocidal acts in a State party’s territory, the State must prosecute the alleged perpetrator without delay, subject to prosecutorial discretion exercised independently, impartially and in good faith.²¹⁷

for believing that a person has been subjected to enforced disappearance ... even if there has been no formal complaint”).

²¹² Committee Against Torture, *Concluding Observations: France*, U.N. Doc. CAT/C/FRA/CO/3 (7-25 November 2005), para. 20. See also Committee Against Torture, *Concluding Observations: Luxembourg*, U.N. Doc. CAT/C/LUX/CO/6-7 (3 June 2015), para. 15. See also para. 31 above; fn. 103 above. The European and Inter-American human rights courts have reached similar conclusions when considering the trigger for a State’s duty to investigate violations of the right to life in regional human rights treaties: see, e.g., European Court of Human Rights, *Ergi v. Turkey*, App. no. 23818/94, 28 July 1998, para. 82; European Court of Human Rights, *Isayeva v. Russia*, App. no. 57950/00, 24 February 2005, para. 209; Inter-American Court of Human Rights, *Montero-Aranguren v. Venezuela*, Series C no. 150, 5 July 2006, para. 79 (“Upon learning that member of the security forces have used firearms causing lethal consequences, the State must immediately initiate a rigorous, impartial and effective investigation *ex officio*”). See also *Republic of Guinea v. Democratic Republic of the Congo* (ICJ Merits Judgment), paras. 66-68. See further paras. 6-10 above.

²¹³ The duty to prosecute is subject to prosecutorial discretion that must be exercised independently, impartially and in good faith: see paras. 39-45 above, para. 105 below.

²¹⁴ *Bosnia v. Serbia* (ICJ Judgment), para. 443 (referring to the duty to cooperate with “international penal tribunals” under article VI).

²¹⁵ Counter-Memorial, para. 12.24.

²¹⁶ *ibid.*, para. 12.25. The Gambia does not directly address this argument.

²¹⁷ This requirement is discussed at para. 105 below.

93. The Maldives’ submission that States parties must prosecute persons charged with genocidal acts “without delay” draws on the Court’s observations on the comparable duty to prosecute torture under article 7(1) of the Convention Against Torture, which — like the Genocide Convention — does not provide for a specific time period within which a State must “submit a case” against an alleged torturer “to its competent authorities for the purpose of prosecution”.²¹⁸ In analysing this provision, the Court observed that:

While Article 7, paragraph 1, of the Convention does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention ... which is “to make more effective the struggle against torture” It is for that reason that *proceedings should be undertaken without delay*.²¹⁹

94. The Maldives submits that the same approach should be adopted when construing the duty to prosecute under the Genocide Convention.²²⁰

b. The procedural standards applicable to the duty to investigate and prosecute persons charged with genocide

- i. States parties must carry out good faith investigations that are prompt, effective and thorough, independent and impartial.

95. The Maldives submits that the requirement in article VI of the Convention that persons “shall be tried” for genocide “by a competent tribunal” should be construed to include a duty to conduct investigations that are prompt, effective and thorough, independent and impartial.

96. It is undisputed that Myanmar established several bodies to make inquiries about events during the 2016 – 2018 “clearance operations”²²¹ but that none of them had the mandate to investigate crimes allegedly committed by the Tatmadaw, which remained under the “military justice system”.²²² The Gambia submits that the bodies Myanmar set up were a

²¹⁸ Convention Against Torture, art. 7(1). See also para. 31 above.

²¹⁹ *Belgium v. Senegal* (ICJ Judgment), paras. 113-115 (emphasis added).

²²⁰ See also C. Tams et al., p. 243 (observing that article VI of the Genocide Convention provides that “persons charged with genocide ‘shall’ be tried. This is a strict duty, which leaves contracting parties no discretion — where a charge has been made, a trial must necessarily follow”).

²²¹ Memorial, para. 11.53. See Counter-Memorial, para. 12.87. These bodies were established in 2016-2020 and include the Annan Commission, the Rakhine State Investigation Committee and the Investigation Commission on Maungdaw in Rakhine State, all of which issued reports: Memorial, paras. 11.54-11.99; Counter-Memorial, paras. 12.87-12.112. Cf. Counter-Memorial, para. 12.94.

²²² Counter-Memorial, para. 12.89. See Reply, para. 8.22.

“sham”²²³ intended “to create the false impression that an investigation was occurring”²²⁴ when in fact Myanmar was refusing to cooperate with international investigators²²⁵ and destroying evidence of genocide.²²⁶ Myanmar denies this,²²⁷ raising the issue of the standard of investigations necessary to satisfy article VI.

97. The Maldives’ proposed construction of article VI is based on the standard that has been adopted in multiple U.N. instruments endorsed by the U.N. General Assembly that codify States’ obligations to investigate alleged international crimes and unlawful killings.²²⁸ The U.N. Minnesota Protocol,²²⁹ for example, provides that “[i]nternational law requires that investigations be: (i) prompt; (ii) effective and thorough; (iii) independent and impartial.²³⁰
98. There is consensus across U.N. and regional treaty mechanisms that investigations must comply with this standard. For example, the U.N. Human Rights Committee, the treaty body that monitors the implementation of the International Covenant on Civil and Political Rights (“ICCPR”) by its 174 States parties,²³¹ has declared that States must investigate violations of the ICCPR “promptly, thoroughly and effectively through independent and impartial bodies” and that a “failure by a State party to investigate allegations of violations” of the Covenant in line with this international standard “could

²²³ E.g., Memorial, para. 12.136; Reply, para. 1.18. The Gambia argues that this is because these bodies did not have the mandate to investigate genocide or other crimes allegedly committed by the military; they were staffed by military personnel lacking independence and impartiality; and the reports they produced were “flimsy”: Reply, para. 8.22. See also Memorial, paras. 11.54, 11.58, 11.68; Reply, paras. 8.23-8.32. The Gambia also refers to submissions by the Prosecutor of the International Criminal Court that “the Tatmadaw’s purported investigation of itself was not genuine, and was intended only to shield the perpetrators of atrocities committed against the Rohingya”: Memorial, para. 11.85.

²²⁴ Reply, para. 8.22.

²²⁵ Memorial, paras. 11.49-11.51; Reply, para. 8.18.

²²⁶ Memorial, paras. 11.40-11.48; Reply, para. 8.33 (alleging the burning of Rohingya homes, mutilation of dead bodies and bulldozing of Rohingya villages).

²²⁷ Myanmar denies that the bodies it set up were shams “merely because they do not have the purpose of investigating and prosecuting crimes”, or that they were not “independent”: Counter-Memorial, paras. 12.90, 12.104. It also denies allegations of destruction of evidence and argues that it was under no obligation to collaborate with international investigators: Counter-Memorial, paras. 12.80-12.81, 12.84.

²²⁸ See Vienna Convention, art. 31(3)(c); Statute of the Court, art. 38(1).

²²⁹ See also paras. 87-88 above on the U.N. Minnesota Protocol. See further paras. 6-10 above.

²³⁰ U.N. Minnesota Protocol, para. 22. See also U.N. Human Rights Commission, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, U.N. Doc. E/CN.4/2005/102/Add.1 (8 February 2005), principle 19 (“States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law” of “those responsible for serious crimes under international law”); U.N.G.A., *U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. A/RES/60/147 (15 December 2005), principle 3(b) (requiring States to “[i]nvestigate violations effectively, promptly, thoroughly and impartially”).

²³¹ U.N. Treaty Collection, Chapter IV (Human Rights), ICCPR (16 December 1966) (status as at 26 February 2025). There are 153 States parties to the Genocide Convention: see U.N. Treaty Collection, Chapter IV (Human Rights), Genocide Convention (9 December 1948) (status as at 26 February 2025).

in and of itself give rise to a separate breach of the Covenant”.²³² Regional courts and treaty mechanisms in Europe, Africa and the Americas have applied a similar standard to investigations of regional human rights treaty violations.²³³ Taking this jurisprudence into consideration is consistent with the Court’s practice of reviewing the construction by other human rights bodies of treaty provisions “close in substance” to those at issue in the case “to achieve the necessary clarity and essential consistency of international law”.²³⁴

99. The requirement that investigations should be prompt²³⁵ must, pursuant to the Vienna Convention, be complied with in good faith and construed in a manner consistent with the object and purpose of the Genocide Convention, which includes “safeguard[ing] the very existence of certain human groups”.²³⁶ Article VI must also be read in the context of other provisions of the treaty, including the requirement in article IV that perpetrators “shall be punished” — as perpetrators cannot be punished if they are not first identified.²³⁷ And States cannot rely on provisions of their internal laws to justify a failure or delay in performing their treaty obligations.²³⁸ The U.N. Minnesota Protocol confirms that “[t]he duty of promptness does not justify a rushed or unduly hurried investigation” but requires States to “conduct an investigation as soon as possible and proceed without unreasonable delays”.²³⁹
100. The requirement that investigations be effective and thorough has been noted by the U.N. Security Council which has, in the context of “serious violations of international humanitarian law”, affirmed “the responsibility of States to comply with their relevant obligations to end impunity and, to that end, to thoroughly investigate and prosecute

²³² Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (29 March 2004), para. 15. The Human Rights Committee confirmed that “potentially unlawful deprivations of the right to life” must be investigated “in accordance with relevant international standards, including the Minnesota Protocol”: Human Rights Committee, *General Comment No. 36 on article 6: right to life*, U.N. Doc. CCPR/C/GC/36 (3 September 2019), para. 27.

²³³ The European Court of Human Rights confirmed that an investigation of violations of the right to life must be “effective”, “prompt”, “independent” and “objective”: European Court of Human Rights (Grand Chamber), *Al-Skeini et al. v. United Kingdom*, App. no. 55721/07, 7 July 2011, paras. 163-167. Investigations of violations of the right to life under the African Charter of Human and Peoples’ Rights require the same standard: African Commission on Human and Peoples’ Rights, *General Comment No. 3 On The African Charter of Human and Peoples’ Rights: The Right to Life* (4-18 November 2015), para. 7 (requiring “prompt, impartial, thorough” investigations). And the Inter-American Court of Human Rights has taken a similar approach, e.g., to investigations of deaths in State custody: Inter-American Court of Human Rights, *Landaeta Mejías Brothers et al. v. Venezuela*, Series C no. 281, 27 August 2014, para. 254 (requiring “an investigation ex officio, that is complete, impartial and independent”).

²³⁴ *Republic of Guinea v. Democratic Republic of the Congo* (ICJ Merits Judgment), paras. 66-68. See further paras. 6-10 above.

²³⁵ See also paras. 84-89 above on the timing of States parties’ duty to investigate.

²³⁶ *Reservations to the Convention on Genocide* (ICJ Advisory Opinion), p. 23. See also Vienna Convention, arts. 26, 31(1).

²³⁷ Emphasis added. See Vienna Convention, arts. 31(1), 31(2).

²³⁸ Vienna Convention, art. 27.

²³⁹ U.N. Minnesota Protocol, para. 23.

persons responsible for genocide”.²⁴⁰ Regional human rights courts have applied a similar standard.²⁴¹ And the U.N. Minnesota Protocol provides that States should “at a minimum” take “all reasonable steps” to identify the victims, recover all material probative of the cause of death and the identity of the perpetrators, identify possible witnesses and obtain their evidence, and “identify not only direct perpetrators but also all others who were responsible for the death”, including “officials in the chain of command who were complicit in the death”.²⁴² The Protocol also notes that “[t]he investigative mechanism charged with conducting the investigation ... must, at a minimum, have the legal power to compel witnesses”, “require production of evidence” and “be able to ensure the safety and security of witnesses”.²⁴³

101. The requirement that investigations must be independent and impartial is also contained in the U.N. Minnesota Protocol, which makes clear that impartiality requires investigators to “act at all times without bias”, “analyse all evidence objectively”²⁴⁴ and that:

Investigations must be independent of any suspected perpetrators and the units, institutions or agencies to which they belong. Investigations of law enforcement killings, for example, must be capable of being carried out free from undue influence that may arise from institutional hierarchies and chains of command. Inquiries into serious human rights violations, such as extrajudicial executions and torture, must be conducted under the jurisdiction of ordinary civilian courts.²⁴⁵

102. Regional human rights courts have likewise adopted this international standard. For example, in the context of military investigations, the European Court of Human Rights has recognised that it was particularly important that an investigating authority “was, and was seen to be, operationally independent of the military chain of command”.²⁴⁶ An

²⁴⁰ U.N.S.C., *Security Council Resolution 2150 (2014)*, U.N. Doc. S/RES/2150(2014) (16 April 2014), p. 2.

²⁴¹ See, e.g., European Court of Human Rights, *Yevgeniy Petrenko v. Ukraine*, App. no. 55749/08, 29 January 2015, para. 65 (finding that “an effective official investigation ... should ... be capable of leading to ... the identification and punishment of those responsible”); European Court of Human Rights, *Jasar v. The Former Yugoslav Republic of Macedonia*, App. no. 69908/01, 15 February 2007, para. 55 (finding that the requirement that investigations be thorough “means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation”); European Court of Human Rights, *Mikheyev v. Russia*, App. no. 77617/01, 26 January 2006, para. 107 (concluding that any “deficiency in the investigation which undermines its ability to establish” the cause of death or the identity of the persons responsible “will risk falling foul of this standard”). See also fn. 233 above. See further paras. 6-10 above.

²⁴² U.N. Minnesota Protocol, paras. 25-26.

²⁴³ *ibid.*, para. 27.

²⁴⁴ *ibid.*, paras. 28-31.

²⁴⁵ *ibid.*, para. 28.

²⁴⁶ European Court of Human Rights (Grand Chamber), *Al-Skeini et al. v. The United Kingdom*, App. no. 55721/07, 7 July 2011, para. 169.

investigation would lack the necessary independence if “the investigation process remained entirely within the military chain of command”.²⁴⁷

103. The requirement that investigations must be carried out in good faith and be prompt, effective and thorough, and independent and impartial is mirrored in the provisions of the Rome Statute of the International Criminal Court (“ICC”) — a treaty to which approximately two-thirds of the world’s States are parties.²⁴⁸ Like the Genocide Convention, the Rome Statute aims to combat serious international crimes, including genocide, and both treaties focus on prosecution in national courts to hold the perpetrators of these crimes accountable.²⁴⁹
104. Under the ICC’s Statute, a State is deemed “unwilling ... genuinely to carry out an investigation or prosecution” if, “having regard to the principles of due process recognized by international law”, the national proceedings are being undertaken “for the purpose of shielding” the offender “from criminal responsibility”,²⁵⁰ if the proceedings were not “conducted independently or impartially”²⁵¹ or if there has been “an unjustified delay” that is “inconsistent with an intent to bring the person concerned to justice”.²⁵² The ICC has confirmed that genuine investigations require States to undertake “tangible, concrete and progressive investigative steps” with a view to conducting “criminal prosecution”.²⁵³ According to commentators, this requires the State to use “‘all the legal means at its disposal’ in the conduct of a serious criminal process that identifies the suspects involved and leads to actual trial and appropriate punishment if necessary”.²⁵⁴

²⁴⁷ *ibid.*, para. 171. See also African Commission on Human and Peoples’ Rights, *Amnesty International et al. v. Sudan*, Comm. nos. 48/90, 50/91, 52/91, 89/93, 15 November 1999, para. 51 (“Investigations must be carried out by entirely independent individuals, provided with the necessary resources”).

²⁴⁸ 125 of the world’s 195 States are parties to the Rome Statute, see International Criminal Court, “The States Parties to the Rome Statute”, *available at* <https://asp.icc-cpi.int/states-parties>.

²⁴⁹ See Rome Statute, art. 1 (stipulating that the ICC’s “jurisdiction over persons for the most serious crimes of international concern ... shall be complementary to national criminal jurisdictions”), art. 5(a) (providing for the ICC’s jurisdiction with respect to the crime of genocide).

²⁵⁰ *ibid.*, arts. 17(1)(a), 17(2)(a). Both Parties refer to this standard: see, e.g., Memorial, para. 11.85; Rejoinder, para. 12.83.

²⁵¹ Rome Statute, arts. 17(1)(a), 17(2)(b).

²⁵² *ibid.*, arts. 17(1)(a), 17(2)(c).

²⁵³ *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation, 31 October 2022, para. 45 (emphasis in original omitted); see para. 58 (concluding that Afghanistan was “not presently carrying out genuine investigations” and that the “limited number of cases and individuals prosecuted by Afghanistan” supported this conclusion). See also *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, 7 December 2012, para. 7 (confirming that an investigation requires “the taking of steps directed at ascertaining whether this individual is responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”).

²⁵⁴ Kai Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck/Hart/Nomos 2021, 4th ed), p. 972.

105. In light of the comparable treaty framework and the emphasis — in the relevant provision of the Rome Statute — on compliance with international “due process principles”,²⁵⁵ the Maldives submits that the circumstances in which a State is deemed unwilling genuinely to carry out a national investigation or prosecution of genocide under the Rome Statute are indicative of a violation of a State party’s duty to investigate and prosecute persons charged with genocidal acts before a “competent tribunal” under article VI of the Genocide Convention.²⁵⁶

ii. States parties must exercise prosecutorial discretion independently, impartially and in good faith.

106. As set out above, consistent with the requirement to punish “[p]ersons committing genocide” under article IV, the Maldives submits that the duty to try those charged with genocide before a competent tribunal under article VI requires States parties to exercise prosecutorial discretion independently, impartially and in good faith.²⁵⁷ This construction of article VI is also consistent with the prohibition against invoking internal laws as a justification for a failure to perform a treaty obligation and the requirement to interpret and perform treaty provisions in good faith and in the context of the other provisions of the treaty, including article IV.²⁵⁸ Article IV’s stipulation that “[p]ersons charged with [genocidal acts] shall be punished” means that if sufficient evidence has been collected — whether by the territorial State or otherwise — indicating that a person has committed genocidal acts, and a State party fails to prosecute that person, the burden falls on the State party to justify the failure to prosecute in line with its obligations under the Convention.²⁵⁹ And if a State party has failed to carry out a prompt, effective and thorough, independent and impartial investigation, it cannot justify a failure to prosecute by claiming that it does not have “sufficient evidence”. This is all the more important if much or all of the relevant evidence is within the State’s control, including in situations where the alleged perpetrators of genocide are members of its own apparatus.²⁶⁰

iii. States parties must try persons charged with genocidal acts before a competent tribunal that complies with international fair trial standards, including the requirement that the tribunal be independent and impartial, in both civilian and military courts.

107. The Maldives submits that article VI, in particular the requirement that persons charged with genocide shall be tried by a “competent tribunal”, should be construed to mean a

²⁵⁵ Rome Statute, art. 17(2). See also Rome Statute, art. 21(3) (requiring the ICC’s “application and interpretation of law” to be “consistent with internationally recognized human rights”).

²⁵⁶ See also Vienna Convention, art. 31(3)(c).

²⁵⁷ See paras. 39-45 above.

²⁵⁸ Vienna Convention, arts. 26, 27, 31(1).

²⁵⁹ See paras. 39-45 above on the limits on prosecutorial discretion as part of States’ obligations under article IV.

²⁶⁰ See also para. 124 below (on States raising similar concerns during the drafting of the Genocide Convention).

tribunal that complies with internationally recognised fair trial standards, in line with customary international law. The Joint Interveners take the same position.²⁶¹

108. The Parties agree that article VI requires territorial States to try those charged with genocidal acts.²⁶² Myanmar does not deny that — as alleged by The Gambia — there have been only two prosecutions of Tatmadaw soldiers for crimes against Rohingya victims during the “clearance operations”.²⁶³ And Myanmar concedes that crimes committed by members of the armed forces are dealt with by military courts rather than the civilian justice system and that the “commander-in-chief and other top commanders” have “oversight of the system that would have jurisdiction over them if they had committed any crimes”.²⁶⁴ However, the Parties disagree about the standards applicable to trials required under the Genocide Convention and their applicability to a military justice system.²⁶⁵
109. The Maldives and the Joint Interveners agree that international fair trial standards form part of customary international law,²⁶⁶ which should be taken into account as a relevant rule of international law when construing the Convention.²⁶⁷ Construing article VI in this way is consistent with the obligation to perform treaty obligations in good faith and interpret them in their context and in the light of the treaty’s object and purpose.²⁶⁸ As the Joint Interveners submit, failure to respect fair trial standards and conducting “sham trials meant only to shield the accused from justice” would leave “the trial ... an empty promise, unable to attain the aim of combating impunity” and “‘liberat[ing] mankind’ from the ‘odious scourge’ of genocide”.²⁶⁹

²⁶¹ See Joint Declaration, para. 79.

²⁶² Memorial, para. 4.70; Counter-Memorial, para. 4.89.

²⁶³ Memorial, paras. 11.16-11.17; Counter-Memorial, paras. 12.64-12.68; Reply, paras. 8.5-8.7. See also fn. 71 above.

²⁶⁴ Counter-Memorial, paras. 12.54-12.55.

²⁶⁵ The Gambia argues that the two trials conducted by Myanmar violate the Genocide Convention because they were “sham trials” and because Myanmar’s military justice system “gives exclusive jurisdiction to the Tatmadaw over its own crimes”: Memorial, para. 11.4, Reply, paras. 8.11-8.15. The Gambia also argues that Myanmar’s failure to try six top military commanders “accused ... of responsibility for genocide against the Rohingya” by “the UN Fact-Finding Mission” is “[e]mblematic of this unaccountable system”: Memorial, para. 11.8, Reply, para. 8.13. Myanmar argues that its justice system meets applicable standards and that the circumstances of the two trials dealing with crimes against Rohingya victims “do not establish that ‘Myanmar does not hold its military personnel accountable for acts of genocide’”: Rejoinder, para. 12.19.

²⁶⁶ Joint Declaration, para. 79. This has been confirmed by various international courts and bodies, including the ICTY Appeals Chamber: see, e.g., *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Appeals Judgment, 24 March 2000, para. 104. See also A. Clooney and P. Webb, pp. 13-25 and sources cited therein.

²⁶⁷ See Vienna Convention, art. 31(3)(c); Statute of the Court, art. 38(1)(b) (requiring the Court to apply international custom). See also C. Tams et al., pp. 241-242 (“The inherent right to a fair trial must be kept in mind as a rule of international (criminal) law pursuant to Article 31 para. 3 lit. (c) VCLT when considering a trial under Article VI”).

²⁶⁸ Vienna Convention, arts. 26, 31(1), 32(2).

²⁶⁹ Joint Declaration, para. 79 (citing Genocide Convention, preamble).

110. International fair trial standards are codified in article 14 of the ICCPR and feature in all the major human rights treaties concluded by the U.N. and regional organisations.²⁷⁰ When considering fair trial guarantees under these treaties, international and regional treaty bodies have confirmed that the right to a fair trial is non-derogable, meaning that no exception is permitted even during times of emergency.²⁷¹ In addition, fair trial principles are enshrined in the Geneva Conventions and form part of international humanitarian law.²⁷²
111. The right to a fair trial under article 14 of the ICCPR can be disaggregated into 13 components.²⁷³ These are: (i) the right to be tried by a competent, independent and impartial tribunal established by law; (ii) the right to a public trial; (iii) the right to be presumed innocent; (iv) the right to prepare a defence; (v) the right to counsel; (vi) the right to be tried without undue delay; (vii) the right to be present; (viii) the right to examine witnesses; (ix) the right to have an interpreter; (x) the right to silence; (xi) the right to an appeal; (xii) the right to equality; and (xiii) the right not to be subjected to “double jeopardy”.²⁷⁴
112. The Maldives submits that the duty to try persons charged with genocidal acts before a competent tribunal must be construed to refer to an independent and impartial tribunal, a component of the right to a fair trial that has itself achieved the status of customary international law²⁷⁵ and on that basis a “relevant rule of international law” applicable to

²⁷⁰ International Covenant on Civil and Political Rights, art. 14; European Convention on Human Rights, art. 6; African Charter on Human and Peoples’ Rights, art. 7; American Convention on Human Rights, art. 8; Universal Declaration of Human Rights, art. 10; and ASEAN Human Rights Declaration, art. 20.

²⁷¹ Human Rights Committee, *General Comment No. 29, Article 4: Derogations during a State of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001), para. 11; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 Rev. 1 Corr. (22 October 2002), paras. 245-247; African Commission on Human and Peoples’ Rights, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Comm. no. 74/92, 2-11 October 1995, para. 21; Arab Charter on Human Rights, art. 4(2).

²⁷² Convention (I) for the Amelioration of the Condition of the Wounded an Sick in Armed Forces in the Field (12 August 1949); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949); Convention (III) relative to the Treatment of Prisoners of War (12 August 1949); Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949); common article 3(1)(d).

²⁷³ See Supreme Court of the United Kingdom, *R. (o/a TN (Vietnam)) v. Secretary of State for the Home Department* [2021] UKSC 41, para. 66 (observing that the “right to a fair trial” can be “disaggregate[d] into a number of separate elements” following “the methodology in *The Right to a Fair Trial in International Law*, Clooney and Webb, (Oxford, 2021)”). See also Vienna Convention, art. 31(3)(c); Statute of the Court, art. 38(1)(d) (providing that the Court can consider “judicial decisions” as subsidiary means for determining “relevant rules of international law”).

²⁷⁴ See A. Clooney and P. Webb, p. 7.

²⁷⁵ See *ibid*, pp. 19-20 and sources cited therein.

the States parties that the Court can take into account in construing the Convention.²⁷⁶ The Joint Interveners agree.²⁷⁷

113. The ECCC²⁷⁸ considered impartiality and independence in connection with allegations of genocide when it was required to determine whether a defendant’s prior conviction for genocide by a domestic court precluded the ECCC from hearing the case.²⁷⁹ The court indicated that article 14 of the ICCPR applies to domestic proceedings,²⁸⁰ noted that the trial “was not conducted by an impartial and independent tribunal”,²⁸¹ and found that “the deficiencies affecting these proceedings were so significant that the decision resulting from this trial cannot be characterized as a genuine judicial decision. It is therefore incapable of producing valid legal effects”.²⁸² The Maldives submits that the Court should adopt a consistent approach to construing the requirement that States put “[p]ersons charged with genocide” on trial before a “competent tribunal” under article VI of the Genocide Convention.
114. The Human Rights Committee has also confirmed that the “requirement of competence, independence and impartiality of a tribunal ... is an absolute right that is not subject to any exception”.²⁸³ According to the Committee:

The requirement of independence refers ... [to] the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.²⁸⁴

²⁷⁶ Vienna Convention, art. 31(3)(c).

²⁷⁷ Joint Declaration, para. 79 (“Although the Genocide Convention does not specify how a prosecution and trial must be conducted in order to [fulfil] the obligation of investigation, prosecution, and trial by a ‘competent tribunal’, the Declarants submit that the relevant provision must be interpreted as encompassing guarantees of fair trial, including that such a tribunal be independent and impartial”). The Joint Interveners also argue that there should be “sufficient transparency in the prosecution and trial”: Joint Declaration, para. 80. The Maldives agrees with this and notes that this is in line with the right to a public trial, a component of the right to a fair trial under international law: see, e.g., A. Clooney and P. Webb, pp. 152-197. See also para. 111 above.

²⁷⁸ See fn. 181 above on the ECCC. See also paras. 6-10 above.

²⁷⁹ *Prosecutors v. Nuon Chea et al.*, 002-19-09-2007/ECCC/TC, Decision on Ieng Sary’s Rule 89 Preliminary Objection (Ne bis in idem and Amnesty and Pardon), 3 November 2011, paras. 30-36.

²⁸⁰ *ibid.*, paras. 30, 32.

²⁸¹ *ibid.*, para. 30.

²⁸² *ibid.*

²⁸³ Human Rights Committee, *General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and Right to a Fair Trial*, U.N. Doc. CCPR/C/GC/32 (23 August 2007), para. 19.

²⁸⁴ *ibid.*

115. U.N. instruments²⁸⁵ and regional human rights courts²⁸⁶ have all taken a similar approach.
116. The Human Rights Committee has confirmed that impartiality consists of two requirements: first, a subjective requirement that “judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other”; and second, an objective requirement that “the tribunal must ... appear to a reasonable observer to be impartial”.²⁸⁷ Regional human rights bodies define impartiality in similar terms.²⁸⁸ The Maldives submits that the Court should adopt a consistent approach when construing the duty to prosecute under article VI in light of the customary international law standard that trials must take place before an independent and impartial tribunal.²⁸⁹
117. These requirements apply to military courts as well as to civilian courts. The Human Rights Committee has confirmed that the right to a fair trial and its components applies to “all courts and tribunals” and “its guarantees cannot be limited or modified because of the military or special character of the court concerned”.²⁹⁰
118. Members of the Human Rights Committee have considered that trials of military staff before military courts are “difficult to reconcile with the independence of judges”.²⁹¹ Regional human rights courts have reached similar conclusions.²⁹² And the International

²⁸⁵ E.g., the U.N. Basic Principles on the Independence of the Judiciary, which were adopted by Seventh U.N. Congress on the Prevention of Crime and Treatment of Offenders and endorsed by the U.N. General Assembly in 1985: see U.N.G.A., *General Assembly Resolution 40/32*, U.N. Doc. A/RES/40/32 (29 November 1985); U.N.G.A., *General Assembly Resolution 40/146*, U.N. Doc. A/RES/40/146 (13 December 1985).

²⁸⁶ E.g., European Court of Human Rights, *Kleyn et al. v. the Netherlands*, App. nos. 39343/98, 39651/98, 43147/98 and 46664/99, 6 May 2003, para. 190-192; Inter-American Court of Human Rights, *Valencia Hinojosa v. Ecuador*, Series C no. 327, 29 November 2016, paras. 113-114; African Commission on Human and Peoples’ Rights, *Lawyers for Human Rights v. The Kingdom of Swaziland*, Comm. no. 251/02, 11 May 2005, paras. 56-58.

²⁸⁷ Human Rights Committee, *General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and Right to a Fair Trial*, U.N. Doc. CCPR/C/GC/32 (23 August 2007), para. 21.

²⁸⁸ E.g., European Court of Human Rights, *Kyprianou v. Cyprus*, App. no. 73797/01, 15 December 2005, paras. 118-121; Inter-American Court of Human Rights, *Palamara-Iribarne v. Chile*, Series C no. 135, 22 November 2005, paras. 145-147; African Court on Human and Peoples’ Rights, *Alfred Agbesi Woyome v. Republic of Ghana*, App. no. 001/2017, 28 June 2019, paras. 126-128.

²⁸⁹ Vienna Convention, art. 31(3)(c). See para. 112 above on the right to an independent and impartial tribunal as part of customary international law. See also paras. 6-10 above.

²⁹⁰ Human Rights Committee, *General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and Right to a Fair Trial*, U.N. Doc. CCPR/C/GC/32 (23 August 2007), para. 22 (emphasis added).

²⁹¹ Human Rights Committee, *Ebenezer Derek Mbongo Akwanga v. Cameroon*, U.N. Doc. CCPR/C/101/D/1813/2008, 22 March 2011, Individual opinion of Committee members Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Sir Nigel Rodley and Ms. Margo Waterval.

²⁹² See, e.g., European Court of Human Rights, *Öcalan v. Turkey*, App. no. 46221/99, 12 May 2005, para. 112 (noting that “the status of military judges sitting as members of the national security courts made their independence from the executive questionable”); Inter-American Court of Human Rights, *La Cantuta v. Perú*, Series C no. 162, 29 November 2006, paras. 141-144 (finding that cases were referred to military courts to shield perpetrators “from ... the ordinary courts and thus secure their impunity”).

Committee of the Red Cross has confirmed that “[t]he need for independence of the judiciary from the executive, as well as subjective and objective impartiality, has meant that in a number of cases [involving international humanitarian law], military tribunals ... have been found not to be independent and impartial”.²⁹³

119. In addition, the Human Rights Committee has also noted that although the ICCPR “does not prohibit the trial of civilians in military or special courts” in all circumstances, trials of civilians by military tribunals “should be exceptional”, as they “may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned”.²⁹⁴ Regional human rights courts have taken a similar approach, with the European Court of Human Rights highlighting that “if a civilian has to appear before a court composed, even only in part, of members of the armed forces taking orders from the executive, the guarantees of impartiality and independence are open to a serious doubt”.²⁹⁵

120. The Maldives submits that the obligation in article VI to hold trials before a “competent tribunal” should be construed as requiring trials by tribunals that comply with international fair trial standards, including the right to an independent and impartial tribunal, and that this applies to any trial of a person charged with genocidal acts, whether before a civilian or military court. These rights form part of customary international law, which should be taken into account as a “relevant rule of international law” applicable to the States parties to the Genocide Convention.²⁹⁶

c. States parties may discharge their duty to punish under article VI by accepting the jurisdiction of and cooperating with an “international penal tribunal” that meets international fair trial standards.

121. It is undisputed that the duty to punish applies to all States parties to the Genocide Convention,²⁹⁷ regardless of whether there is a territorial nexus to the alleged genocidal

²⁹³ International Committee of the Red Cross, Customary IHL Database: Rule 100, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule100>. See also U.N. Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher: Addendum — Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, U.N. Doc. E/CN.4/2005/102/Add.1 (8 February 2005), principle 29; Frank Haldemann and Thomas Unger (eds.), *The United Nations Principles to Combat Impunity* (OUP 2018), p. 322.

²⁹⁴ Human Rights Committee, *General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and Right to a Fair Trial*, U.N. Doc. CCPR/C/GC/32 (2007), para. 22. See also Human Rights Committee, *Aleksandr Tyvanchuk et al. v. Belarus*, Comm. no. 2201/2012, 26 March 2018, para. 7.2 (finding that States must “take all measures necessary to prohibit the trial of civilians in military courts”).

²⁹⁵ European Court of Human Rights, *Al Nashiri v. Poland*, App. no. 28761/11, 24 July 2014, para. 562. See also Inter-American Court of Human Rights, *Durand and Ugarte v. Peru*, Series C no. 68, 16 August 2000, para. 117 (concluding that “civilians must be excluded from the military jurisdiction”); African Commission on Human and Peoples’ Rights, *Media Rights Agenda v. Nigeria*, Comm. no. 224/98, 23 October-6 November 2000, para. 62 (“[military courts] should not, in any circumstances whatsoever, have jurisdiction over civilians”). See further A. Clooney and P. Webb, pp.130-133.

²⁹⁶ Vienna Convention, art. 31(3)(c).

²⁹⁷ See Memorial, para. 2.3; Counter-Memorial, paras. 4.79-4.94; Joint Declaration, para. 77.

acts.²⁹⁸ For territorial States, in which genocide has allegedly occurred, the Court has confirmed that article VI “obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction” in their national courts.²⁹⁹ But article VI also provides that, as an alternative to being tried by a “competent tribunal” in the territorial State, persons charged with genocide can be tried by an “international penal tribunal”.

122. The Gambia’s position is that persons within Myanmar’s jurisdiction “who are suspected on probable grounds of having committed acts of genocide” should be submitted to trial “before an independent and effective tribunal, including before an international penal tribunal”.³⁰⁰ Myanmar, for its part, has entered a reservation to the Convention providing that “nothing contained in [article VI of the Genocide Convention] shall be construed as depriving the Courts and Tribunals of [Myanmar] of jurisdiction or as giving foreign Courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in article III committed within [Myanmar’s] territory”.³⁰¹
123. The Maldives submits that article VI requires that territorial States that fail to conduct an independent and impartial trial of those charged with genocidal acts, in line with international fair trial standards,³⁰² must ensure a trial by an “international penal tribunal” by accepting its jurisdiction, surrendering those charged, and cooperating with the tribunal as required by that tribunal. The Joint Interveners take a similar position.³⁰³
124. Interpreting article VI in this way is consistent with the ordinary meaning of the text and the terms of the Convention as a whole, which include the obligation to punish individuals responsible for committing genocide as a “crime under international law”.³⁰⁴ This construction is also supported by the *travaux*,³⁰⁵ which reveal that there was a concern on the part of the drafters of the Genocide Convention that territorial States may be participants or complicit in genocide and may therefore seek to shield perpetrators from prosecution in their own courts.³⁰⁶ The delegate from the Philippines commented that because “genocide was a collective crime of such proportions that it could rarely be committed except with the participation or the tolerance of the State”, “it would be

²⁹⁸ Cf. fn. 5 above.

²⁹⁹ *Bosnia v. Serbia* (ICJ Judgment), para. 442.

³⁰⁰ Memorial, Submissions, para. 2(A)(ii).

³⁰¹ U.N. Treaty Collection, Chapter IV (Human Rights), Genocide Convention, 9 December 1948, Reservations and Declarations (status as at 26 February 2025).

³⁰² See paras. 107-120 above on States parties’ obligations to try persons charged with genocidal acts in line with international fair trial standards.

³⁰³ Joint Declaration, para. 77 (arguing that a State party can discharge the duty to punish by “cooperating with competent international tribunals when it has accepted their jurisdiction”).

³⁰⁴ Genocide Convention, art. I; Vienna Convention, arts. 31(1), 31(2).

³⁰⁵ Vienna Convention, art. 32.

³⁰⁶ U.N.G.A., 98th Meeting of the Sixth Committee, Continuation of the consideration of the draft convention on genocide (E/794): report of the Economic and Social Council (A/633), U.N. Doc. A/C.6/SR.98 (10 November 1948), pp. 381-382 (comments from the representative of Canada: “Everyone was aware that serious cases of genocide were committed by Governments with which domestic courts were not competent to deal”).

paradoxical to leave to that same State the duty of punishing the guilty”.³⁰⁷ The delegate for the Philippines also observed that “if the convention were not to remain a dead letter, it was necessary to establish an international criminal court to ensure the punishment on an international level of those who might escape with impunity either because their national courts were not competent to deal with them owing to particular constitutional laws, or because they received favourable treatment thanks to the connivance or indifference of the national criminal courts”.³⁰⁸ This is why article VI contains an alternative to prosecution of alleged perpetrators in domestic courts of the territorial State, providing that persons charged with genocide can also be prosecuted by an international penal tribunal with jurisdiction.

125. The Court has already recognised that article VI obliges States parties to the Genocide Convention “to co-operate with the international penal tribunal” mentioned in article VI.³⁰⁹ As the Court has found:

It is certain that once such a court has been established, article VI obliges the Contracting Parties “which have accepted its jurisdiction” to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory ... and, failing prosecution of them in the parties’ own courts, that they will hand them over for trial by the competent international tribunal.³¹⁰

126. The Maldives also submits that any trial taking place before an international tribunal would be required to comply with international fair trial standards.³¹¹ Commentators agree that the right to a fair trial applies to all trials under article VI, whether in the territorial State or not, as “[t]his general duty to ensure the effective conduct of a trial is not dependent on a territorial nexus”.³¹²

³⁰⁷ U.N.G.A., 97th Meeting of the Sixth Committee, Continuation of the consideration of the draft convention on genocide (E/794): report of the Economic and Social Council (A/633), U.N. Doc. A/C.6/SR.97 (9 November 1948) p. 365 (comments from the representative of the Philippines).

³⁰⁸ *ibid.*

³⁰⁹ *Bosnia v. Serbia* (ICJ Judgment), para. 443. This case makes clear that the duty applies even to non-territorial States. Cf. fn. 5 above.

³¹⁰ *Bosnia v. Serbia* (ICJ Judgment), para. 443. See also G. Mettraux, p. 101.

³¹¹ See paras. 109-110 above.

³¹² C. Tams et al., p. 240. See also G. Mettraux, pp. 105-106. See further Joint Declaration, para. 77 (arguing that State parties may discharge the duty to punish “by extraditing persons accused of genocide for trial in other States, as relevant”); *Belgium v. Senegal* (ICJ Judgment), para. 112 (discussing the obligations of a State exercising extraterritorial jurisdiction under the Torture Convention and commenting that “[t]he diligence with which the authorities of the forum State must conduct the proceedings is also intended to guarantee the suspect fair treatment at all stages of the proceedings”).

d. States parties may be ordered to prosecute specific individuals under certain circumstances if found in violation of the duty to punish genocide under the Convention.

127. The Parties disagree as to whether a remedy for a violation of the duty to punish under article VI of the Convention can include an order to prosecute specific individuals, as The Gambia has asked the Court to do.³¹³ Myanmar argues that “The Gambia ... cannot request the Court to declare that Myanmar is required to prosecute specified named individuals for genocide”³¹⁴ because the Court is not a criminal court, and it is “not for the Court to make determinations of whether sufficient evidence exists to justify the prosecution of named individuals”.³¹⁵ The Gambia disagrees on the basis that its request “is a legitimate remedy” for violations of the Genocide Convention, and in particular “a guarantee of cessation and non-repetition”.³¹⁶
128. The Maldives submits that the Court should construe article VI to include remedies for violations of the duty to punish that can ensure full compliance with States parties’ obligations to punish perpetrators of genocidal acts.
129. The Maldives notes that the Court has already recognized that breach of articles I and VI can be remedied by an order requiring the respondent State to punish specific perpetrators to ensure full compliance with the Convention. In *Bosnia v. Serbia*, Bosnia and Herzegovina requested that the Court order Serbia to “take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention” and “to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal”.³¹⁷ The Court not only granted Bosnia and Herzegovina’s general request,³¹⁸ but specifically named General Ratko Mladić as an example of such an

³¹³ The Gambia has sought an order requesting that the Court order that Myanmar “submit to trial” six senior commanders: Memorial, Submissions 2(A)(ii). The Maldives notes that one of the six people named by The Gambia, Senior-General Aung Min Hlaing, is also the subject of an application for an arrest warrant issued by the ICC Prosecutor in November 2024: ICC, Statement of ICC Prosecutor Karim A.A. Khan KC: Application for an arrest warrant in the situation in Bangladesh/Myanmar, *available at* <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-application-arrest-warrant-situation-bangladesh>. Argentinian prosecutors have also issued arrest warrants for Senior-General Aung Min Hlaing and Vice Senior-General Soe Win, amongst others, alleging genocide and crimes against humanity committed against the Rohingya: see Forbes, “Argentine Court Issues Arrest Warrants in the Rohingya Genocide Case” (14 February 2025).

³¹⁴ Counter-Memorial, para. 12.42.

³¹⁵ *ibid*, para. 12.40.

³¹⁶ Reply, para. 8.14.

³¹⁷ *Bosnia v. Serbia* (ICJ Judgment), para. 459.

³¹⁸ *ibid*, paras. 465, 471(8).

individual,³¹⁹ despite Bosnia and Herzegovina not framing the request as such.³²⁰ As the Court stated:

It will be clear from the Court’s findings above on the question of the obligation to punish under the Convention that it is satisfied that the Respondent has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide, in order to comply with its obligations under articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić... . The Court will therefore make a declaration in these terms in the operative clause of the present Judgment, which will in its view constitute appropriate satisfaction.³²¹

130. The Gambia’s proposed order would also be consistent with the Court’s finding in another case that the remedy of satisfaction “can include measures such as ‘disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act’”.³²² The Maldives therefore submits that the proper construction of article VI of the Convention is that the Court may make a declaration related to a violation of this provision that includes the prosecution of individuals as a remedy to ensure full compliance with the Convention, as the Court has done in prior cases.

³¹⁹ *ibid*, para. 465.

³²⁰ See also, *ibid*, para. 448 (noting that “General Mladić ... was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now”).

³²¹ *Ibid*, para. 465.

³²² *Democratic Republic of the Congo v. Uganda* (ICJ Reparations Judgment), para. 389 (citing International Law Commission, *Report of the Commission to the General Assembly on the work of its fifty-third session*, Yearbook of the International Law Commission 2001, Vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), p. 106 (Article 37 of the Articles on Responsibility of States for Internationally Wrongful Acts)). The proposed order would also be consistent, as The Gambia argues, with the obligation of cessation: Reply, para. 8.14. See also International Law Commission, *Report of the Commission to the General Assembly on the work of its fifty-third session*, Yearbook of the International Law Commission 2001, Vol. II, Part Two, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), p. 89 (Commentary to Article 30 of the Articles on Responsibility of States for Internationally Wrongful Acts).

VI. Conclusion

131. For the reasons set out above, the Maldives submits that the Court should adopt the following construction of the relevant provisions of the Genocide Convention:

- a) Article I of the Genocide Convention:
 - i. requires the punishment of genocide or any of the other acts enumerated in article III. A State party can breach its duty to punish genocidal acts under article I regardless of whether it is responsible for the underlying genocidal acts, and the Court is not required to find any intent to commit genocide on the part of a State in order to find a breach of that State's duty to punish.
 - ii. The obligation in article I for States parties to punish genocidal acts is different from the obligation of States parties to prevent genocide, and the Court's holding that the obligation on States parties is to "employ all means reasonably available" to prevent genocide does not apply to the duty to punish. Rather, the Convention stipulates minimum requirements for States parties to satisfy their obligation to punish genocidal acts under article I, and these are set out in articles IV, V and VI.
- b) Article IV of the Genocide Convention requires States parties to punish perpetrators of genocidal acts, subject to prosecutorial discretion exercised independently, impartially and in good faith. If there is sufficient evidence that a person committed genocidal acts, and the State fails to prosecute this person, the burden falls on the State party to justify the failure to prosecute in line with its obligations under the Convention. The obligation under article IV for States parties to punish perpetrators of genocidal acts does not exclude persons bearing command responsibility for genocidal acts from the scope of "persons" who must be prosecuted.
- c) Article V sets out an aspect of the duty to punish, and a State party cannot fulfil the duty to punish genocide under article I without satisfying article V. To comply with the requirement to enact legislation that will "give effect" to the Convention under article V, the legislation enacted by a State party must allow for the prosecution of all acts committed in its territory that are punishable under the Convention, and ensure that all potential perpetrators of genocidal acts committed in its territory can be prosecuted, in accordance with article IV. Legislation that is incompatible with the Convention can be a breach of article V based on its terms, not just its application. For a penalty to be "effective" for the purposes of article V, it must be proportionate to the gravity of the crime of genocide, and sufficient to deter future potential perpetrators.
- d) The duty to punish in article VI of the Genocide Convention encompasses a duty to investigate as soon as there are reasonable grounds to believe that genocidal acts may have been committed in its territory, and a duty to prosecute without delay as

soon as there is sufficient evidence of their commission, subject to prosecutorial discretion exercised independently, impartially and in good faith. The duty to punish under article VI encompasses a duty to conduct investigations in good faith that are prompt, effective and thorough, and independent and impartial. The duty to punish encompasses a duty to prosecute persons charged with genocidal acts before a “competent tribunal” that complies with fair trial standards defined in international law, including the right to an independent and impartial tribunal, in both civilian and military courts. States parties may discharge their duty to punish under article VI by accepting the jurisdiction of and cooperating with an “international penal tribunal” that meets international fair trial standards. And States may be ordered to prosecute specific individuals under certain circumstances if found in violation of the duty to punish.

Ahmed Usham

Attorney General Ahmed Usham (Agent)