

INTERNATIONAL COURT OF JUSTICE

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

**THE GAMBIA
v.
MYANMAR**

MEMORIAL OF THE GAMBIA

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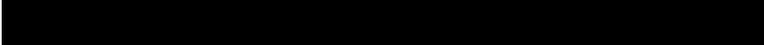
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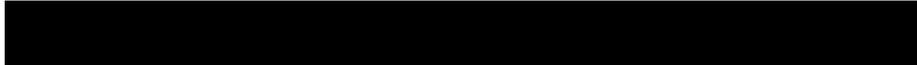
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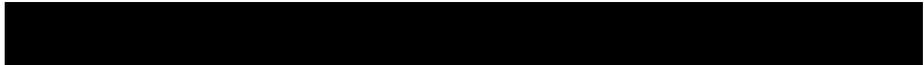
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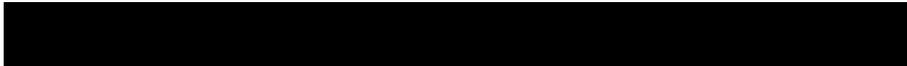
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INTERNATIONAL COURT OF JUSTICE

Expert Report of Professor Michael A. Newton

October 2020

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I. INTRODUCTION

1. In this Report, after describing my professional background and experience, along with particularized expertise in the fields of counterinsurgency and terrorism, I identify the well-established characteristics, or indicia, of authentic counterinsurgency operations. I then present my views on whether the “clearance operations” conducted by Myanmar’s armed forces in Rakhine State from 2016 to 2018 can be described as bona fide counterinsurgency operations.

2. My knowledge of counterinsurgency derives from my professional military experience as both a legal advisor and former combat arms officer, as supplemented by subsequent academic research and pedagogy. My knowledge of terrorism derives from real world operational experience, extensive research, and sustained teaching and publication in the field. My knowledge of the “clearance operations” is based on my examination of the extensive reports issued by the UN Fact Finding Mission, and the Verbatim Records of proceedings in this case. I also reviewed the following materials, *inter alia*: the series of reports compiled by the Special Rapporteurs on the situation of human rights in Myanmar;¹ two reports prepared by the Simon-Skjoldt Center for the Prevention of Genocide at the U.S. Holocaust Memorial Museum; and reports by Fortify Rights and the Public International Law and Policy Group.

II. PROFESSIONAL BACKGROUND AND EXPERIENCE

3. I am Professor of the Practice of Law at Vanderbilt University Law School, Nashville, Tennessee, as well as Professor of the Practice of Political Science. At Vanderbilt, I teach courses on terrorism, international criminal law, human rights, law of armed conflict, and diplomacy. I graduated from the United States Military Academy at West Point, New York in 1984 with a Bachelor of Science degree and a designated International Relations area of concentration. Prior to my current service at Vanderbilt, I taught International Law in the Law Department of the United States Military Academy at West Point and the U.S. Army Legal Center and School, Charlottesville, Virginia, from which I earned my first advanced LL.M.

¹ See United Nations Office of the High Commissioner for Human Rights, Myanmar, *available at* <https://www.ohchr.org/EN/Countries/AsiaRegion/Pages/MMIndex.aspx>.

degree in 1996. I obtained my law degree from the University of Virginia Law School in 1990, as well as a second LL.M. degree in 2001. For more than 25 years, my academic focus has been on international humanitarian law, international human rights law, the legal regime related to terrorism, transitional justice mechanisms, and the larger field of atrocity law. I have specialized, in particular, on the application of international law, including international criminal law, to armed conflict, both international and domestic.

4. I served in the United States Army from 1984 until my retirement in 2005. I held the rank of Lieutenant Colonel at the time of my retirement from active duty.

5. During my active duty military service, I was deployed on multiple multinational operations and supported numerous combined training exercises. I have provided legal advice to commanders and policymakers at all levels of operations, including senior political officials. I also provided expert advice to the Afghanistan Rule of Law Field Force under NATO authority, and have lectured in NATO courses. From 1999 to 2002, I served in the U.S. Department of State as the Senior Advisor to the United States Ambassador-at-Large for War Crimes, advising on transitional justice policy in numerous contexts. In that capacity, I helped negotiate the Elements of Crimes for the International Criminal Court. In particular, I helped gain consensus agreement on the text of the constituent details for proving the range of genocide offenses, crimes against humanity, and war crimes specified in the Rome Statute. I served as the U.S. representative on the U.N. Planning Mission that established the Special Court for Sierra Leone and later as a member of the academic consortium supporting the work of the Special Court.

6. I have provided expert advice upon request from governments and non-governmental organizations on counter-terrorism and the application of international criminal law. In particular, I was the International Advisor to the Judges of the Iraqi High Tribunal and provided extensive advice on the Anfal genocide case, among others. I have participated at the Appeals Chamber of the International Criminal Court in the *Bemba*, *Bashir*, and *Ntaganda* cases, and I am on the Counsel List for that Court. I was the co-leader for Working Group I [Investigation and Prosecution of Terrorist Acts] convened by the Government of the Netherlands during which approximately thirty leading international experts reached consensus on the Leiden Policy

Recommendations on Counter-terrorism and International Law.² In 2017, I was selected for the expert roster of Justice Rapid Response.³ I also served as one of the expert advisors to the Genocide Prevention Task Force⁴ under the auspices of the United States Holocaust Memorial Museum, American Academy of Diplomacy, and United States Institute of Peace. I am an elected member of the International Institute for Humanitarian Law, San Remo, Italy.

7. I have published more than 90 articles, books, and case comments. Most recently, I was the editor of *The United States Department of Defense Law of War Manual: Commentary and Critique* (Cambridge University Press, 2019). I conceived and co-authored *Proportionality in International Law* (Oxford University Press, 2014). I have also authored, *inter alia*, “The Interoperability of the Laws of Armed Conflict,” in *The Legal Pluriverse Surrounding Multinational Military Operations* (Robin Geiß and Heike Krieger, eds., Oxford University Press, 2020) and “Charging War Crimes: Policy & Prognosis,” in *The Law and Practice of the International Criminal Court* (Carsten Stahn ed., Oxford University Press, 2015). I was the Senior Editor of the *Terrorism International Case Law Reporter* published by Oxford University Press throughout the life of that series.

III. THE CHARACTERISTICS OR INDICIA OF AUTHENTIC COUNTERINSURGENCY OPERATIONS

8. Authentic counterinsurgency (COIN) seeks to counter the presence of insurgents within a given population. COIN operations thus have only one purpose: to end an insurgency. To accomplish this purpose, COIN requires comprehensive efforts to reassert the sovereign authority of the state, with the overall objective of establishing stable and secure peace that

² Larissa van den Herik, Nico Schrijver, eds., *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press, July 2013), available at <https://www.cambridge.org/core/books/counterterrorism-strategies-in-a-fragmented-international-legal-order/E3AD32A32411F93EEF06143F0451DFEC>.

³ Justice Rapid Response is a global facility providing rapidly deployable experts specialized in international criminal and human rights investigations. See Justice Rapid Response, available at <https://www.justicerapidresponse.org/who-we-are/about-us/>.

⁴ United States Institute of Peace, Genocide Prevention Task Force, *Preventing Genocide: A Blueprint for U.S. Policymakers* (2008), available at <https://www.usip.org/genocide-prevention-task-force/view-report>.

protects the civilian population. The conception of an enemy/adversary must therefore be strictly constrained by reference to the subset of the overall population who are armed insurgents. This means that, by definition, COIN applies state power against the insurgency rather than the entire civilian population. This tenet of counterinsurgency is the logical corollary to the mandate drawn from the law of armed conflict that prohibits all “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population.”⁵ Regardless of the scope or nature of particular armed conflicts, the civilian population *per se* cannot constitute a lawful military target of COIN. The overarching objective of disaggregating the enemy from innocent civilians necessarily constrains such operations. Indiscriminate attacks directed at entire segments of a civilian population are thus entirely incompatible with COIN, and warrant the inference that the objective is not to defeat an insurgency, but to punish or destroy the civilian population.

9. Insurgency is a complex and context-dependent phenomenon. The details of particular COIN operations vary depending upon the idiosyncrasies of the affected population, the terrain, and the characteristics of the State seeking to reassert its sovereignty. The essence of COIN operations remains constant, however, because the fundamental goal must be to defeat the insurgents by instituting state authority in a manner that enhances its legitimacy and effectiveness. The security of the local population is a vital predicate to successful COIN. The essence of COIN is “therefore ultimately a political struggle that includes a wide range of activities in partnership” with local leadership.⁶ The U.K. Manual, *inter alia*, specifies that the “political purpose and effective governance must have primacy and be seen to be working to

⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 609, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolII.aspx>, art. 13(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3, available at <https://ihl-databases.icrc.org/ihl/INTRO/470>, art. 51(2).

⁶ NATO Standard, *Allied Joint Doctrine for Counter-Insurgency (COIN)*, Edition A Version 1, Allied Joint Publication-3.4.4 (July 2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/625810/doctrine_nato_coin_ajp_3_4_4.pdf, para. 0130.

better the lives of the people.”⁷ COIN is thus not about the unconstrained application of governmental authority or overuse of military firepower. Rather, it seeks to establish the changed societal and security conditions needed to sustain a lasting political settlement of grievances.

10. Military manuals around the world stress the interconnectedness of means and methods that are integral aspects of purposeful COIN operations.⁸ The Canadian Manual, for example, notes that authentic COIN requires “military, paramilitary, political, economic, psychological and civic actions taken to defeat an insurgency.”⁹ Coordinated operations implemented to defeat insurgencies are necessarily context-dependent. However, modern forms of asymmetric warfare and the recurring refinement of tactics across cultures has required development of the specialized genre of operations known around the world as COIN. Much like fingerprints can be evaluated based on objective analysis of their unique combination of observable characteristics, the legal and doctrinal elements of COIN provide the template for assessing the “clearance operations.”

11. Successful counterinsurgency thus represents a complex challenge for military commanders. Insurgencies are asymmetric operations conducted in order to overthrow a government (or challenge governmental authority within a particular territory) in order to replace it with another ruling power, or to force desired political change.¹⁰ As Chairman Mao Tse Tung

⁷ British Army Field Manual, *Countering Insurgency*, Army Code 71876, Vol. 1, Pt. 10 (October 2009), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_11_09_army_manual.pdf, pp. 3-2 to 3-3.

⁸ See British Army Field Manual, *Countering Insurgency*, Army Code 71876, Vol. 1, Pt. 10 (October 2009) available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_11_09_army_manual.pdf, p. 1-11 (“Those military, law enforcement, political, economic, psychological and civic actions taken to defeat an insurgency.”) (emphasis omitted); Armée de Terre, *Doctrine for Counterinsurgency at the Tactical Level* (April 2010), available at <https://info.publicintelligence.net/FR-TacticalCOIN.pdf>, Section II, Introduction (stating that “the first pillar in the struggle against an insurgency is based upon action among the population”).

⁹ Canada Land Force, *Counter-Insurgency Operations*, B-GL-323-004/FP-003 (13 December 2008), available at <https://info.publicintelligence.net/CanadaCOIN.pdf>, para. 103.1.

¹⁰ See NATO Standard, *Allied Joint Doctrine for Counter-Insurgency (COIN)*, Edition A Version 1, Allied Joint Publication-3.4.4 (July 2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/625810/doctrine_nato_coin_ajp_3_4_4.pdf, para. 0203 (“Insurgency is defined as: actions of an organized, often ideologically motivated, group or movement that seeks to effect or prevent political change or to overthrow a governing authority

observed, counterinsurgency requires “constant activity and movement” because there is “no such thing as a decisive battle,” nor opportunity to rely upon “the fixed, passive defense that characterizes orthodox war.”¹¹ Commanders must simultaneously protect their own forces and lines of logistical support, reinforce the legitimacy and authority of local leaders, and erode the military and political capacity of the insurgency. Insurgents rely upon the support or neutrality of the general population. It follows that both the government and insurgent force seek to deepen the public perception that they represent the legitimate interests of the population.

12. NATO military experts describe counterinsurgency as “a complex form of security operations to enable stabilisation using all available instruments of power to create a secure environment, while promoting legitimate governance and rule of law.”¹² Such nuanced operations require unity of effort between disparate elements which necessarily entails a high degree of civil-military coordination and cooperation. Effective and deliberate COIN requires tiered efforts that simultaneously seek to defeat the insurgent military capability, provide security for the population, and buttress the ability of local leadership to address popular grievances that otherwise sustain the insurgents.

13. Authentic counterinsurgency efforts are thus focused on the overriding objective of bolstering or restoring governmental legitimacy. Securing the population, rather than regarding it as a monolithic enemy entity, is the first tactical goal at the outset of COIN. The welfare of the civilian population is the center of gravity for COIN planning. Counterinsurgency thus relies upon using “every opportunity to help the local populace and meet its needs and expectations. Projects to improve economic, social, cultural, and medical needs can begin immediately.

within a country or a region, focused on persuading or coercing the population through the use of violence and subversion.”).

¹¹ Samuel B. Griffith (tr), *Mao-Tse Tung on Guerilla Warfare*, (Fleet Marine Force Reference Publication (FMFRP) 12-18, US Marine Corps, Department of the Navy, 1989), available at http://www.irregularwarrior.com/files/Mao_Tse-tung_Guerrilla_Warfare.pdf, p. 52.

¹² Andre D. Rakoto & Gary Rauchfuss (eds), *Counterinsurgency: A Generic Reference Curriculum* (2020), available at https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2017_09/20170904_1709-counterinsurgency-rc.pdf, p. 3.

Actions speak louder than words.”¹³ Assistance towards the civilian population and coordination with local governance structures represent the *sine qua non* of genuine effort.

14. COIN requires that military commanders implement precautionary measures to protect civilians during military operations. To command is an active verb. The commander’s duty to control the application of violence by subordinate forces represents the essence of authentic COIN operations.¹⁴ Failure to protect civilians or subject them to indiscriminate attacks undermines the intransgressible imperative that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”¹⁵

15. By contrast, operations that are not designed to protect the civilian population and restore respect for the government undermine the fundamental objectives of COIN.¹⁶ Any insurgency is built from the ground up. Its core consists of early supporters with a firm conviction to challenge the government, but recruits must be persuaded to accept the significant risks of joining the insurgency. It is accepted counterinsurgency doctrine that the “first basic need for an insurgent

¹³ US Army and Marine Corps, *Counterinsurgency*, US Army Field Manual No. 3-24, Marine Corps Warfighting Publication No. 3-33.5 (15 December 2006), available at <https://www.hsdl.org/?view&did=468442>, para. 5-75.

¹⁴ International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), available at https://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf, art. 87, para. 3550 (“Undoubtedly the development of a battle may not permit a commander to exercise control over his troops all the time; but in this case he must impose discipline to a sufficient degree, to enforce compliance with the rules of the Conventions and the Protocol, even when he may momentarily lose sight of his troops”).

¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS, 3, available at <https://ihl-databases.icrc.org/ihl/INTRO/470>, art. 57(1).

¹⁶ Australian Army, *Land Warfare Doctrine LWD 3-0-1 Counterinsurgency*, (December 2009), available at https://australianarmycadets.files.wordpress.com/2018/03/lwd_3-0-1_counterinsurgency_full_0.pdf, para. 3.8; Office of the Chairman of the Joint Chiefs of Staff, *DOD Dictionary of Military and Associated Terms* (June 2020), available at <https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf>, p. 112 (defining “irregular warfare” as “a violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s).”); British Army Field Manual, *Countering Insurgency*, Army Code 71876, Vol. 1, Pt. 10 (October 2009), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_11_09_army_manual.pdf, para. 1-13 (“legitimacy is a population’s acceptance of its government’s right to govern . . . [w]ithout legitimacy, a political settlement will not endure . . . [l]egitimacy is the central concern of all parties directly involved in a [COIN] conflict.”), paras. 3-2 to 3-3 (listing as the first principle of COIN, “primacy of political purpose” and further explaining that “political purpose and effective governance must have primacy and be seen to be working to better the lives of the people.”).

who aims at more than simply making trouble is an attractive cause. ... With a cause, the insurgent has a formidable, if intangible, asset that he can progressively transform into concrete strength.”¹⁷ Accordingly, reinforcing the political legitimacy of the counterinsurgent state power must remain the paramount objective in authentic COIN operations.¹⁸

16. Highly focused intelligence cycles are the fulcrum that guides the COIN campaign. This continuous and dynamic process inevitably results in a variety of operational postures and mission priorities across the area of operations. Every published COIN doctrine places intelligence collection as a very high priority for all tactical and operational activities.¹⁹

¹⁷ David Galula, *Counterinsurgency Warfare: Theory and Practice* (Praeger Security International, 2006), available at <https://pdfs.semanticscholar.org/f2d2/aedbdcab918cc7c2d837882aff7068db6d4f.pdf>, p. 12.

¹⁸ Canada Land Force, *Counter-Insurgency Operations*, B-GL-323-004/FP-003 (13 December 2008), available at <https://info.publicintelligence.net/CanadaCOIN.pdf>, para. 117.2 (COIN forces must “abide by rules of engagement and conduct activities with a view to maintaining their legitimacy and the moral high ground.”), para. 309.4 (“[C]ommanders and even their soldiers must understand the need to help ensure the supported government remains legitimate and acts accordingly.”), para. 529.1 (“Even if the majority of tactical tasks are conducted with a view to gaining public support and winning campaign legitimacy, the populace will remember and the insurgents will exploit those few poorly conducted tasks that undermined legitimacy.”); NATO Standard, *Allied Joint Doctrine for Counter-Insurgency (COIN)*, Edition A Version 1, Allied Joint Publication-3.4.4 (July 2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/625810/doctrine_nato_coin_ajp_3_4_4.pdf, paras. 0110-0113 (describing the employment of military forces in COIN operations as support for the civil authorities that properly govern).

¹⁹ See Armée de Terre, *Doctrine for Counterinsurgency at the Tactical Level* (April 2010), available at <https://info.publicintelligence.net/FR-TacticalCOIN.pdf>, Section I, Introduction (stating that because “understanding the environment” is necessary to successful COIN “[f]or this reason, and for more than any other tactical method, in COIN, intelligence guides the action.”) (emphasis omitted); NATO Standard, *Allied Joint Doctrine for Counter-Insurgency (COIN)*, Edition A Version 1, Allied Joint Publication-3.4.4 (July 2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/625810/doctrine_nato_coin_ajp_3_4_4.pdf, para. 0340 (stating that COIN “must be based on timely, accurate and predictive analysis” to “increase the chances of neutralizing targets hiding among neutral or friendly subjects, as well as reducing the possible collateral damage which could alienate the local population support to the forces conducting COIN”), para. 0341 (in apparent recognition of the intelligence function of non-lethal fires stating that COIN operators “should focus less on material indicators intelligence and more on subjective but systematic analysis.”); Annex B (depicting in Figure B.1 and describing the “Learning and Adaptation” cycle as a continuous, self-reinforcing feedback loop); Canada Land Force, *Counter-Insurgency Operations*, B-GL-323-004/FP-003 (13 December 2008), available at <https://info.publicintelligence.net/CanadaCOIN.pdf>, para. 701.1 (“Good intelligence ... is especially inextricable to successful COIN, where it will be in constant ... demand ... Accurate intelligence will permit commanders to conduct operations with precision, reducing the detrimental effect on the host nation population and minimizing casualties among friendly forces.”); US Army and Marine Corps, *Tactics in Counterinsurgency*, US Army Field Manual No. 3-24.2, FM 90-8, FM 7-98 (March 2009), available at <https://fas.org/irp/doddir/army/fmi3-24-2.pdf>, para. 5-16 (stating, as the first element of offensive mission variables “offensive operations should be based on the best intelligence available, while inflicting the minimal damage to the population, infrastructure, and local

Commanders who attack the insurgency while protecting the civilian population seek constant feedback from local civilian sources. Doctrine in the Indian Army recognizes the centrality of the population in the provision of intelligence not only as a resource supporting military operations but also as an indicator in itself. This insight frames intelligence as “a manifestation of the support from the people who are both a medium as well as a source.”²⁰ Kinetic force is always intelligence driven. Assistance towards the civilian population rather than its annihilation is a crucial aspect of COIN. Indiscriminate use of force against the civilian population is inconceivable as COIN strategy. Any military operations that included indiscriminate killing of civilians, raping of women, burning of homes and destruction of villages would be the polar opposite of authentic COIN. Deliberate efforts to destroy the well-being of the civilian population bear zero resemblance to COIN doctrine.

17. Because the civilian population is the real terrain of the armed conflict, COIN requires strict fire control measures. Every published COIN doctrine has explicit injunctions against conducting unnecessary kinetic actions or kinetic actions that would harm the population. British doctrine states that “in a COIN campaign, success or failure will depend upon the effectiveness of the intelligence effort” and recognizes the consequences of inaccurate detection or delivery of fires by stating that in COIN “a tactical action can have a strategic effect”²¹ Strict Rules of Engagement and fire control measures are often stated as official “minimum force” policies. The

economy.”); United States Government, Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide* (2009), available at <https://2009-2017.state.gov/documents/organization/119629.pdf>, p. 19 (stating that in conventional warfare, “decision makers mostly require intelligence about the enemy, but in COIN they primarily need intelligence about the population.”); Australian Army, *Land Warfare Doctrine LWD 3-0-1 Counterinsurgency*, (December 2009), available at https://australianarmycadets.files.wordpress.com/2018/03/lwd_3-0-1_counterinsurgency_full_0.pdf, para. 5.1 (“In a COIN campaign, success or failure will be influenced by the effectiveness of intelligence.”), para. 7-29.b(2) (describing targeting process for non-lethal fires by targeting “insurgents, supporters of the government and the uncommitted populace individually and collectively”), para. 5.7 (describing the intelligence cycle as “continuous and regular direction from the commander is crucial”).

²⁰ Indian Army, *Doctrine for Sub Conventional Operations* (December 2006), available at <https://documents.in/document/sub-conventional-operations-2006>, p. 40.

²¹ British Army Field Manual, *Countering Insurgency*, Army Code 71876, Vol. 1, Pt. 10 (October 2009), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_11_09_army_manual.pdf, p. 5-1.

State's ultimate claim to legitimate sovereign power relies upon judicious employment of its vastly superior military force. As described by the Allied Joint Doctrine for Counter-Insurgency:

The overall security aim should be to defeat the insurgents using all available means, whilst simultaneously using no more force than is *absolutely necessary*. A heavy-handed and overly destructive approach that causes civilian casualties and other collateral damage may boost the radicalization of the insurgents' narrative and only serve to enlarge their popular support and recruit new fighters.²²

Nothing alienates a population as quickly, or provides as much ready fodder for the insurgents' information operations, as the counterinsurgent's employment of excessive force and unnecessary destruction of property or the deaths of innocent civilians.

18. The primary purpose of COIN can never devolve to violent coercion. Popular support and reinvigorated loyalty to the sovereign authority is the key terrain in COIN. Destruction of insurgent forces and occupation of the geographic zone of operations are insufficient to foster sustainable peace. The Philippines' Minister of Defense during the Huk rebellion (himself a former insurgent) instituted reforms to instill a love of the Filipino people as the first priority of every soldier, and the killing of insurgents as the secondary goal.²³ Canadian doctrine requires "No more force may be used than is necessary to achieve an aim. The amount used must be reasonable and it must not be punitive. Once the aim is achieved, no more force should be

²² NATO Standard, *Allied Joint Doctrine for Counter-Insurgency (COIN)*, Edition A Version 1, Allied Joint Publication-3.4.4 (July 2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/625810/doctrine_nato_coin_ajp_3_4_4.pdf, para. 0285 (emphasis added), A.3 ("It should be kept in mind that killing numerous insurgents will be seriously counterproductive if collateral damage kills peaceful civilians too. That will create legitimacy for the insurgency and lead to increased support from the population. For this reason, commanders have to establish procedures to achieve a balanced use of force and to avoid any excessive use of force that leads to collateral damage."); Indian Army, *Doctrine for Sub Conventional Operations* (December 2006), available at <https://fdocuments.in/document/sub-conventional-operations-2006>, Appendix B, Supplementary Commandments, p. 67 ("Operations must be people friendly, using minimum force and avoiding collateral damage - restraint must be the key."); Ch. III.11.b, p. 33 ("The use of force should be judicious and governed by explicit rules of engagement that must hinge on the principle of 'minimum force'").

²³ Lawrence Greenburg, *The Hukbalap Insurrection: A Case Study of a Successful Anti-Insurgency Operation in the Philippines 1946-1955* (US Army Center of Military History, 1987), available at <https://babel.hathitrust.org/cgi/pt?id=mdp.39015034923618&view=1up&seq=162>, pp. 145-146.

used.”²⁴ In a similar vein, the COIN doctrine of the Indian Army establishes the inviolable essentials for every soldier as follows: “Remember that people you are dealing with, are your own countrymen. All your conduct must be dictated by this one significant consideration.²⁵ . . . Only fear God, uphold Dharma and enjoy serving the country.”²⁶

19. Authentic COIN operations seek at all times—and as a matter of strategic necessity—to reduce collateral property damage, human suffering, and the unnecessary or erroneous injury or killing of the population. Minimization of collateral damage amongst innocent civilians and infrastructure springs from the necessity of gaining trust between governmental forces and the population rather than reinforcing existing societal divisions. British doctrine articulates this premise as follows: “Force may solve a tactical problem . . . but if the use of force is perceived as excessive or ill targeted the neutral segment of the population may be antagonized or alienated and it may leave a lasting feeling of resentment and bitterness. Worse still, active support for the insurgents by those suffering or observing the effects of force may be engendered.”²⁷ Actions must be synchronized and precise because they must simultaneously buttress a state’s legitimacy in the eyes of the population. By extension, COIN requires finesse, patience, and unity of effort across sectors, because misuse of force in one village can have disastrous effects in others.

20. Accordingly, all COIN doctrine separates the targets of military operations into two distinct spheres, with different military objectives for each sphere. The first sphere consists of the population, who are the targets of rehabilitative efforts only: information operations, civil-military operations, psychological warfare operations and direct-action operations designed to protect them from the depredations of the insurgents. This sphere makes up the bulk of the

²⁴ Canada Land Force, *Counter-Insurgency Operations*, B-GL-323-004/FP-003 (13 December 2008), available at <https://info.publicintelligence.net/CanadaCOIN.pdf>, para. 318.1.

²⁵ Indian Army, *Doctrine for Sub Conventional Operations* (December 2006), available at <https://fdocuments.in/document/sub-conventional-operations-2006>, Supplementary Commandments, Appendix B.

²⁶ Indian Army, *Doctrine for Sub Conventional Operations* (December 2006), available at <https://fdocuments.in/document/sub-conventional-operations-2006>, Coas Ten Commandments, Appendix B.

²⁷ British Army Field Manual, *Countering Insurgency*, Army Code 71876, Vol. 1, Pt. 10 (October 2009), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_11_09_army_manual.pdf, p. 3-28.

population, encompassing the state-supporting, neutral and non-active-but-insurgent-sympathetic populations. The second sphere consists of the active insurgents, who are the targets of both rehabilitative efforts and kinetic operations. This sphere encompasses the opposing force that is attacking the government and the population, and those who provide significant direct support to the active insurgents. The distinction between these spheres, and the populations that fall within them, are fundamental to COIN doctrine.²⁸

IV. THE “CLEARANCE OPERATIONS” CONDUCTED BY MYANMAR’S ARMED FORCES

21. Myanmar’s “clearance operations” demonstrated none of the characteristics or indicia associated with counterinsurgency. Neither the operational nor the tactical aspects of these “clearance operations” demonstrate the accepted principles or planning criteria for military efforts focused on countering insurgents or responding to terrorist threats. To the contrary, Tatmadaw commanders and soldiers treated all Rohingya civilians as enemy forces subject to indiscriminate lethal force. Moreover, Tatmadaw “clearance operations” focused on annihilation of the civilian population rather than a coordinated diplomatic, informational, military, and economic effort that is the hallmark of authentic COIN.

22. Tatmadaw commanders cannot plausibly claim ignorance regarding the universally shared aspects of COIN operations. Authentic COIN campaigns share similar strategy and operational contours. COIN requires deliberate efforts to build civil capacity and to secure the civilian population. It necessitates limited direct attacks only, and persistent efforts to reinforce legitimacy and to separate insurgents from their perceived base of support. Genuine COIN necessitates patient interdisciplinary campaigns rather than murderous rampages. These

²⁸ British Army Field Manual, *Countering Insurgency*, Vol. 1, Pt. 10 (2009), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_11_09_army_manual.pdf, Figure 2.2, para. 2-15 (showing typical concentric-ring diagram); NATO Standard, *Allied Joint Doctrine for Counter-Insurgency (COIN)*, Edition A Version 1, Allied Joint Publication-3.4.4 (July 2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/625810/doctrine_nato_coin_ajp_3_4_4.pdf, Figure 2.1, para. 0220 (depicting concentric rings as one-dimensional continuum); see generally, US Army and Marine Corps, *Counterinsurgency*, US Army Field Manual No. 3-24, Marine Corps Warfighting Publication No. 3-33.5 (15 December 2006), available at <https://www.hsd1.org/?view&did=468442>, “Elements of Insurgency”, paras. 1-59 to 1-68 (describing the elements that support an insurgency from an organizational standpoint based on the concentric-ring model).

characteristics transcend cultures and contexts. Modern counterinsurgent doctrine is universally understood and publicly available. No modern military can feign ignorance of its mandates.

23. Military operations of the armed forces of sovereign States, including counterinsurgency operations, are, by definition, highly planned and tightly controlled. Such operations are premised on an overarching objective that is framed as a mission statement to senior commanders. In every modern military, staff planners take such mission statements and separate them into detailed lists of specified and implied tasks. Rules of Engagement and tactical orders flow from this complex staff planning process. Logistics flow to the necessary areas, and units are moved in a choreography of operational integration. Reinforcements are positioned and equipment replaced or upgraded as necessitated by the requirements of the specified and implied tasks. In this deliberate planning process, the intentions of the force become plain.

24. In this context, the coordinated nature of the Tatmadaw's attacks against the civilian population employed strikingly similar tactics across a broad expanse of territory. The "clearance operations" were planned and executed based on explicit command guidance and pursuant to orders. They were the primary, if not exclusive, avenue of effort rather than a necessary adjunct to an overarching political strategy. Tatmadaw operations were not random acts of spontaneous and uncoordinated violence conducted by renegade commanders of undisciplined outliers. Among numerous other telltale signs of the operational intent, Tatmadaw commanders provided no grid coordinates to secured safe zones. Instead, they permitted soldiers to kill escaping Rohingya without any countermanding orders. Noncombatants, especially women and children, are entitled to affirmative protections from the effects of hostilities under both international humanitarian law and human rights law. Tatmadaw commanders provided no protection for civilians desperate to avoid the deadly effects of the "clearance operations," nor did they provide food, baby formula, shelter, water, or any other relief to fleeing civilians. There is no conceivable basis under COIN doctrine for such deliberate targeting directed against the civilian population.

25. As explained above, principles of minimal force are universal in COIN doctrine. No State wins in counterinsurgency through a campaign of intentional destruction. Military doctrine around the world universally reinforces that obvious point. Tatmadaw commanders cannot have been oblivious of this truism. If the "clearance operations" were truly for counter-insurgency

purposes, Myanmar authorities would have taken steps to protect the civilian population rather than inflict massive harm on them.²⁹

26. The objectives of the “clearance operations” must be assessed against the backdrop of the societal structure combined with preexisting legal and psychological measures marginalizing the Rohingya population. COIN never occurs in a cultural or military vacuum. An understanding of the social and legal context within a nation is an essential precursor for undertaking COIN. In Myanmar, this context included a national narrative and bureaucratic system to support the marginalization of the Rohingya population. The 1982 exclusion of Rohingya from the official listing of Myanmar minorities is one of the more visible manifestations of the integrated socio-economic, cultural, and political narrative. Similarly, institution of the NVC card led to an artificially created societal cleavage that served as a proxy for loyalty to the larger commonwealth of interests.

27. The long-standing pattern of persecution against the Rohingya created a loss of empathy within the whole of society that permeated Tatmadaw command and control structures. The sense that the affected population represents a monolithic enemy entity, accompanied by the decreased perception of human qualities within the target population, represent recurring features in situations where military actions are launched against an entire civilian group. Authentic COIN focuses on the fraction of the overall population engaged in armed opposition against the State. The “clearance operations” demonstrated no effort to reinforce local institutions or reinforce respect for governmental structures amongst the Rohingya population. Tatmadaw

²⁹ Australian Army, *Land Warfare Doctrine LWD 3-0-1 Counterinsurgency*, (December 2009), available at https://australianarmycadets.files.wordpress.com/2018/03/lwd_3-0-1_counterinsurgency_full_0.pdf, para. 3.8; Office of the Chairman of the Joint Chiefs of Staff, *DOD Dictionary of Military and Associated Terms* (June 2020), available at <https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf>, p. 112 (defining “irregular warfare” as “a violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s).”); British Army Field Manual, Vol. 1, Part 10, *Countering Insurgency* (October 2009), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_11_09_army_manual.pdf, para. 1-13 (“legitimacy is a population’s acceptance of its government’s right to govern . . . [w]ithout legitimacy, a political settlement will not endure . . . [l]egitimacy is the central concern of all parties directly involved in a [COIN] conflict.”), paras. 3-2 to 3-3 (listing as the first principle of COIN, “primacy of political purpose” and further explaining that “political purpose and effective governance must have primacy and be seen to be working to better the lives of the people.”).

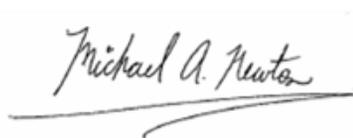
operations did not demonstrably focus on the obvious avenues of effort that are the hallmarks of authentic COIN.

28. The Tatmadaw regarded the entire Rohingya population as a homogeneous enemy to be defeated and destroyed through its “clearance operations”, or in their perceptions, as alien and inferior “Bengalis” who represented a threat to the existence of the ethnic Buddhist majority, and whose presence in Myanmar represented a “problem” that would finally be “solved”. As a result, the Rohingya endured coordinated and carefully planned offensive attacks regardless of their age, gender, or involvement with any insurgent or terrorist efforts. Authentic COIN can never encompass such indiscriminate slaughter of civilians.

V. CONCLUSION

29. Any argument that the Tatmadaw’s “clearance operations” against the Rohingya represented authentic or appropriate counterinsurgency is not credible. The “clearance operations” violated a wide variety of legal and moral constraints. There is no conceivable basis for such operations under modern military doctrine or developed state practice. The attacks were intentionally directed against the civilian population. They were juxtaposed against decades of oppression and human rights violations directed against the Rohingya on the basis of their ethnic and religious identity. The only plausible conclusion from the available evidence is that the “clearance operations” were conceived, coordinated, and conducted with the intention of destroying the Rohingya population on the basis of their ethnic and religious identity.

The whole respectfully submitted:

A handwritten signature in cursive script that reads "Michael A. Newton". The signature is written in black ink on a white background and is underlined with a single horizontal stroke.

Michael A. Newton
Professor, Vanderbilt University Law School

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Witness Statement of Christina Lamb, signed on 8 October 2020

REPUBLIC OF THE GAMBIA

v.

REPUBLIC OF THE UNION OF MYANMAR

WITNESS STATEMENT OF CHRISTINA LAMB

I, Christina Lamb, of 28 Grosvenor Gardens, London, SW14 8BY, will say as follows:

Introduction

1. I make this statement to assist the International Court of Justice in proceedings brought by The Gambia against Myanmar under the Genocide Convention. This statement sets out my experiences as a journalist covering Myanmar, including the situation of the Rohingya Muslims, and, in particular, my visit to the refugee camps in Bangladesh in 2017.

Background

2. I have been a journalist for 33 years, based in Pakistan, Brazil, South Africa, Washington DC and London. After studying Politics, Philosophy and Economics (PPE) at University College, Oxford, I trained as a journalist at Central TV/ITN then went to live in Pakistan and worked as correspondent for the Financial Times from 1988-90. From there I went to live in Rio de Janeiro as Brazil correspondent. I spent one year at Harvard on a Nieman fellowship then joined the Sunday Times as Africa correspondent based in Johannesburg. In 1998 I returned to London to become Diplomatic Editor of the Sunday Telegraph. In 2003 I rejoined the Sunday Times and have worked there ever since, first as roving Foreign Correspondent covering the wars in Afghanistan and Iraq then as US editor 2009-13. Since then I have been Chief Foreign Correspondent based in London. I have won 15 major journalism awards including five times Foreign Correspondent of the Year as well as Europe's most

prestigious prize, the Prix Bayeux, and been named OBE by the Queen in 2013 and Honorary Fellow of University College, Oxford . I have authored nine books. In early December 2017 I was sent by my paper to Bangladesh to report on the situation of the Rohingya fleeing across the border from Myanmar. I stayed for several weeks in Cox's Bazaar interviewing Rohingya in camps as well and in Dhaka.

3. I was shocked at the stories I heard and the wide scale, particularly following on from reporting on Yazidis and girls abducted by Boko Haram in Nigeria over the previous two years and it was one of my motivations for going on to write a book, *Our Bodies Their Battlefield*, about sexual violence in conflict.

Visit to Kutupalong refugee camp

4. I flew from London to Doha then Dhaka then Cox's Bazaar in northeast Bangladesh on 2 December 2017 and met up with photographer Paula Bronstein, who I have previously worked with. The reports were for my paper's annual Christmas charity appeal and we went with a local interpreter we had hired as well as staff from Save the Children to Kutupalong refugee camp on 3 December as well as a number of times over the next 3 weeks.
5. The refugees were Rohingya. I was aware that, beginning in the last few days of August 2017, Rohingya people started pouring into Bangladesh from Rakhine state in western Burma, crossing the Naf River by boats or makeshift rafts or even swimming in some cases. I understand that as many as 10,000 a day were coming. People were still coming during my visit though by then far fewer. Most were mothers and children and they came with unimaginable stories of Burmese soldiers and Buddhist mobs moving into their villages, slaughtering the men, setting fire to their huts, then raping the women and girls often in front of their family. In my time in the refugee camps, I spoke to many of the refugees there about their experiences at the hands of Burmese soldiers and what emerged was a consistent pattern of systematic violence against Rohingya people, involving murder, rape, and the destruction of their villages. I recount in this statement some of the individual stories I heard, recalled from the detailed contemporaneous notes I took when interviewing individuals.

Borochara village

6. I met Shahida Begum, a 25-year-old Rohingya mother, shortly after arriving in Kutupalong camp. She was one of three young widows from the same village in Rakhine state, staying together, each of whom had lost a husband and a child. The other widows were Munira Begum, who was 30, and Madina Khaten, who was 25.
7. Munira described how “First they came for the men”, recalling the night a few months earlier in late September when Burmese soldiers burst into their homes in Borochara village in Maungdaw. “Then two days later they came for us.” She said:

“It was around 2am and I was breastfeeding my baby when I heard the first shot. Then there were so many it was as if it was raining fire. I could see flames in the distance from all villages around burning and rockets flying overhead.

That’s when the soldiers took the men, tying their hands with bind. Then two days later they came back, again after midnight, shouting “come out and see what happened to your husbands!” They entered our homes, pointed guns at our hearts and dragged us out.

They took all the girls and women of the village to a rice field and lined us all up – maybe 40 or so - and forced themselves on us. To start with we were all screaming but in the end it was quiet, we could cry no more.

I was gang-raped by five men, first one then the next. They beat me and slapped me and kicked me and bit me. I was too terrified to move. I saw two girls dead near me.

By the time the sun came up I was barely conscious. When I came to, I tried to find my children. I couldn’t walk but only crawl. There were bodies all around. Then I saw a small boy lying face down, shot in the back. It was Subat Alam, my eldest. He had been running towards me. He was 8.”

8. Shahida told me that she had grabbed her six-month-old baby son and two year old daughter when the soldiers burst in to her hut. “They were in my arms and soldiers came to snatch them away,” she said. “I tried to hold them but I could only protect one. They grabbed my baby boy and threw him to the ground then I heard a shot as I was running. I didn’t look back as I worried I would lose my daughter too.”

9. Pushed into the line of women at gunpoint, her heart was pounding so much she could barely stand. "I'd heard about women being raped in other villages," she said. "Then they bound me against a banana tree and raped me....I was raped by one soldier and was crying and shouting as he assaulted me. Afterwards he wanted to shoot or knife me but it was too dark."
10. Somehow she escaped to the jungle where she found her three remaining children huddled together in terror. "As the sun rose, we saw everything," she said. "All the cattle, chicken and goats killed and our houses burnt down. People beheaded, their limbs cut off, or shot."
11. Madina said "I was sleeping when the soldiers burst in. I managed to flee with my three children to the hill behind. I was very scared because I was five months pregnant. If a woman is pregnant they cut out the foetus from her belly. They think Rohingya are not humans. They want to wipe us out." She said "Then one soldier saw me and grabbed me. I was terrified he would feel my swollen belly. They had big knives and machetes."
12. As he raped her in the forest, she repeatedly prayed for the baby she was carrying. "I was shouting so my children cried," she said. "They were scared. That's when they took my eldest. I never saw him again. We know if the children are taken they are killed."
13. The three women told me that they eventually managed to escape, passing a graveyard east of the village then hiding for a month in the jungle with other rape survivors as well as the elderly and children from the village.
14. "We were hiding under bushes, moving from one place to another," said Munira. "It was raining day and night and we had no hope. We women had lost our appetite because of all the horror but our children were crying for food. All we could give them was fruits and leaves. Some days all we had was water from streams. We had to keep moving as the military were searching everywhere. Some people had managed to bury their crops before fleeing so after a week went back to the village to dig up

some millet but the soldiers saw them and shot them in the head. We kept seeing dead bodies. Some had died a few days before. Others were fresh.”

15. “It was hard to sleep,” said Shahida. “I would see those soldiers on me and pray for help.”

16. Eventually they crossed the river to Bangladesh and safety.

Tumbro village

17. A large number of Rohingya refugees – around 6,000 (according to assessments by the Bangladesh border force) – had not made it to the official Kutupalong camp, but were stranded on a muddy island Kona Bara in the river in a no man’s land. They were living in makeshift shelters from bamboo poles and plastic sheets and the conditions were horrendous. I was greeted by Din Mohammad, a community leader, aged 51, who had studied psychology at Rangoon university but had never been allowed to practise. “To the Burmese regime we are non-people,” he said. “For decades they harassed us every day, sent our people to jail, didn’t give us citizen rights but alien cards as if we were foreigners. We had no rights, no education – there were primary schools in our villages but no teachers. We weren’t allowed to travel to another village without permission, which they refused, or even to get married and they demanded more and more money for a license.”

18. He told me there were 300 families on the island, as well as 20 orphaned children and 120 who had lost one parent. I met a girl of 14, Amina, from Tumbro in Mongu township whose parents had been killed and she had been left taking care of her five siblings aged 4 to 12 as well as her grandmother. She told me her soldiers entered the village around midnight. “We were woken by shooting and everyone came out of our their houses and there were lots of bodies. They had already taken away my parents. They set fire to our huts. We started running away but kept falling down and soldiers caught me. My neighbours managed to snatch me and we ran away.”

Chalipara village

19. In the main Kutupalong camp, I also interviewed a 14-year-old Rohingya girl called Yasmin, who was from Chalipara village. She told me that:

“The morning the Tatmadaw (the Burmese military) came, it was about 10am and I was taking a break from stitching leaves and playing outside our house with some friends. We didn’t hear the trucks as there is no road to our village so the soldiers had stopped on the main road and walked.

Five or six of them came to our house. They were in uniform with black masks and rucksacks. One soldier took a grenade from his rucksack and threw it inside where my mum and dad and two little brothers were. Immediately there were flames and I could hear them screaming. I tried to run in but my friends pulled me back. Before our eyes the house burnt to ashes.

We tried to run away as we knew the soldiers often took girls to rape. But they caught us. They took us to the jungle. I was scared and crying and screaming but one of the men put his hand over my mouth to stop me. They ripped my clothes, tied my hands behind me then two soldiers raped me, one after another. The second one was saying ‘kill her’ but I pleaded with them not to. I told them I already lost all my family, why kill me? Two of my friends bled so much they died. I can’t say what they did to me because when I think about those incidents I cry.”

20. She told me that her village was burnt down, and that after the Tatmadaw raped her:

“They left me naked. I just had a yellow scarf which I wrapped around me then I made my way very slowly to the river bank as I couldn’t walk well.

In the jungle I met a lady with her sons and she saw I was bleeding down my leg and asked what happened. She gave me cloth to wrap round it and helped me to the river bank. It was full of people trying to cross. Boatmen wanted money and I had nothing. I told them all I have is this nose-ring so they took that. It was the only thing I had from my parents.

We were about 30 people crowded into the boat. It had an engine but no roof against the rain and it took long, from dawn to early afternoon, maybe eight hours. Still, it was our good luck to find one as lots of people were on makeshift rafts which were very risky.

The boat took us to the island on the Bangladesh side. When we got there I left the lady because I was afraid. She had two sons about my age and I was scared they could also harm me so I said to her 'I will find my own way, Allah will be with me'.

Then I sat down and I was crying so hard that people of the island asked me what happened. They gave me rice-cake and water and also some money to cross to Teknaf [on the Bangladesh mainland].

After that I walked ten minutes along the broken road and saw some Bangladesh army. They could see I was Rohingya and gave me biscuits and water then put me in a bus to the transit centre. I stayed there two days and was so tired I couldn't talk. I was lying on the ground, my foot and stomach all swollen. Someone said she has no one and took me to Balukali camp."

Boli Bazaar

21. Another refugee, Sanoara Begum, 35, told me she was from Boli Bazaar, in Maungdaw, a village which had already been targeted in 2016. She told me:

"First the military came to our village and burnt all the houses so we fled to another village called Leda. But then the next night they came there about 9pm and shouted all you people must leave Myanmar, why are you still here? Then they started killing the men. They took my older son Mohammad Shaufiq and shot him in the chest and slit his throat. He was 15.

After that around midnight they seized younger girls and married women and took us to a school. There were six of us, four young girls and two married women and me. Two of us were pregnant. I was eight months pregnant.

They bound my hands and legs and lay me on the ground. I was raped by twelve soldiers, three at a time. I kept thinking about the baby and what would happen. They bit me. When I tried to resist they beat me with the gun, look I lost two teeth.”

22. She pulled back her lip to show me a gap. Then she said “After a while I was senseless then three more men came. One of them told me if you tell anyone we will kill you. Then another came in and shot me - they shot me twice, in my right knee and by my vagina.” She lifted up her trousers to show me. “Once with a pistol and once a big gun.”

23. She said:

“I lay so still I didn’t even dare move my eyeballs. Then I can’t remember anything. My husband and brother came to me and carried me. They thought I was dead but my fingers were moving a little so they realised I was alive. They sold my daughter’s gold nose-ring and took me to a doctor who gave me some medicine. I gave birth to the baby on the banks of the river but it was dead so we buried it there. I was a mother of four but now there are only two.

My husband and brother carried me the whole journey on a blanket because I couldn’t walk. It was six days walking to the river and we had to stop three days on a hill so they could rest.

We crossed by boat then we got to the border at Utipara, I was bleeding from the shot wounds so they took me in a tuk-tuk to Kutupalong camp and I was treated. I feel very much pain.”

Declaration

I, Christina Lamb, make this declaration voluntarily and believe that the facts stated in this witness statement are true.

Signed:



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8/10/20

Dated: 8 October 2020

Annex 372

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Annex 373

Statement of Antonia Mulvey, Executive Director of Legal Action Worldwide,
signed on 9 October 2020 (with exhibits)

STATEMENT OF ANTONIA MULVEY, EXECUTIVE DIRECTOR OF
LEGAL ACTION WORLDWIDE (LAW)

1. My name is Antonia Mulvey and I am a UK-qualified lawyer of 17 years' experience. I am the Founder and Executive Director of Legal Action Worldwide (LAW).
2. Legal Action Worldwide (LAW) is a non-profit organisation with headquarters in Switzerland and the United Kingdom, and offices in the Netherlands, Kenya, Lebanon, Sri Lanka, Somalia and Bangladesh. LAW has a presence in South Sudan and Jordan. LAW was founded in 2013 following extensive discussions with the UN, international lawyers, academics and international non-governmental organisations, which identified a need for a new organisation to provide 'on-the-ground' creative legal thinking in countries affected by conflict.
3. LAW's focus is on increasing access to justice, improving Rule of Law and addressing human rights violations and abuses, with a particular focus on gender and discrimination, sexual and gender-based violence, natural resource exploitation and transitional or transformative justice. LAW provides legal information, assistance and representation to individuals and communities to facilitate their meaningful access to justice thereby empowering them to assert their legal rights. LAW works with justice institutions, law faculties and national partners to strengthen their ability to deliver survivor-centred and effective justice and uphold human rights. LAW conducts strategic advocacy with decision makers and supports national champions to promote human rights and the rule of law.
4. Between June 2017 – September 2018, I was an investigator for the United Nations Independent International Fact-Finding Mission on Myanmar, covering the file of sexual and gender-based violence and violence against children. I have 22 years experience interviewing vulnerable victims and witnesses, specifically sexual and gender-based violence. I am a rostered expert for the UK Government Prevention of Sexual Violence initiative and a rostered justice expert for the UK Government Stabilisation Unit. I am a rostered sexual and gender-based violence expert for UN Women and Justice Rapid Response. In 2016, I was appointed a Visiting Fellow at the Centre for Women, Peace and Security at the London School of Economics and from 2012-2013 I was a Visiting Scholar at Columbia University law school, New York.

5. LAW has undertaken activities in Bangladesh since September 2018. These have primarily focussed on empowerment of Rohingya women, but also male survivors of sexual violence, and facilitating the meaningful engagement of the Rohingya community in the international justice processes that are being undertaken. At the present time, LAW represents 172 Rohingya on an individual basis, as well as two Rohingya networks; Shanti Mohila, a network of more than 400 Rohingya women and girls, displaced from Myanmar during the 2017 ‘clearance operations’ and group of 18 Male Survivor Advocates. All of LAW’s Rohingya clients are located in the camps in Cox’s Bazar, Bangladesh.
6. In December 2019, LAW supported three Rohingya refugees, Yousuf Ali, Hasina Khatun and Hamida Begum, who were displaced from northern Rakhine state, Myanmar to Bangladesh during the 2017 ‘clearance operations’ by the Myanmar army (Tatmadaw) in traveling to The Hague, from the camps in Cox’s Bazar, in order to witness the hearings on provisional measures in the case before International Court of Justice (ICJ) in the case between The Gambia and Myanmar on the application of the Convention on the Prevention and Punishment of the crime of Genocide (10-12 December 2019). H.E. Mr. Abubacarr Tambadou, then Gambian Attorney General, Minister of Justice, and agent in The Gambia’s case, noted in his statement to the court: “I am also pleased that The Gambia’s delegation today includes members of the Rohingya community, including those who have travelled from the refugee camps in Bangladesh.”
7. On 24 February 2020, LAW entered into a memorandum of understanding with Foley Hoag LLP, legal representatives of the Republic of The Gambia (“The Gambia”) before the ICJ in its case against Myanmar (ANNEX 1). Through the memorandum of understanding, LAW agreed to provide Foley Hoag with access to the witness statements of LAW’s Rohingya Clients in order to consider those statements for potential submission as evidence as part of The Gambia’s case against Myanmar before the ICJ.
8. Between 28 April and 9 October 2020, LAW gathered witness statements from its Rohingya clients. These statements have been gathered through remote and in-person interviews in line with LAW’s Standard Operating Procedures (ANNEX 2). Some witness statements were compiled by three senior criminal investigators, [REDACTED] and others by a team of police investigators from the Royal Canadian Mounted Police. Three interpreters attended the interviews.

9. [REDACTED]
10. In-person interviews were conducted and statements prepared by a team of investigators provided by the Royal Canadian Mounted Police at LAW's secure centre near the camps in Cox's Bazar between 22 September and 9 October 2020.
11. Additionally, LAW has provided to Foley Hoag a copy of the representations submitted to the Victim Participation and Reparations Section of the International Criminal Court in October 2019, pursuant to the Notification by the Prosecutor of a Request to Pre-Trial Chamber III for an investigation dated 4 July 2019 ("Victim Submission"). The submission includes information provided by male and female survivors of sexual violence, perpetrated by members of the Tatmadaw and Border Guard Police.
12. LAW has requested that Foley Hoag protect the identity of its Rohingya clients within the memorial to the International Court of Justice.
13. This statement consisting of 3 pages is true to the best of my knowledge and recollection. I have given this statement voluntarily and I have not been influenced by any coercion, duress or threat. I am happy to provide further clarification or an additional statement as needed.

Signed: 

Date: 9 October 2020

Annex 374

Witness Statement of Alex Crawford and Neville Lazarus, signed on 12 October 2020

REPUBLIC OF THE GAMBIA

v.

REPUBLIC OF THE UNION OF MYANMAR

WITNESS STATEMENT OF ALEX CRAWFORD AND NEVILLE LAZARUS

I, Alex Crawford, of Sky TV News, 6 Centaurs Business Park, Osterley, Isleworth, Middlesex TW7 5QD, England, and I, Neville Lazarus, of Sky News Asia, 2 Floor, Dalmia House, Scindia House, Connaught Circus, New Delhi, India 110001, will say as follows:

Introduction

1. We make this statement for the assistance of the International Court of Justice in proceedings brought by The Gambia against Myanmar under the Genocide Convention.
2. I, Alex Crawford, am Special correspondent for Sky News and have worked as a journalist in television, radio and newspapers for 40 years. I have reported on most major stories around the world over the past fifteen to twenty years and have headed several foreign bureaux for Sky News including in Asia (based New Delhi), Africa (based Johannesburg), the Gulf (based Dubai) and the Middle East (based Turkey). I have received various recognition for my work over the years including three Emmy awards; three British Academy Film and Television Awards (BAFTAS) and five awards for the British Royal Television Society Journalist of the Year.
3. I, Neville Lazarus, am the Sky News India reporter and producer, and I cover stories for Sky News across Asia. I have been involved in award-winning reports from Afghanistan, Iraq, Syria, Egypt, Libya, Myanmar, Pakistan, Sri Lanka, Nepal, Bangladesh and India. I have received 2 Emmy awards for my work, including one for coverage of the Rohingya crisis in 2018, for which I also received a BAFTA.
4. Sky News has been covering the Rohingya crisis from the first week of September 2017. We arrived in Bangladesh on 5 November 2017 with Sky News cameraman Martin Smith.
5. Our report from November 2017 was the only independent eyewitness journalist account from inside Myanmar during the worst phase of violence against the Rohingya population in Myanmar.
6. We went unencumbered by any Myanmar minders, entirely on our own, and collected first-hand accounts with photographic evidence as well as what we saw with our own eyes.

7. We personally witnessed and video-documented the shocking deprivation, desperation and horror of thousands of people who were stranded on the beaches of Dang Khali Sau in Maungdaw district of Myanmar. (See Map, Exhibit 1)
8. Our statement includes time-stamped references to video footage that we filmed as part of the night time voyage to Dang Khali Sau on 7 November 2017.¹

The Journey

9. We arrived at Cox's Bazar, Bangladesh in the afternoon of 5 November 2017 and went to the refugee camps. We heard that people were still coming by boat, and so we went further south to Teknaf and then down to Shah Pori Dwip. Both Teknaf and Shah Pori Dwip are where the refugees were landing in large numbers by boat.
10. During our research, travel and talking to people in the camps, we were told about people trapped on the beaches in Maungdaw district and who were in desperate conditions. We did not know where exactly on the beaches of the Naf River or how many people were trapped.
11. Boat journeys had become dangerous and the Bangladesh government had stopped its fishermen from carrying out any activity on the river. There were a number of reports of overloaded boat wrecks which resulted in many refugees drowning in the swollen Naf River. In October, Sky News documented this in several reports.²
12. We spoke to several people who told us that Bangladesh put an end to all water transport by their fishermen, who were the main conduits of this travel. There has always existed a very close relationship between both the communities, i.e. Bangladeshi (Muslim) and Myanmar (Rohingya) on either side of the Naf River.
13. We heard that Bangladeshi fishermen were being arrested and their boats were being burnt. We both saw wreckage of two burnt boats at Shah Pori Dwip.
14. We started contacting fishermen to inquire about them taking us to these locations, as there were relatives on the Bangladesh side who were attempting to organise 'rescue missions' to pick up friends or family. We contacted a number of fishermen through our local helper.
15. Eventually our local helper found a friend who had hired a fisherman to bring his relatives from one of the beaches in Maungdaw. We met with the fisherman beforehand to talk through the arrangements, as we were taking a journey with a risk to all our lives. Almost 200 Rohingya people had already died trying to do just this.
16. On 7 November 2017, we left our hotel in Cox's Bazar and travelled to a small village in the Shamlapur area, which is on the western coast of Teknaf (southern tip of Cox's Bazaar district).

¹ See Alex Crawford, "Rohingya babies dumped and left to die in Myanmar crisis", Video, *available at* <https://news.sky.com/story/rohingya-babies-dumped-and-left-to-die-in-myanmar-crisis-11123366>.

² See, for example, Ashish Joshi, "'I watched my children drown': Rohingya mother shares devastating story", *Sky News* (16 October 2017), *available at* <https://news.sky.com/story/i-watched-my-children-drown-rohingya-mother-shares-devastating-story-11083942>.

17. We bought ourselves life jackets and kept updating our editors in London through messages and our GPS locations. We set out in complete darkness as the fisherman and his crew were also afraid of being caught by the Bangladesh police who were patrolling the area.³
18. We left in a traditional, wooden, crescent-shaped Bangladeshi fisher boat. It had a few holes in the bottom and all along the way the crew of the boat were bailing out water that was filling up at the bottom.
19. The route that we followed was to travel south of the western coast of Teknaf. We had to head south into the Indian Ocean to evade the Bangladesh Coast Guard watch tower and an anchored Coast Guard boat further into the sea.
20. The Boatman had given clear instructions that under no circumstances a torchlight or camera light was to be switched on. They were very anxious of being caught by security.
21. We were told that once we travel into the Naf River upstream we should be very quiet and keep a watch for patrolling Myanmar Coast Guard boats.
22. The journey lasted for about three and a half hours. We reached the beach of Dang Khali Saur, and in the distance we could see torch lights flickering at us. It was a signal, and the boatman responded likewise.⁴
23. The boat had to be anchored some distance away, so we had to jump off in nearly waist-deep water and wade inland, and then we saw the crowds of people. We hadn't even reached the beach, but people were already gathering on the shoreline. Soon we there were tens of people coming to us. The crowd soon rose to hundreds. This was the first time an outsider / foreigner had come to the beach.⁵
24. Many were tugging and pulling at us, imploring, begging and showing us their physical condition. (Exhibit 2) Each one wanted to tell us their story, showing their children to us, or their old and infirm and hurt.⁶
25. We started talking to them and asking questions and were told that some of them have been trapped on the beach for weeks, some for a month and some for two months.⁷
26. Babies had been born on the beach. We filmed one with its umbilical cord still attached. (Exhibit 3) They were born into almost starvation with no drinking water, no medical facilities, and just some plastic held up by two bamboo poles to protect them from the elements.⁸

³ See Alex Crawford, "Rohingya babies dumped and left to die in Myanmar crisis", Video, at 0:10-0:24, available at <https://news.sky.com/story/rohingya-babies-dumped-and-left-to-die-in-myanmar-crisis-11123366>.

⁴ *Id.* at 1:23-1:35.

⁵ *Id.* at 1:35-1:50.

⁶ *Id.* at 1:55-2:20.

⁷ *Id.* at 1:50-1:55.

⁸ *Id.* at 5:28-6:27.

27. We saw horror in the eyes of men, women and children. And we were told by them that there were thousands and thousands just on that strip of beach.⁹ (Exhibit 4)
28. All the while we were there, there was this low sound, a hum of noise. It was the crowd wailing: old men, young men, children and women – all wailing. It was an eerie sound to us - of agony, pain, distress, misery and helplessness – all rolled in one. We cannot adequately do justice to this in words. It was a unified, spontaneous, continuous moan of repressed pain because of the fear of being heard and attracting the Myanmar guards they said were close by.¹⁰
29. They all looked confused, dazed. It just seemed to us absolutely cruel beyond belief that these people had been forced here and left to die on this little strip of the beach.
30. We were told by the victims on the beach that the Myanmar military corralled them onto the beach and then laid land mines behind them to prevent them from going back. Narrow strips of land were left open like gates, which were manned by the military. Anyone trying to go back was severely beaten or taken away.¹¹
31. We were shown a young man, unconscious, with his ribs protruding through his chest. (Exhibit 5) We were told he was severely beaten by the guards for trying to fetch drinking water. He tried to go through the narrow passage manned by the guards who caught him and beat him. To us, it seemed that he would die without immediate medical intervention.¹²
32. We were shown men working on a raft, which they were trying to make out of bamboo, string and discarded plastic jerry cans. Running out of food and water, they could wait no longer. The 40-sq-foot raft had taken them 5 days to make, and they estimated another 5 days was needed to finish it.
33. Makeshift rafts like these would be packed with babies, children, women and men making a dangerous journey over a swollen river. It was a do-or-die situation for them. A choice between the devil and the deep blue sea. Desperate, scared, fuelled by the fear of landlines, assault, starvation, rape and death.¹³
34. Many children seemed to be on their own, their parents killed or lost while fleeing.¹⁴
35. We were warned that we must leave, as someone had spotted some Myanmar soldiers walking towards the beach. Our boatman wanted us to leave immediately. They had explained the patrols came at certain times, and our arrival had been timed in-between patrols.
36. We waded through water to get back into our boat. There was a surge of people wanting to clamber onto our boat with us. The boatman tried to keep people at bay. It was horrifying to see the mad scramble to get out of this place. We decided to leave,

⁹ *Id.* at 2:30-3:50.

¹⁰ *Id.* at 3:52-4:15.

¹¹ *Id.* at 5:00-5:30.

¹² *Id.* at 6:55-7:09.

¹³ *Id.* at 6:35-6:55.

¹⁴ *Id.* at 7:18-7:30.

taking with us the most vulnerable – babies, children, the sick and their families. Thirty more people crammed on to our tiny boat.

37. We felt that we had actual visual footage and documentary evidence of the horrors being endured by these forsaken people.
38. What struck us both was the large number of children that had come across to Bangladesh as refugees. More than half of the refugee population were children. Young men were conspicuous by their absence, which raised disturbing concerns about where they were.
39. We got back to the safety of the village from where we had set off just before sunrise on 8 November 2017.
40. There could have been deaths there on the beach, but because it was night time we couldn't see, and we were concentrating on the living.
41. Our journalistic careers have taken us to several crisis regions across the world - Iraq, Syria, Afghanistan, Pakistan, Yemen, Mali, Libya, Democratic Republic of Congo, South Sudan to name a few - but what we saw that night was a shocker. We all think this is one of the worst things we've ever seen in decades of working in journalism.
42. The continuous wailing of the women and men was and still is haunting.

Statement of Truth

I, Alex Crawford, and I, Neville Lazarus, make this declaration voluntarily and believe that the facts contained in this witness statement are true.

Signed: 

Dated: October 12, 2020

Signed: 

Dated: 12/10/2020.

Exhibit 1, Map of Dang Khali Sau, Maungdaw, Myanmar

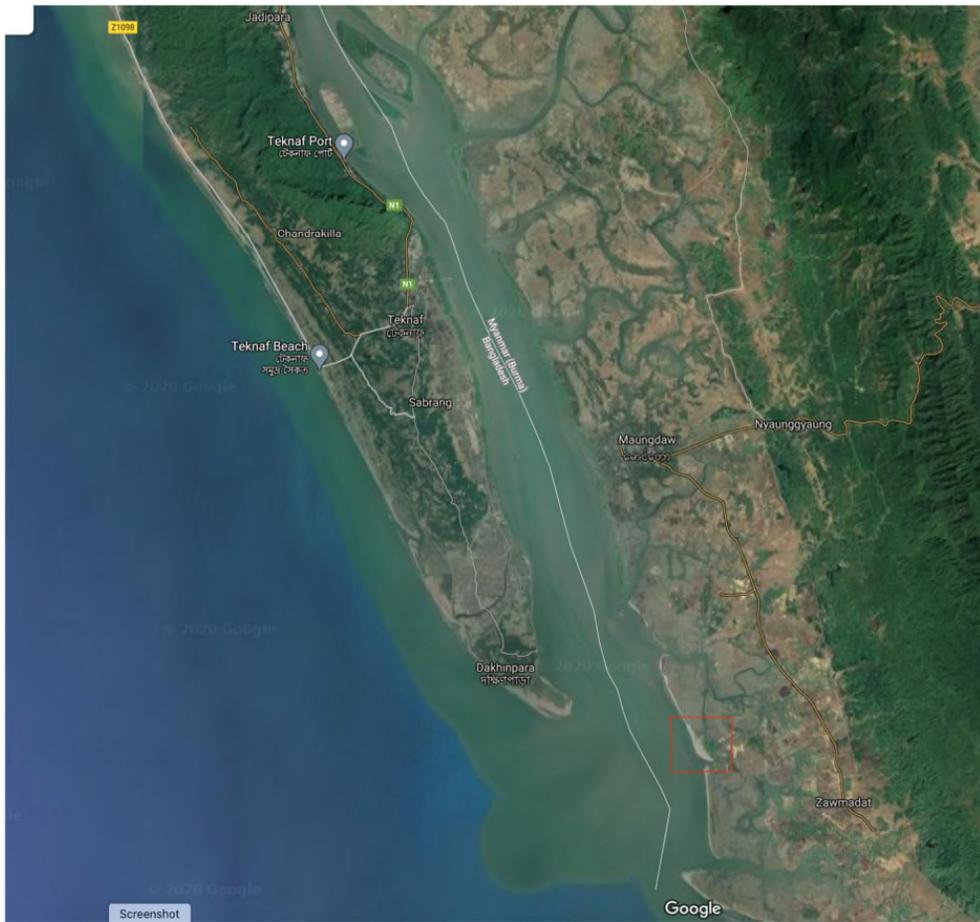




Exhibit 2 – Physical Condition



Exhibit 3 – Babies Born on Beach



Exhibit 4 – Hundreds Seeking Help



Exhibit 5 – Injured Man



Annex 375

Witness Statement of Jonathan Head, signed on 14 October 2020

REPUBLIC OF THE GAMBIA

v.

REPUBLIC OF THE UNION OF MYANMAR

WITNESS STATEMENT OF JONATHAN HEAD

I, Jonathan Head, of 36/19; Chavana Place, Soi Ari 4, Phaya Thai, Bangkok, Thailand, will say as follows:

Introduction

1. I make this statement for the assistance of the International Court of Justice in proceedings brought by The Gambia against Myanmar under the Genocide Convention. This statement sets out my experiences as a journalist covering Myanmar, including the situation of the Rohingya Muslims, and, in particular, two visits I took to Northern Rakhine State in 2017 and 2019.

Background of my experience of Myanmar

2. I have been a journalist for 32 years, and a foreign correspondent for 24. I have studied and involved myself in South East Asian issues for most of my life. I have been schooled in the BBC's journalistic values. Impartiality, rigour and fairness are at the core of these values. I have significant experience of covering conflicts in the region and elsewhere, and understand the need to consider their complexities and ambiguities.
3. I studied Burmese history as part of my MA course at SOAS in 1984-5 under Professor Bob Taylor.
4. I am currently the BBC's South East Asia Correspondent based in Bangkok, a position I have held since 2012. I previously held the same post from 2000-2003 and 2006-2009.



In the course of my tenure as a journalist covering South East Asia, I have visited Myanmar on 14 occasions.

5. My first experiences of Myanmar started with very limited and short government-approved visits. This included two in 2001, one to cover an Association of South East Asian Nations (“ASEAN”) meeting and the discussion about the possible release from house arrest of Aung San Suu Kyi (“ASSK”), the other to cover a ground-breaking visit by then-Thai Prime Minister Thaksin Shinawatra. I also visited in October 2006 to cover the opening of the constituent assembly. My visit in March 2007 was the first chance foreign journalists had to see Naypyitaw. After the so-called ‘Saffron Uprising’ in September 2007, when large-scale anti-government protests broke out in Yangon and several parts of Myanmar, it became impossible for me to obtain a Myanmar visa of any kind, so I had to cover the story of the uprising itself, and cyclone Nargis in May 2008, from Bangkok.
6. My involvement in the story of Rohingya Muslims in Myanmar began in January 2009, when from Bangkok I covered the plight of boats packed with fleeing Rohingyas which were being pushed back out to sea by the Thai navy. A BBC colleague in Dhaka broke this story when he was informed by Indian Navy contacts on the Andaman Islands of the arrival of starving and dehydrated boats full of Rohingya migrants. My colleague spoke Chittagong dialect and was able to get their story of being towed out to sea by the Thai navy and left to drift, after their engines were disabled. I kept reporting this story through most of January and early February 2009 as we got more details of similar boats in Aceh, and was able to press the Thai government to change its policy.
7. The next occasion on which I travelled to Myanmar to cover the situation of the Rohingya was in early November 2012 (I was the BBC correspondent in Istanbul from August 2009 to August 2012 before returning to the role of South East Asia Correspondent – so I was then near the start of the my third (and current) stint as the BBC’s South East Asia Correspondent). On that trip, I reported from Sittwe and the camps of Rohingya displaced by the communal violence in June and October that year. I was able to interview recently displaced Rohingya and Kaman Muslims in camps on the outskirts of Sittwe, more displaced people from Kyaukpyu in Sintamaw, and to film



- burned Rohingya communities in Pauktaw. I also interviewed members of the Rakhine Buddhist community, including the abbot of the main temple in Sittwe.
8. I was able to visit Myanmar several more times over the following years. I had the opportunity on these visits to interview government officials and Rakhine Buddhists. I questioned ASSK on the Rohingya issue on November 2012 at her home in Naypyitaw, during the official visit of the then-President of the European Commission, Manuel Barroso. I challenged her on her failure to speak out against the treatment of Rohingyas in Rakhine. She responded that she was not an expert on immigration (I had asked her why she did not advocate giving citizenship to Rohingyas), that to use her moral authority, as I suggested, would be a misuse of it in a conflict in which both sides had suffered. She rejected my suggestion that it was the Rohingya community which had suffered disproportionately.
 9. I went to Sittwe again in June 2013 to cover the visit of the UK Minister for Overseas Development. I used the opportunity to get permission to take a boat trip to an isolated and troubled Rohingya community in Rathedaung. This community was entirely surrounded by hostile Rakhine Buddhist villages, with which there had been violent clashes in June 2012. All their livestock had been taken, and they were unable to travel outside the village for health treatment or trade, and were in a parlous economic state. At this time, 2012 to 2014, it was near-impossible for journalists to get permission to visit Maungdaw or Buthidaung – applications for permits were nearly always denied.
 10. From early 2014, the BBC had a reporter, Jonah Fisher, based in Yangon, and I did not go back to Myanmar after that except to help cover the election in November 2015. In May 2015, I reported extensively in southern Thailand on the plight of trafficked Rohingyas and Bangladeshis in Thailand and the Andaman Sea. I did not cover the October 2016 attacks by Rohingya militants and the military clearance operation that followed, as my colleague Jonah Fisher did so from Yangon.
 11. In June 2017, Jonah Fisher left Yangon, and was not immediately replaced so that the BBC did not then have a reporter in Yangon. On 25 August 2017, when we received the first reports of attacks on military and police posts in Rakhine, we were all tied up covering the trial, and flight, of former Thai Prime Minister Yingluck Shinawatra. Over



that weekend we received sparse information, but by 28 August there were increasingly alarming reports of significant violence and destruction in a number of Rohingya communities. I began getting information from a network linked to Rohingya activists about specific places like Chut Pyin, in Rathedaung. I warned my editors that, given the huge exodus of an estimated 87,000 individuals who fled the military operation after a much smaller number of attacks in October 2016, we should expect a very big humanitarian disaster. I lobbied the Bangladesh Embassy for a visa, and applied for a Burmese visa too, although I argued with my editors that if we had no access to Rakhine State there would be little value being in Yangon or Naypyitaw. However, the BBC covers Bangladesh from its Delhi bureau, which sent the first BBC teams to Cox's Bazaar on 3 September.

September 2017 Northern Rakhine State Visit

12. On Monday 4th September 2017, I received visas for both countries. The BBC bureau in Yangon then learned of two government-organised trips to Northern Rakhine State ("NRS"). We had missed the first, and were told they would not welcome westerners, but that a single space might become available on the second, which was leaving Yangon via Sittwe on 5th September. My name was put down, and I was approved. It was challenging trying to manage all the equipment routinely needed for broadcasting, carrying safety kit, sleeping kit and food. Normally, because of the requirements for broadcasting, we travel in teams of two or three. With limited electrical power likely to be available I needed to carry a large number of batteries. I was also without a translator. The trip was approved by the president's office, and organised by the Ministry of Information ("MOI"), which sent a single official to accompany us. Transport and security would be provided by the local authorities in NRS.
13. There were 18 of us on our trip, all but three of us local journalists, although some of the local journalists were working for international media. I was given invaluable help by at least three other Burmese journalists, including with translations of what people told us. The other westerner was a freelance Canadian documentary-maker. There was a senior journalist working for a Singapore media group as well.



14. We flew to Sittwe, stayed overnight, and took a 6-hour boat journey north to Buthidaung, where we were put into a three-vehicle convoy. We had a substantial armed police escort, and space was very limited in our vans; we took the 1-hour road trip over the forested Mayu Hills to Maungdaw with our luggage on our knees.
15. On arrival in Maungdaw, we were taken to the office of the township administration and briefed by Colonel Phone Tint, the State Minister for Border Security. He gave us the standard and official government position; that there had been terrorist attacks, in which more than 300 people had been killed, and several bridges and some 2,700 buildings destroyed. Asked about who was burning down the Muslim villages, he stated that 100 percent of them were being destroyed by the Muslims themselves. He said eight camps had been established for displaced non-Muslims. When asked about the whereabouts of the many displaced Muslims he said he had no idea where they were. When asked about allegations of rape by Burmese security forces he insisted troops and police were too busy in action in the jungle to investigate these allegations. He then said: "you women journalists (referring to my female Burmese colleagues), just look at the women making these accusations – they are not of a quality that anyone would want to do that to them".
16. We were taken from there to a nearby school. Several dozen Hindu residents were sheltering there, and we were encouraged to interview them about attacks by Rohingya militants which they said had driven them from their homes nearby. I filmed a little of this but did not pay too much attention, as we were escorted by police and officials, and it hardly seemed possible in those circumstances to get an honest and authentic account. However, one Hindu man did go off script, stating that it was soldiers who attacked his village. He seemed quite sure of this, but was then taken aside by other members of his community, advised that he had got this wrong, and came back quickly and changed his story, to agree that it was the Muslims who had attacked the village. My Burmese colleagues observed this interaction and translated it for me. As I explain below, it turned out later I had reason to value my video material from this school.
17. We were next taken to a Muslim neighbourhood called Shwe Zar, still within Maungdaw town. A handful of local community leaders were brought to us, by the roadside. One agreed to be interviewed, but again with officials and police present. This



seemed to cause them to be nervous and hesitant. They told us they just wanted peace restored, and the opportunity to restart the local economy. The greatest problem was restrictions on their movement even to the town centre, which was only 2 kms away. No one would talk about the violence, or who was responsible. I formed the impression that the presence of officials and police caused them not to talk about this. Walking quietly away from the main road with a couple of my Burmese colleagues we found some young men who said they were very afraid, that they feared for their lives, and wanted to follow the rest of the Rohingya community to Bangladesh, but their own leaders had ordered them not to.

18. From there we were taken to a Buddhist monastery in Maungdaw town called Zaw Ti Kar Rom. A monk described how he had seen the Muslim residents of the houses next to the monastery set light to their own homes. A cluster of houses, perhaps six or seven, was burned to ashes. The monk gave photographs from his phone to the Burmese journalists, apparently showing people in Muslim dress setting the houses on fire, and posing for the photographs, some brandishing machetes. We looked closely at the photographs and some of us felt immediately that they looked odd, that perhaps the scene had been staged. This was right in the town centre, in the middle of a massive security emergency. Why would they take the time to pose, in daylight, while performing an illegal act? Why would they allow themselves to be photographed in this way? The head-coverings of the women looked odd too, ill-fitting and unlike any Muslim head-covering I had seen before.
19. Later, after returning to Yangon and having time to go through my own video material in detail, I was able to identify two of the alleged 'Muslim' perpetrators in the photographs: they were two of the displaced Hindus, both wearing identical clothing to what they were wearing when we met them. One, a woman in a distinctive orange and lacy blouse, had been especially vocal about the violence she had suffered at the hands of Muslims. The head-covering she was wearing in the staged photos appeared to be a tablecloth. My conclusion was that the photos had been staged quite close to the time of our arrival, in order to support the government's assertion that Muslim villages were being destroyed by their own inhabitants.



20. The next day, 7th September 2017, we were told by our MOI minder that we would head south of Maungdaw in the morning, and make a journey north in the afternoon.
21. We stopped first at the main Muslim market. It was moderately busy, but much quieter than usual, according to local people. We were, as always, escorted by armed police, and we found it difficult to speak to people. Most did not want to talk. The few that did simply stated that they were suffering economically, and they were frightened. When asked what they were frightened of, most would not answer. One man did state that he was frightened of the government. Not one person stated that they were frightened of the Arakan Rohingya Salvation Army (“ARSA”), or Muslim militants. No-one had been prepared for us to speak to, so there was no-one to support the official narrative. We simply walked up to people and asked if they would speak.
22. Our journey south took us on a new and smooth road which runs a little inland of the old road, alongside a low ridge of hills. We noticed new-looking barracks and police posts along the way, and a helicopter landing pad right next to the road. We stopped at a village called Mawrawadi, inhabited by ethnic Rakhine Buddhists, who told us there had been a history of violent incidents with nearby Muslim communities. They had sent most of the women and children away to Maungdaw or Buthidaung towns after the 25 August 2017 violence broke out. They had heard gunfire and were frightened. I asked whether their Muslim neighbours were still there, as we understood that outside Maungdaw town nearly all Muslims had fled. They did not know. They said that they were too frightened to go and check.
23. Our drive continued south, towards the town of Alel Than Kyaw, on the coast, where one of the first ARSA attacks had taken place on 25 August. We began to see extensive areas of housing around the mainly Muslim village of Chain Hkar Li, which had been burned down, and abandoned boats and abandoned goats and cattle. There were no people at all on a 15 minute stretch of the drive. In Alel Than Kyaw, we were allowed to get out and wander around. Most of the town had been burned down. Parts of it were still smouldering. There was a Médecins Sans Frontières (“MSF”) clinic there, identifiable by the sign, which was completely destroyed. There was some livestock wandering in the ruins but no inhabitants.



24. A police lieutenant, Aung Kyaw Moe, described the morning of the attack. He said they had received advanced warning of it, and had moved the non-Muslim population and government officials into the relative safety of the police barracks, which had a rudimentary bamboo fence and steel gate around it. He said a large crowd of Muslims had run up shouting from the beach. Mostly they appeared to be armed with swords and sticks. An immigration official whose house was close to the beach was killed, he said. But the police opened fire on them from the barracks, and eventually they ran away. When they came out, they recovered 17 of the attackers' bodies. He said the Muslim population had burned down their own houses and then run away. I asked, through a colleague, why, if the Muslim population had fled soon after the attack, there were still smoking ruins two weeks' later, in the rainy season when it rains every two or three days. He said a few Muslim inhabitants had stayed behind, and must have just set their homes alight before fleeing in the past few days. He gave no more details.
25. We were allowed to walk towards the beach, where we could see four columns of smoke in the near distance, and hear sporadic automatic weapons fire. At least one burst sounded like a heavier machine gun. I filmed more of the burned ruins and asked my Canadian colleague to shoot a TV stand-up for me. A few colleagues had walked along the beach, and met a Rohingya man walking towards a very distant group, who he said were trying to get a boat across to Bangladesh. It would have taken us too long to walk there, so we went back to our minder and asked him to drive us round to the point where the Rohingyas were gathering. He refused, citing security concerns. He was also concerned that we had taken much longer here than expected, and were more than an hour behind schedule.
26. On the drive back we suddenly spotted a thick column of smoke billowing out from a cluster of trees in the rice-fields – the trees usually indicate a village. My Singaporean colleague shouted to stop the car, sufficiently dramatically that the whole three-vehicle convoy stopped. I think our minder probably thought she was feeling sick. We all piled out, and began walking quickly across the rice-fields in the direction of the smoke. Our police escort came with us, trying to deter us from proceeding by telling us it was not safe.



27. I saw two ethnic Rakhine men pushing a cart, with difficulty, across the rice-fields. It was piled high with cooking utensils and at least 2 bicycles, one of which appeared to belong to a child. They seemed embarrassed to be asked questions by us, and said they had seen the smoke, gone to check, and had 'found' the items there.
28. We saw new columns of smoke and could hear the loud cracking of burning timber and bamboo. One policeman tried to persuade us this was explosives, and we should go no further. We ignored him. One house, on its own in the fields, was going up in flames, filling the blue sky with smoking debris. It took about 15 minutes to burn to the ground.
29. In the trees, there were several other houses already ablaze, and a group of young Rakhine men, some armed with long swords. They did not want to talk, but said they had not done the burning and had just come to see what was happening. They started leaving immediately when they saw us. Two walked back further into the village, we realised to collect others who were there and bring them out. In total, I saw eight men. We walked further in and saw the madrasa had just been set alight, on one corner of the palm-thatch roof. Within five minutes it was completely ablaze. A plastic jug, smelling of petrol, was left in the path, along with the pages of religious passages in Arabic script, which we believed were copies of the Quran, torn and strewn on the path. There were articles of women's clothing also strewn on the path, with a burned bicycle and a child's plastic rocking horse. One of my experienced Burmese colleagues spoke to a boy next to the burning houses, who told her the village had been set alight by the Rakhine men we had seen and the police. We learned that the name of the village was Gawdu Thara. At the time we had no idea what had happened to its Muslim inhabitants. Two weeks later I was able to find a family in southern Bangladesh who had lived there, and had fled, with the rest of the community, four days before I had seen it partially burned down.
30. We discussed among ourselves what we had seen. None of us had actually seen the young Rakhine men setting the houses alight, and all but one of the other journalists felt unable to state categorically that the men we saw had done the burning. One of the Burmese media groups there wrote that Muslim militants has burned the village, although there was no dispute about the identity of the men we met, who openly acknowledged that they were ethnic Rakhine. In my view, on the basis of what I saw



and all the surrounding circumstances, it was impossible that anyone else could have been responsible for the destruction other than members of the Rakhine community [supported or encouraged by the military]. We had stayed for 30 minutes after the men left, and had wandered around the remains of the village. No-one else had been there. Some buildings, such as the madrasa, had clearly only just been set alight, and once alight the buildings burned quickly, so they cannot have been set alight much before our arrival. Our own armed police guard did nothing to halt the damage, and called in no other forces to ascertain what had happened or prevent further damage. They just watched the village burn, as though it were a normal occurrence, as though it was appropriate. There was a police barracks not far from the village.

31. We were at Gawdu Thara from 1437 to about 1525. Our schedule had now been even further delayed. Our minder, who was clearly very worried by the effect on us of what we had seen, decided to abandon the planned trip north of Maungdaw, and instead took us to look at the border fence along the Naf River.
32. The following morning, we started the long journey back to Sittwe, and our flight back to Yangon. I edited my material and it was broadcast on the main BBC bulletins on the night of 8th and during the day on 9th September 2017. I also wrote further reports debunking the fake photos of 'Muslims' burning their own homes.
33. While in Maungdaw, we had been surprised to discover a decent 3G phone network, which worked most of the way along the road south to Alel Than Kyaw. I was able to send out a few reports from there, and tweeted what we had seen at Gawdu Thara. The government official spokesman Zaw Htay challenged with a tweet of his own: "Hard evidence? Where are Rakhine youths setting fire in your photo? We won't accept anyone who's burning like #ARSA". My debunking of the faked photographs was also challenged by the editor of one Eleven Media, one of Myanmar's biggest news groups. Zaw Kyaw Lin denied that the two perpetrators I identified as displaced Hindus were the same people, and accused me of making allegations without evidence. Zaw Htay had also tweeted the faked photographs on the night of 6th September copying the English text used by several other tweets, after some of the Burmese media, including Eleven Group, had published them, as evidence of Muslims burning their homes, although he later took his down.



Trip to Bangladesh

34. After my reporting from Rakhine State, in early September 2017 the BBC asked me to replace a BBC team which had been reporting in Cox's Bazaar in Bangladesh. I travelled there with my Bangkok cameraman, and teamed up with a Delhi-based producer, a Dhaka-based producer, and a local translator who spoke Chittagong dialect and had good contacts with the Rohingya community there.
35. We made a series of video reports on the plight of arriving Rohingya refugees, but focussed on trying to find people who had fled from Gawdu Thara, the village I had filmed being burned in NRS, and on making contact with the Rohingya militant group ARSA. I made reports for BBC TV, website and radio on both those issues.
36. We found the family of Abdul Majid after six days. There was a makeshift refugee settlement we heard about in some fields of crops which were being rented to them by a local landowner. The lack of space in the established camps was forcing newcomers to settle wherever they could. People were clearing tropical scrub off the small hills that sat among the fields, and putting up rudimentary shelters there. We found Abdul Majid sitting with his family under a plastic tarpaulin, rigged onto a flimsy structure of branches and bamboo.
37. He told me he had lived all his life in Gawdu Thara. I brought out photographs I had taken at the burning village, and he quickly identified the madrassa, which I filmed just after it had been set alight, and he described the layout of the village accurately. He became emotional when he saw the video of the village being burned. I asked him to tell me what had happened. He described hearing sustained gunfire, which was very loud, and running with his family into the rice-fields. There was some uncertainty about the date, but by running carefully through the number of days he had been in Bangladesh we established that the attack happened on 3 September 2017. He said the gunfire lasted about an hour, together with a great deal of shouting. After that they decided to make their way to the nearby Naf River and take a boat across to Bangladesh. He said they had already heard about trouble in other parts of NRS. They had grabbed



two bundles of possessions when they left, mostly cloths and blankets. He had a handful of Burmese money, worth a few dollars, and nothing else.

August 2019 Northern Rakhine State Visit

38. In August 2019 the BBC Yangon bureau learned that a place was available for a BBC journalist to join a government-run trip to Northern Rakhine State, to see the preparations the Myanmar government was making to receive any Rohingya refugees who agreed to return to Rakhine. When the itinerary was announced, I realised two of the reception facilities we would be shown had been constructed on Rohingya villages, which satellite photographs showed had been partially burned in the violence of August and September 2017, and then razed in early 2018. The BBC decided that we should make a report putting together what I was able to see on the ground, together with the satellite evidence we had collected, to show what appeared to be a policy of deliberately erasing Rohingya settlements.
39. The trip was from 29 to 31 August 2019. We took a commercial flight to Sittwe, and were then driven to take a boat across the Mayu River to Ma Kyi Chaung, from where a recently upgraded road now offers the fastest route to Maungdaw. Our itinerary was set and non-negotiable, according to the Ministry. We were taken first to a recently-built reception centre at Hla Poe Kaung, built on the site of two Rohingya villages, Haw Ri Tu Lar and Thar Zay Kone. There I asked the camp administrator why the Rohingya villages had been destroyed. He denied this, then suggested the villages were located elsewhere. When I told him I had satellite images which showed without doubt that the Rohingya villages had been on the exact spot where the camp had been built, he said he had only recently been appointed to the job and knew nothing about this.
40. The following day we were taken to the border post at Taungpyo Letwe to see how any returning Rohingyas would be processed, and from there to a planned resettlement at Kyein Chaung, both locations in the north of Maungdaw township. Kyein Chaung had been constructed, with funds donated by the governments of Myanmar, India and Japan, on the site of a Rohingya village called Myar Zin. Speaking off the record to officials there, they confirmed that Myar Zin had been razed to make way for the new



resettlement camp, made up of orderly rows of stilted houses, and fenced in with barbed wire.

41. As on all government trips, we were in convoy and not allowed to stop except at places on the official itinerary. However we filmed as best we could from our vehicles, and I was able to film a new government and police barracks on the site of Myo Thu Kyi, just outside Maungdaw town, and compare it to identical shots from a vehicle of My Thu Gyi which I had taken in September 2017, when it was still visibly a partially burned Rohingya village.
42. We were also taken to Inn Din, site of a massacre of ten Rohingya men on 2 September 2017, which was acknowledged by the Myanmar military after it was investigated by two Reuters journalists – who were later sentenced to seven years in prison, though subsequently freed.
43. Only the Rakhine Buddhist portion of the village remained. The Muslim Rohingya quarter, which had comprised about three quarters of the village, was burned back in September 2017, and was now completely erased. I was able to film at a barbed-wire fence at the point where the Muslim quarter used to be, and where now a newly-built and very large Border Guard Police barracks lies. No trace of the Muslim community remains.
44. These four examples were used in a BBC report published in September 2019 alleging that the Myanmar authorities were deliberately destroying the remains of Rohingya communities abandoned by their inhabitants during the military clearance operation of 2017.

Declaration

I, Jonathan Head, make this declaration voluntarily and believe that the facts stated in this witness statement are true.

Signed:



Dated:

14/10/2020
Jonathan Head.



