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ICJ Verdict Holding Myanmar Guilty of Genocide and Lessons For India

By: Raushan Tara Jaswal

The International Court of Justice ruling against Myanmar on genocide against the Rohingyas holds significance for India. It signals that India must restrain and deter those issuing calls for violence against Muslims, economic boycott, and for excluding them from civic life.

ON 19th November 2026, the International Court of Justice (ICJ) in a landmark ruling found Myanmar nation-state guilty of the crime of 'genocide', by nine votes to six, against the Rohingyas in northern Rakhine State during the 2017 military "clearance operations" (hereinafter referred to as the *judgment*). The historic judgement makes the Myanmar as the first nation-State to have been adjudged for egregiously committing genocide. The Court also found that the Republic of the Union of Myanmar had failed to prevent genocide by individuals acting alongside its security forces, failing to enact necessary legislation, and failing to punish offences under the Genocide Convention and jus cogens norms (customary international law).

While the judgment has come seven years after The Gambia brought the case (11th November 2019), an interim order was issued on 23rd January 2020, which was sought as an emergency ruling to protect the Rohingyas against further atrocities at the time, and also four years after the order protecting and confirming that The Gambia had locus to sue Myanmar even though it is not directly impacted by the actions of Myanmar (22nd July 2022). Hence, each of these stages helps us to identify different international law obligations and protections before, during, and after an atrocity of this scale.

Genocidal Intent, Provisional Measures, Jus Cogens Norms

Apart from finding Myanmar guilty of genocide, it also goes into detail about state actions that led it to define it as Genocide, including but not limited to withholding citizenship rights as an important tenet acting as a contributing factor for genocide. The Genocide Convention (hereinafter referred to as the '*Convention*') requires State parties to prevent and punish genocide in times of peace and war (Article I) and identifies acts such as killing members of a protected group based on nationality, ethnicity, race, or religion. It also includes causing them serious bodily or mental harm, deliberately imposing conditions of life calculated to bring about the group's physical destruction, and even measures intended to prevent births within the group and forcibly transferring its children to another group (Article II). However, mere instances, without 'specific intent, ' are not enough to establish the crime of Genocide. For the crime to be committed, such acts need to be committed with 'specific intent' to destroy, in whole or in part, the protected group (Article II). The intent has an incredibly high threshold to be established, as per the ICJ, and should be the only inference drawn from the evidence when taken as a whole.

In the present case, Myanmar invoked counter-terrorism and forced displacement as explanations for the measures taken, which the majority subsequently rejected in their *judgment*. While the reasoning in the *judgment* allows for more than one objective to coexist - where the State can pursue a military objective or seek to drive a population out while also pursuing the destruction of a protected group -the distinguishing factor is genocidal intent.

> ...[the ICJ] ordered Myanmar to take measures within its power to prevent acts of genocide, to ensure that its military and others within the State's control or influence did not commit prohibited acts, to preserve the evidence, and to also report on the steps it had taken.

In the present *judgment*, no individual criminal responsibility is attributed, but rather Myanmar is ordered to take immediate and effective steps to investigate people who may be reasonably suspected of *Convention* offences (2017 Operations) and to prosecute and punish them. Individual and state accountability can, hence, proceed alongside each other. This is merely a reiteration of its earlier order (2020), in which it identified a real and imminent risk of irreparable prejudice.

The ICJ apart from ordering preliminary measures to be taken, ordered Myanmar to take measures within its power to prevent acts of genocide, to ensure that its military and others within the State's control or influence did not commit prohibited acts, to preserve the evidence, and to also report on the steps it had taken. However, the ICJ has now found in its final *judgment* that clearance operations took place in May 2020 and 2021, breached the obligation to preserve evidence, and continued to commit prohibited acts. This

distinction between an interim order, which provides protection while the case is being heard, and a *judgment* on the merits that determines responsibility on the evidence in that case is important, given the different objectives offered to explain a course of conduct (*South Africa vs Israel*).

Other aspects to be considered are the question of The Gambia's locus in actions taking place in Myanmar, the territoriality of its operations, and Myanmar's non-ratification of the *Convention*. Firstly, the ICJ held that parties to the *Convention* have a common legal interest in compliance with the obligations (*erga omnes partes*), owed to other parties to the treaty.

Even though Myanmar never ratified the *Convention*, The Gambia is a member state, and it was held that a State party can invoke another party's responsibility without showing that it suffered a special injury, provided that the Court has jurisdiction (2022). Hence, a State that never ratified or acceded to the *Convention* is still bound by the prohibition of genocide, and such a prohibition is a peremptory norm of public international law (jus cogens norms - a norm from which a State cannot derogate, which has a wider and stricter obligation). Even on the question of consent, the ICJ held that the peremptory character of the prohibition (jus cogens) did not by itself give it jurisdiction, whereas an obligation (*erga omnes*) can bind every State even when a particular court lacks jurisdiction to decide a dispute about it (*Democratic Republic of Congo v. Rwanda*). For parties to the *Convention*, the liability is stronger, as it relies on their duty to prevent, and such duties can reach beyond their own jurisdiction (*Bosnia and Herzegovina v. Serbia and Montenegro*). The ICJ places heavy reliance on the obligation of due diligence and states that the duty to act begins at the point of serious risk; however, genocide must actually occur for the Court to intervene.

India's Obligation to the Rohingyas

The stance taken by The Gambia showcases its determination to uphold universal human rights - as injustice anywhere is a threat to justice everywhere. India ratified the Genocide Convention and is therefore bound by its substantive provisions; however, with a reservation to the consent clause, under which a dispute can be submitted to the ICJ (Article IX). India's proximity and its relationship with Myanmar are relevant to the prevention inquiry, as they may affect what diplomatic or other lawful means are available to it. Due to the "clearance operations" in 2017 and territorial proximity, India received about 40,000 Rohingya refugees during this period.

> Calls for elimination and social and economic boycott have put the victims at, what has been described as 'precipice of a genocide'.

The Supreme Court, at the time, affirmed their Right to Life (Article 21 of the Indian Constitution) in an earlier order on Rohingya refugees. In the absence of India being a signatory to the Refugee Convention, it specifically looked at its own jurisprudence and stated that Article 21 is available to all persons regardless of their citizenship. However, when the question of deportation of Rohingyas residing in Jammu came up for consideration, in April 2021, the Supreme Court declined to stay the deportation of Rohingyas, subject to the authorities following the prescribed procedure for such deportation (keeping in mind, available procedure and discretion of the Ministry of Home Affairs) and the 'rule of law' (Mohammad Salimullah v. Union of India). The petitioners relied on the ICJ's 2020 Order, which clearly identified a 'real and imminent risk of irreparable harm' to their rights claimed under the *Convention* on their return to Myanmar. However, the Supreme Court bench at the time stated it "cannot comment upon something happening in another country". Such a refusal goes to the heart of the case, as acts were committed during and after the ICJ's 2020 Preliminary Measures Order and the Supreme Court of India's Order.

The prohibition of genocide binds even States outside the *Convention* to act to protect the victims. The ICJ *judgment* in the present case also raises a question for Parliament of India about whether Indian criminal law gives full effect to the *Convention*, including its provisions on direct and public incitement, as well as its obligation to prevent genocide and preserve evidence.

The immediate question, however, is how Article 21 should be enforced before deportation. Rohingya Muslims from Myanmar fall outside the Citizenship (Amendment) Act's special route to citizenship, but Article 21 protects every person. The ICJ's 2026 *judgment* requires Myanmar to facilitate safe, voluntary and dignified return and protect the Rohingya from discrimination in access to citizenship and freedom of movement. India, having taken note of the *judgment*, and has assured 'safe, speedy and sustainable return of the displaced Rohingya people from the Rakhine State, however, refuses to mention the term 'genocide.' Before India sends someone back, that person should have a meaningful opportunity to show, using current evidence, whether their documents will be recognised, whether they can move freely and whether they can obtain protection if threatened.

> If India forcibly returns Rohingya to Myanmar where they face a real risk of persecution, torture or arbitrary deprivation of life, it may breach the principle of non-refoulement.

The Supreme Court had reasons to ask about those risks in 2021, regardless of the ICJ *judgment*, on the basis of its own *jus cogens norms*. The *judgment* makes that inquiry more urgent today. If India forcibly returns Rohingya to Myanmar where they face a real risk of persecution, torture or arbitrary deprivation of life, it may breach the principle of non-refoulement. The case for treating the protection under non-refoulement as jus cogens is strongest where return would expose a person to torture, whose prohibition is a peremptory norm. The ICJ's *judgment* directs Myanmar to facilitate safe, voluntary and dignified return. For India, the *judgment* makes it harder to justify deportation without first assessing, on current evidence, the risks each person would face at the proposed destination.

Domestically within India the ICJ judgement assumes significance to restrain and deter those issuing the blood curdling calls to kill people because they pursue a faith different from the faith of the majority of population and asking for comprehensive social and economic boycott of Muslims. Even some of the constitutional functionaries occupying the office of Chief Ministers of several States have issued such calls to economically incapacitate them so that they their lives would be made miserable. Such calls for elimination and social and economic boycott have put the victims at, what has been described as "precipice of a genocide."

Raushan Tara Jaswal is an assistant professor and a PhD Candidate at Jindal Global Law School, O.P. Jindal Global University, Sonepat, Haryana.

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