

INTERNATIONAL COURT OF JUSTICE

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

THE GAMBIA

v.

MYANMAR

**REJOINDER OF
THE REPUBLIC OF THE UNION OF MYANMAR**

30 DECEMBER 2024

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TABLE OF ABBREVIATIONS AND DEFINED TERMS

1982 Law	Citizenship Law, 1982
2018 FFM Detailed Findings	UN Human Rights Council, <i>Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar</i> , UN Doc. A/HRC/39/CRP.2, 17 September 2018
2018 FFM report	UN Human Rights Council, <i>Report of the independent international fact-finding Mission on Myanmar</i> , UN Doc. A/HRC/39/64, 12 September 2018
2019 FFM Detailed Findings	UN Human Rights Council, <i>Detailed findings of the Independent International Fact-Finding Mission on Myanmar</i> , UN Doc. A/HRC/42/ CRP.5, 16 September 2019
2019 FFM report	UN Human Rights Council, <i>Report of the independent international fact-finding mission on Myanmar</i> , UN Doc. A/HRC/42/50, 8 August 2019
AMM	Aqa Mul Mujahidin [a name by which Harakah al-Yaqin (HaY) was also known]
AG	Application instituting proceedings of The Gambia, 11 November 2019
Annan Commission	Advisory Commission on Rakhine State
Application	Application instituting proceedings of The Gambia, 11 November 2019
<i>Bosnia Genocide case</i>	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 4</i>
ARSA	Arakan Rohingya Salvation Army
ARSIWA	International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts, 2001
BGP	Border Guard Police

CMM	Counter-Memorial of Myanmar, 24 August 2023 [where no volume number is given, the reference is to Volume I]
<i>Croatia Genocide case</i>	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3</i>
Eighth Provisional Measures Report	Eighth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 November 2023
FFM	Independent International Fact-Finding Mission on Myanmar
Fifth Provisional Measures Report	Fifth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 May 2022
First Provisional Measures Report	Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 22 May 2020
Fortify Rights Document	Fortify Rights, “First-hand Testimonies from August-September ‘Clearance Operations’ in Myanmar”, August-September 2017 (extracts at MG, Vol. X, Annex 338 and CMM, Vol. VII, Annex 278)
Fourth Provisional Measures Report	Fourth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 November 2021
The Gambia	Republic of The Gambia
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, <i>United Nations Treaty Series</i> , vol. 78, p. 277
HaY	Harakah al-Yaqin [which later called itself the Arakan Rohingya Salvation Army (“ARSA”)]
ICC	International Criminal Court
ICOE	Independent Commission of Enquiry
<i>ICSFT and CERD case</i>	<i>Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on</i>

the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judgment of 31 January 2024

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	internally displaced person
IED	improvised explosive device
IIMM	Independent Investigative Mechanism for Myanmar
ILC	International Law Commission
INGO	International Non-Governmental Organization
LAW	Legal Action Worldwide
MG	Memorial of The Gambia, 23 October 2020 [where no volume number is given, the reference is to Volume I]
MoU	Memorandum of Understanding
Myanmar	Republic of the Union of Myanmar
NGO	Non-governmental organisation
Ninth Provisional Measures Report	Ninth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 May 2024
NRC	National Registration Card
NVC	National Verification Card
OHCHR	United Nations, Office of the High Commissioner for Human Rights
PILPG	Public International Law & Policy Group
Preliminary Objections Judgment	The Court’s judgment of 22 July 2022 on the preliminary objections in this case

Protected group	A “national”, “ethnic”, “racial” or “religious” group within the meaning of Article II of the Genocide Convention
Provisional Measures Order	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3</i>
RG	Reply of The Gambia, 23 May 2024 [where no volume number is given, the reference is to Volume I]
RM	The present Rejoinder of Myanmar [where no volume number is given, the reference is to Volume I]
RSO	Rohingya Solidarity Organisation
SC	Security Council
Second Provisional Measures Report	Second Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 November 2020
Seventh Provisional Measures Report	Seventh Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 May 2023
Sixth Provisional Measures Report	Sixth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 November 2022
Tenth Provisional Measures Report	Tenth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 22 November 2024
Third Provisional Measures Report	Third Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 20 May 2021
UN	United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
USD	United States dollars

USHMM

United States Holocaust Memorial Museum

CHAPTER 1

INTRODUCTION

- 1.1 The Republic of The Gambia (“**The Gambia**”) has brought these proceedings against the Republic of the Union of Myanmar (“**Myanmar**”) by an Application instituting proceedings (the “**Application**” or “**AG**”) filed on 11 November 2019.¹ The Memorial of The Gambia (“**MG**”) was filed on 23 October 2020. The Counter-Memorial of Myanmar (“**CMM**”), was filed on 24 August 2023.² The Reply of The Gambia (“**RG**”) was filed on 23 May 2024. Myanmar now files the present Rejoinder (“**RM**”), in accordance with the order of the Court dated 16 October 2023, as amended by the order of the Court dated 21 November 2024.³
- 1.2 In accordance with Article 49, paragraph 3, of the Rules of Court, this Rejoinder does not unnecessarily repeat the contentions of Myanmar set out in its Counter-Memorial. Myanmar fully maintains those contentions. In any case where the Reply of The Gambia disagrees with anything stated in the Counter-Memorial of Myanmar, and nothing further about the matter is stated in this Rejoinder, the position of Myanmar remains as stated in its Counter-Memorial.
- 1.3 In accordance with Practice Direction II, a short summary of the reasoning of Myanmar in this case is provided in Chapter 16 of this Rejoinder.
- 1.4 For ease of reference, this Rejoinder, to the extent possible, follows the same structure as the Counter-Memorial of Myanmar. Abbreviations used in the Counter-Memorial have the same meaning when used in this Rejoinder, and *vice versa*.

¹ Paris, 9 December 1948, *United Nations Treaty Series*, vol. 78, p. 277. The text of the English version of the Genocide Convention is reproduced in the Memorial of The Gambia (“**MG**”), Vol. II, Annex 1. The official Chinese, English, French, Russian and Spanish versions are annexed to the Preliminary Objections of Myanmar, Replacement Annex 1.

² The relevant prior procedural history is set out at CMM, paras. 1.1 to 1.6.

³ In the Counter-Memorial of Myanmar, as in this Rejoinder, references to “**MG**” are to the Memorial of The Gambia, and references to “**CMM**” are to the Counter-Memorial of Myanmar. In this Rejoinder, references to “**RG**” are to the Reply of The Gambia, and references to “**RM**” are to the present Rejoinder of Myanmar. Where no volume number is given in a reference to one of these pleadings, the reference is to Volume I.

- 1.5 The claim of The Gambia is that acts of genocide were committed against the Bengali-speaking population in northern Rakhine State by Myanmar's security forces during the course of military operations in 2016 and 2017. The operations were a response to ongoing terrorist attacks by the Arakan Rohingya Salvation Army ("ARSA"). The Gambia appears not to dispute the presence and activities of ARSA in the area at the time, but now claims in its Reply that these were a "pretext to engage in a massive campaign of genocidal violence".⁴ Myanmar denies this.
- 1.6 As the written pleadings of Myanmar demonstrate, although there are hundreds of Bengali villages in northern Rakhine State,⁵ the evidence relied on by The Gambia in its Memorial in fact only alleges acts of violence by the Myanmar Defence Services in 40 locations, and in its Rejoinder such acts are alleged in a further three locations. Most of this evidence only relates to the three locations of Min Gyi, Chut Pyin and Maung Nu. While the loss of life is alleged to be relatively large in these three main locations, in relation to some of the other 40 locations, the evidence does not even *allege* anything more than a single incident involving a single victim, or a very small number of victims, and often not involving even a single fatality. In relation to these locations, the evidence of the alleged mistreatment is so weak and lacking in evidential weight that it clearly is incapable of proving that the alleged mistreatment occurred. In relation to the remaining several *hundreds* of Bengali villages across northern Rakhine State, The Gambia presents no evidence whatsoever of mistreatment by members of the Myanmar Defence Services toward any member of the civilian population.
- 1.7 The Gambia does not even seek to quantify the number of casualties who are said to have been civilians *not* participating in ARSA's activities, and who are said to have been deliberately targeted by the Myanmar security forces, as opposed to being collateral casualties of the fighting between the Myanmar security forces and ARSA, or casualties of conduct of ARSA. The Gambia merely makes an unsubstantiated

⁴ RG, para. 9.9.

⁵ As of August 2017 there were 897 villages and 35 wards in northern Rakhine State (a total of 932 locations), of which 465 villages and 13 wards (a total of 478 locations) were entirely inhabited by Bengalis, and 13 villages and 18 wards (a total of 31 locations) were partially inhabited by Bengalis. There were thus 509 locations in northern Rakhine State that were wholly or partly inhabited by Bengalis. See paragraph 8.14 below.

global claim that the “overall death count is at least 10,000”.⁶ This figure is not accepted by Myanmar. However, even if the figure could be assumed to be correct (*quod non*), and even if it were to be assumed that every single person included within that figure was an innocent civilian not taking part in the violence who was deliberately targeted by the Myanmar security forces (*quod non*), that figure is still a miniscule percentage (less than 1%) of the overall population of some 1.4 million Bengalis living in northern Rakhine State at the time.⁷ In the *Croatia Genocide* case, in circumstances where it was alleged that a similar percentage of the population had been killed (12,500 out of a population of 1.7 to 1.8 million), the Court found that genocide had not been proved, and that “the number of victims alleged ... is small in relation to the size of the targeted part of the group”.⁸

1.8 In its Counter-Memorial, and in this Rejoinder, Myanmar considers in detail the individual items of evidence relied on by The Gambia and by Myanmar. Myanmar considers both the quality and evidential weight of individual items of evidence, as well as their content. Myanmar furthermore considers in detail the applicable legal principles, and their application to the facts disclosed by the evidence.

1.9 However, the pleadings of The Gambia contain no comparably detailed analysis of the evidence and the law.

(1) The Gambia confines itself largely to referring to the contents of reports of the United Nations International Fact-finding Mission on Myanmar (the “FFM”), and reports of various other United Nations bodies and officials, NGOs and other bodies. The Gambia simply assumes the correctness of the contents of these reports, without any critical analysis. From those reports, The Gambia selects passages that support its case, and ignores other passages in those reports, and other items of evidence, that are inconsistent with its case and cannot be explained within its narrative.

⁶ RG, para. 9.11.

⁷ CMM, paras. 13.122-13.138 and 13.149-13.152; see also this Rejoinder, paragraphs 13.86(6)-(7), 13.96, 13.128, and 13.140 below.

⁸ See CMM, paras. 13.149-13.151.

- (2) The Reply of The Gambia often just repeats arguments from its Memorial, and simply ignores the answers to those arguments given by Myanmar in its Counter-Memorial, to which The Gambia apparently has no answer.⁹
- (3) The pleadings of The Gambia make bold and sweeping claims that are unsupported by, or indeed, even contradicted by, the evidence. Most pertinently, The Gambia claims that evidence shows the “same pattern of conduct—the same *modus operandi*—of the ‘clearance operations’ in villages throughout northern Rakhine State”¹⁰ when it is plainly obvious that the evidence in fact indicates precisely the contrary (see paragraph 1.6 above).¹¹
- (4) The Gambia continues to resort to emotive rhetoric that is not justified by the evidence in the case.¹² It makes repeated references to aspects of Nazi war crimes trials or the Holocaust that have no demonstrable factual similarity to the present case.¹³ It continues to refer repeatedly to IDP camps as “internment camps”,¹⁴ despite not denying the evidence (which includes a report of the Danish Refugee Council and UNHCR) that no one is forced to reside in an IDP camp and that residents are free to leave.¹⁵ It continues to refer to the Myanmar Citizenship Law (1982) as having “denationalised” large numbers of people, even though it does not dispute that everyone who was a citizen under the previous law became a citizen under the Citizenship Law (1982), and now accepts that not all Bengalis had Burmese citizenship at the time that the Citizenship Law (1982) came into force.¹⁶

⁹ See for instance paragraphs 2.5, 3.3-3.4, 3.21, 3.58, 3.88, 3.112, 3.114, 8.67, 8.140, 9.16, 10.21, 10.46, 10.76, 12.59, 12.96, 12.104, 13.42, 13.147 below.

¹⁰ RG, para. 7.48.

¹¹ See generally Chapters 8 and 9 below.

¹² For example, RG, paras. 1.4 (“final solution”), 5.16 (“eviscerate”).

¹³ See CMM, paras. 10.6, 11.110, and this Rejoinder, paragraphs 10.65, 10.73, 10.90, 10.105 below.

¹⁴ RG, paras. 5.53-5.56, 9.20, 9.66-9.67, 9.68.

¹⁵ See CMM, paras. 10.181-10.182, 10.198-10.208.

¹⁶ See paragraphs 10.14, 10.19, 10.22, 10.26-10.27 below.

- (5) The Gambia furthermore relies on various arguments that are circular or otherwise fallacious, or which simply assume what The Gambia seeks to prove.¹⁷
- (6) The Gambia also makes erroneous suggestions that the burden of proof is somehow on Myanmar to prove that genocide was not committed.¹⁸
- 1.10 The Gambia superficially accepts that the legal principles that fall to be applied in this case are those found in the Court’s judgments on the merits in the *Bosnia Genocide* case¹⁹ and the *Croatia Genocide* case.²⁰ However, without acknowledging that it is doing so, The Gambia in fact seeks to alter those principles fundamentally.
- 1.11 First, The Gambia in fact seeks to expand radically the substantive scope of the Genocide Convention. The Court’s established case law makes clear that the scope of the Convention is limited “to the physical or biological destruction of the group”.²¹ However, The Gambia argues that various acts or measures fall within the *actus reus* of genocide under sub-paragraphs (a) to (d) of Article II of the Convention, notwithstanding that there is clearly no evidence that the acts or measures in question contributed to the physical or biological destruction of *the group as such*, or that they were capable of bringing about its physical destruction in whole or in part, or that they were intended to do so.
- 1.12 The Gambia’s allegations concerning “discriminatory laws and policies” in the decades preceding the counter-terrorism operations are a particularly obvious example of this.²² Originally, The Gambia’s application instituting proceedings did not allege that any acts or measures prior to the commencement of the operations themselves

¹⁷ See CMM, paras. 10.5, 12.4, 14.12; and this Rejoinder, paragraphs 4.13, 10.59, 12.11, 12.32, 12.37, 12.38, 12.44, 12.58, 12.111-12.112, 13.55(5), 14.14, 14.18.

¹⁸ See CMM, paras. 12.33, 12.68; and this Rejoinder, paragraphs 10.25, 10.96, 11.12, 12.18, 12.27, 13.89, 13.164.

¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 4 (“*Bosnia Genocide case*”).

²⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3 (“*Croatia Genocide case*”).

²¹ *Croatia Genocide case*, p. 63, para. 136. See also *Bosnia Genocide case*, p. 186, para. 344.

²² These alleged discriminatory laws and policies are dealt with in MG, Chapter 6; CMM, Chapter 10; RG Chapter 5; and Chapter 10 of this Rejoinder.

amounted to genocide.²³ Nor does its Memorial.²⁴ Rather, these alleged discriminatory laws and policies were originally presented only as backdrop facts that were said to be relevant to proving the existence of a genocidal intent in 2016-2017. However, the Reply of The Gambia now contends that:

- (1) the alleged discriminatory laws and policies were “conditions of life calculated to bring about [the] physical destruction” of the Bengali population of northern Rakhine State, within the meaning of Article II (c) of the Genocide Convention;²⁵ and
- (2) the alleged restrictions on births in Maungdaw Township imposed by Regional Order 1/2005 in the period 2005-2018 were “measures intended to prevent births” within the meaning of Article II (d) of the Genocide Convention.²⁶

Myanmar’s position is that these additional claims fall outside the ambit of the dispute submitted to the Court in the application instituting proceedings, and that the Court should therefore not entertain them. Without prejudice to this position, Myanmar also responds substantively to these claims.

- 1.13 There is no evidence that these alleged discriminatory laws and policies contributed to the physical or biological destruction of the Bengali population of northern Rakhine State as such, or were capable of bringing about its physical destruction in whole or in part, or were intended to do so. However, The Gambia nonetheless maintains that alleged discriminatory “restrictions on movement; on citizenship; on marriage and births; and on access to food, humanitarian assistance, education, health services, and

²³ See CMM, para. 1.7 footnote 3.

²⁴ See CMM, para. 1.7 footnote 3, and paras. 10.1-10.4.

²⁵ RG, para. 9.17. The Gambia suggests (*ibid.*) that it has “clearly alleged” this in MG, paras. 12.14-12.18. However, for the reasons given in para. 1.7 footnote 3, and paras. 10.1-10.4 of the Counter-Memorial of Myanmar, this claim was clearly *not* made in the application instituting proceedings, and was not made in the Memorial of The Gambia. Alternatively, at the very least, this claim was not made clearly and expressly in the Memorial of The Gambia, such that the Memorial, when read together with The Gambia’s application instituting proceedings, must be understood as not making this claim.

²⁶ RG, para. 9.21. The Gambia claims (*ibid.*) that “The Gambia presented those facts as part of the Article II (d) *actus reus* in Chapter 12 of the Memorial”. For the reasons given in para. 1.7 footnote 3, and paras. 10.1-10.4 of the Counter-Memorial of Myanmar, this claim was clearly *not* made in the application instituting proceedings, and was not made in the Memorial of The Gambia. Alternatively, at the very least, this claim was not made clearly and expressly in the Memorial of The Gambia, such that the Memorial, when read together with The Gambia’s application instituting proceedings, must be understood as not making this claim.

livelihoods” are genocidal acts falling within Article II (c) and (d) of the Convention,²⁷ and that the fact of the adoption of these measures is itself proof that they were adopted with a genocidal intent.²⁸ The submissions of The Gambia seek declarations from the Court requiring “the protection of the Rohingya against discrimination and persecution”, “the right of the Rohingya to identify as such”, “the liberty and freedom of movement of the Rohingya within Myanmar”, removal of “any restriction or discrimination on the employment or access to livelihoods”, and the provision of “full and equal citizenship to all members of the Rohingya group”. The Gambia thereby seeks to use the Genocide Convention as a basis for litigating a broad human rights agenda going far beyond the definition of genocide under the Genocide Convention. However, the Court has no jurisdiction to determine, or to grant any remedies in respect of, alleged violations of any human rights norms other than the Genocide Convention.

- 1.14 Secondly, The Gambia in fact seeks to lower substantially the standard of proof for allegations of violations of the Genocide Convention. The Gambia superficially accepts that the Court cannot infer the existence of a genocidal intent from the circumstances unless this is the *only* reasonable inference that can be drawn.²⁹ However, The Gambia erroneously claims that this a lower standard of proof than the “beyond reasonable doubt” standard applied by international criminal courts and tribunals,³⁰ and seeks to give this standard of proof a different effect to that which it was given in the earlier case law of the Court.

- (1) In the *Bosnia Genocide* case, in relation to all locations other than Srebrenica, the Court found that the existence of a genocidal intent was not the only reasonable inference, notwithstanding that “widespread and serious atrocities”

²⁷ RG, para. 9.17.

²⁸ RG, para. 3.14: “the discriminatory practices imposed by Myanmar on the Rohingya, together with the rhetoric which denied their legal right to live in Myanmar and described them as an existential threat to other ethnic groups in Myanmar, expose the intention behind the killings and extreme violence which took place during the ‘clearance operations’”.

²⁹ MG, paras. 1.6, 1.52, 4.47, 11.5, 12.106-12.107, 12.111, 12.113, and the headings above paras. 4.46 and 12.104; RG, paras. 1.5, 1.19, 3.28, 3.33-3.36, 3.48, 5.31, 9.5, 9.25, 9.33, 9.98, and the heading above para. 9.36.

³⁰ See paragraphs 5.21-5.40 below.

had been committed,³¹ and notwithstanding a claimed “pattern of genocidal or potentially acts of genocide committed throughout the territory”.³² This was because the Court found that the evidence would also be consistent with an intent “to create a larger Serb State, by a war of conquest if necessary”, requiring the expulsion of other populations but not necessarily their destruction.³³

- (2) In the *Croatia Genocide* case, in relation to Croatia’s claim, the Court found that the existence of a genocidal intent was not the only reasonable inference, notwithstanding “the existence of a pattern of conduct that consisted ... in widespread attacks ... on ... populations in various regions ..., according to a generally similar *modus operandi*”.³⁴ This was because the Court found that the evidence would also be consistent with an intent “not ... to destroy the Croats, but rather ... [to] forc[e] them to leave the regions concerned so that an ethnically homogeneous Serb State could be created”,³⁵ or with an intent to “punish[, and terribly so], the civilian population as an example to others,³⁶ or an intent “to punish [prisoners of war] because of their status as enemies, in a military sense”.³⁷ The Court also found that the existence of a genocidal intent was not the only reasonable inference because “the number of victims alleged ... [was] small in relation to the size of the targeted part of the group” and the applicant had not shown “that the perpetrators ... availed themselves of opportunities to destroy a substantial part of the protected group”.³⁸
- (3) In the *Croatia Genocide* case, in relation to Serbia’s counter-claim, the Court found that the existence of a genocidal intent was not the only reasonable inference because the acts “were not committed on a scale such that they could only point to the existence of a genocidal intent”,³⁹ and because the Court found

³¹ *Bosnia Genocide* case, p. 198, para. 376.

³² *Ibid.*, p. 194, para. 370.

³³ *Ibid.*, p. 196, para. 372.

³⁴ *Croatia Genocide* case, p. 122, para. 416.

³⁵ *Ibid.*, pp. 124-125, paras. 426-428.

³⁶ *Ibid.*, p. 125, para. 429.

³⁷ *Ibid.*, p. 126, para. 430.

³⁸ *Ibid.*, p. 127, para. 437.

³⁹ *Ibid.*, p. 151, para. 512.

that the evidence would also be consistent with an intent “to inflict damage upon [the group] or to remove it from a territory”, rather than to destroy it.⁴⁰

- (4) In contrast, in the present case, The Gambia apparently suggests that if the evidence would be consistent with the existence of a genocidal intent, then the existence of such an intent must be assumed, unless Myanmar positively asserts and proves the existence of some other intent that did not involve the destruction of the group.⁴¹ At the same time, The Gambia argues that because a genocidal intent can co-exist with another intent or motive, the existence of any intent or motive other than a genocidal intent should simply be ignored.⁴² The practical effect of this argument, if accepted, would be that a genocidal intent must be found to be established if that is *one* possible explanation of the evidence. That would completely contradict the established case law of the Court. The Gambia goes even further, suggesting that the existence of a genocidal intent can be a possible explanation even if there are only two or three victims,⁴³ which is also inconsistent with the established case law of the Court.⁴⁴

- 1.15 These attempts by The Gambia to alter dramatically the established case law of the Court should not be accepted. The Court should apply its settled jurisprudence, not only in order to ensure consistency and certainty in the application of the law, but also in order to respect the terms of the Genocide Convention itself. The terms of treaties are carefully negotiated by States. The willingness of States in future to enter into multilateral treaties will be undermined if such carefully negotiated terms are subsequently given expansive interpretations and applications that exceed anything that the parties ever intended. That is all the more so in a case such as the present, where such an expansive interpretation would also have the consequential result of

⁴⁰ *Ibid.*, p. 151, para. 514.

⁴¹ RG, para. 9.26 (“Myanmar fails to establish the existence of any other reasonable inference to be drawn”), 9.34 (“In this case, the Court is presented with only two competing theories of Myanmar’s intent: The Gambia’s case for genocide, or Myanmar’s case for counter-terrorism”).

⁴² See paragraphs 4.37-4.48 below.

⁴³ RG, para. 3.19.

⁴⁴ See paragraphs 4.52-4.57 below.

expanding the scope of the compromissory clause in the treaty, to include matters that the parties never intended to subject to the jurisdiction of the Court.

- 1.16 According to the Court's settled jurisprudence, The Gambia bears the burden of proving all legal elements of the claimed breaches of the Convention, in accordance with the very high standard of proof that applies in cases of this kind. In the *Bosnia Genocide* case and the *Croatia Genocide* case, the Court did not require the respondent State to plead, let alone prove, an alternative explanation of the evidence. In those cases, the respondents to the claims and counter-claim did not plead or seek to prove that they had engaged in ethnic cleansing rather than genocide, or that they engaged in the collective punishment of the civilian population rather than genocide, and the Court made no finding as to whether or not this is what had occurred. The Court simply found that the applicant State had not proved that a genocidal intent was the only reasonable inference, since alternative explanations not involving a genocidal intent were a reasonable *possibility*.
- 1.17 In the present case, even if it could be demonstrated that there were certain violations of international human rights law or international criminal law during the conduct of the counter-terrorism operations of 2016 and 2017 (which is not accepted by Myanmar), The Gambia has not established that the evidence excludes any possible reasonable explanation not involving a genocidal intent, such as the kind identified in the *Bosnia Genocide* case and the *Croatia Genocide* case. For instance, the Investigation Commission for Maungdaw in Rakhine State contemplated that "there could have been actions that were not in accordance with the law, excessive actions on the part of individual members of security forces".⁴⁵ Myanmar does not accept that disproportionate use of force, intentional killings or intentional displacement have been established by The Gambia, or that The Gambia has established any failure by Myanmar to exercise all due diligence to investigate and prosecute any allegations, but even if The Gambia had established all of this (*quod non*), The Gambia does not explain why the evidence would exclude, even as a reasonable *possibility*, the

⁴⁵ See CMM, para. 12.98, and Summary of the Report of Investigation Commission for Maungdaw in Rakhine State, 8 August 2017, p. 11, paras. 37-39 and 47, MG, Vol. VI, Annex 149.

explanation that there was a disproportionate use of force not involving a genocidal intent.

- 1.18 As is demonstrated in the Counter-Memorial of Myanmar, and in this Rejoinder, if the settled case law of the Court is followed, the application of The Gambia must fail.

PART ONE

CHAPTER 2

BACKGROUND FACTS

A. Introduction

- 2.1 Chapter 2 of the Counter-Memorial of Myanmar sets out relevant background facts relating to Myanmar (formerly known as Burma), Rakhine State (formerly known as Arakan), Bengal (the present-day territory of Bangladesh and West Bengal State in India), the Muslim population in northern Rakhine State, and the names “Rohingya”, “Bengal(i)” and “kala”.
- 2.2 The Reply of The Gambia contains no chapter addressing this chapter of the Counter-Memorial. Indeed, the Reply of The Gambia does not respond at all to the vast majority of the facts stated in Chapter 2 of the Counter-Memorial. The Court should proceed on the basis that those facts which have not been addressed by The Gambia are not contested. These uncontested facts include amongst others the following.
- (1) The majority of the Bengali population in northern Rakhine State is the result of migrations into that region from Bengal during the British colonial period (1826-1948),⁴⁶ and from illegal immigration into Burma/Myanmar from East

⁴⁶ CMM, paras. 2.37-2.49, and 2.118-2.132. In addition to the documents referred to in these paragraphs of the Counter-Memorial of Myanmar, the following is additionally noted. The 1911 census report of Burma stated as follows: “For some time subsequent to the annexation of Pegu [Lower Burma] by the British in 1852, the policy of the Government was to intervene actively to promote the migration of cultivators from India to Burma” (Census of India, 1911, Vol. IX, Burma (Government Printing, Burma, Rangoon, 1912), p. 75, para. 76, RM, Vol. IV, Annex 108. However, the 1911 census report went on to note that “With the exception of the agricultural immigrants from Chittagong into the district of Arakan, few Indians come to Burma with the intention of embarking in agriculture” (*ibid.*, p. 76, para. 77). One historian notes that: “Within two decades of the conquest [of Burma by the British] the majority of the Burmese farmers had lost their lands to the Indian moneylenders, but, even as paid laborers working on the very land they used to own, they had to compete with Indian laborers, who came in thousands. ... The obvious measure the British government should have taken was to restrict the immigration of Indian laborers, but again it refused to recognise the separate identity of the Burmese; as Burma was merely an Indian province, it seemed only right that Indians should come and go at will.” (Maung Hin Aung, *A History of Burma* (Colombia University Press, 1967), p. 273, RM, Vol. II, Annex 35). Another historian notes that: “The British had initially hoped that Burma might be a back door to China. But for the Burmese, British rule led instead to a much closer connection with India than ever before. Rather than making Burma a separate colony (like Ceylon, now Sri Lanka), the one-time kingdom was annexed to British India, and governed as just another province, no different than, say, Bengal or the Punjab. In the early twentieth century, Burma enjoyed a higher standard of living than India and was far less densely populated. And as the economy grew, there was a need for cheap labour as well as entrepreneurial and professional skills. All this came from India, with movement into Burma unchecked and for a long time positively encouraged. By the late 1920s

Pakistan/Bangladesh since independence.⁴⁷ Figures from the 1931 census indicate that some 79% of Bengalis in Arakan (Rakhine) at that time were the result of such migrations during the British colonial period.⁴⁸

- (2) During the British colonial period, the Bengali-speaking Muslim communities that had been in northern Arakan (Rakhine) since before the British colonial period referred to themselves as Arakan-Mahomedans or “*Yakaing-kala*”, and were referred to by the British colonial authorities as such.⁴⁹ In contrast, the Bengali Muslim communities in northern Arakan resulting from migrations during the colonial era were referred to by the British colonial authorities as “Bengali-Mahomedans” and “Chittagonian-Mahomedans”.⁵⁰ There is evidence that these pre-colonial era communities and these colonial-era communities regarded themselves as separate groups.⁵¹ There is no evidence that they regarded themselves as a single group.
- (3) A single article by Francis Buchanan published in 1799 contains a single reference to “the *Mohammedans* ... in *Arakan* ... who call themselves *Rooinga*”.⁵² Three other known publications from 1811 and 1815 cite this reference in Buchanan’s publication.⁵³ The reference to “*Rooinga*” in Buchanan’s article does not establish that “the Mohammedans ... in Arakan” self-identified by that name at the time.⁵⁴ There is no other known text published prior to the 1940s that contains any reference to the name “Rohingya” or any

Rangoon even exceeded New York as the greatest immigrant port in the world and this influx turned Rangoon into an Indian city, with the Burmese reduced to a minority.” (Thant Myint-U, *Where China Meets India: Burma and the New Crossroads of Asia* (2011), RM, Vol. II, Annex 39.).

⁴⁷ CMM, paras. 2.46, 2.52-2.58, 2.65.

⁴⁸ CMM, para. 2.132.

⁴⁹ CMM, paras. 2.36, 2.108, 2.118-2.135.

⁵⁰ CMM, paras. 2.124-2.135.

⁵¹ CMM, paras. 2.108, 2.124-2.125 and 2.136-2.137.

⁵² CMM, paras. 2.111-2.114.

⁵³ CMM, paras. 2.115-2.116.

⁵⁴ CMM, paras. 2.113-2.114.

variation thereof.⁵⁵ Myanmar has invited The Gambia to produce any other such pre-1940s publication if it can.⁵⁶ The Gambia has not been able to do so.

- (4) The name “Rohingya” (and variations thereof) began to be used from the late 1940s by certain individuals and organisations who promoted the creation of a shared identity for Muslims in Arakan.⁵⁷ The name has been described as a “political label seeking to associate a number of Muslim communities rather than an established ethnic identification”.⁵⁸ Use of this name grew over the decades subsequent to the 1940s, but did not become commonplace until the 21st century.⁵⁹
- (5) Even into the 21st century, certain international publications have continued to refer to the Bengali population in northern Rakhine State as “Bengalis”. The *International Encyclopaedia of Linguistics*, published in 2003 by Oxford University Press, states that a “Rohinga” is “[a]n ethnic Bengali Muslim who speaks the Muslim variety of Chittagonian Bengali and was born in Arakan State”.⁶⁰ A 2004 report of a UN Special Rapporteur refers to “the Bengali people residing in northern Rakhine State”.⁶¹
- (6) The word “kala” is a word in the Myanmar language originally denoting a foreigner from somewhere to the west of Myanmar, and was historically used to refer to those coming from South Asia, the Middle East or Europe.⁶² There is evidence that members of the Bengali communities that already existed in Arakan in pre-colonial times still called themselves “*Yakaing-kala*” in 1921.⁶³ The word “kala” (or “kalar”) has never been used officially in Myanmar, and

⁵⁵ CMM, paras. 2.115-2.116.

⁵⁶ CMM, para. 2.116.

⁵⁷ CMM, paras. 2.138-2.147.

⁵⁸ CMM, para. 2.160 (Derek Tonkin, former British diplomat). See also CMM, paras. 2.159 (Myanmar-Institute of Strategic and International Studies), 2.161 (International Crisis Group), and 13.6-13.7.

⁵⁹ CMM, paras. 2.148-2.154, 13.6-13.7.

⁶⁰ CMM, para. 2.149.

⁶¹ CMM, para. 2.153.

⁶² CMM, paras. 2.168-2.169.

⁶³ CMM, para. 2.125.

there are differences of view on the extent to which it is considered offensive today.⁶⁴

- (7) On two previous occasions, in 1978 and 1991-1992 respectively, large numbers of Bengalis crossed from northern Rakhine State into Bangladesh where they lived in camps, and were subsequently repatriated to Myanmar pursuant to arrangements between Myanmar and Bangladesh.⁶⁵
- (8) From October 2017, the Government of Myanmar entered into arrangements with the Government of Bangladesh for the repatriation to Myanmar of those who crossed from northern Rakhine State into Bangladesh following the counter-terrorism operations of 2016 and 2017.⁶⁶
- (9) Internal insurgencies and communal violence have also led to many people of other ethnicities and religions in different parts of Myanmar becoming internally displaced, or fleeing into neighbouring countries.⁶⁷

2.3 The facts in Chapter 2 of the Counter-Memorial of Myanmar that have been disputed by The Gambia are addressed below.

B. The name “Rohingya”

2.4 The Reply of The Gambia continues to maintain that “historical accounts going back centuries show references to the Rohingya language and identity”.⁶⁸

2.5 That statement is unsustainable in the light of what is stated in paragraphs 2.111 to 2.116 of the Counter-Memorial of Myanmar and in paragraph 2.2(3) above. The Gambia simply ignores, and does not engage with or respond to, what is stated in paragraphs 2.111 to 2.116 of the Counter-Memorial. For the reasons given in the Counter-Memorial, the single reference in the article by Francis Buchanan published

⁶⁴ CMM, paras. 2.168-2.170.

⁶⁵ CMM, paras. 2.59-2.65, and 2.68-2.69.

⁶⁶ CMM, paras. 2.94-2.106.

⁶⁷ CMM, paras. 1.46(12), 2.6-2.7, 10.70-10.72, 10.189, 16.28.

⁶⁸ RG, para. 2.11.

in 1799 does not establish that Bengali speakers in Arakan at the time self-identified by the name “Rohingya” or any variation thereof.⁶⁹ The complete absence of any reference to “Rohingya” or any variation thereof in any publication prior to the 1940s, apart from Buchanan’s article, and three other articles in the early 19th century that merely cite Buchanan’s article, is very strong evidence to the contrary.

- 2.6 Indeed, a report published in 2002 by the NGO Minority Rights Group International states that:

Ethnic Rakhines, however, are not the only inhabitants of the state [Rakhine State]. In addition to Chin, Mro and other hill peoples, there is a substantial population of anywhere between 700,000 and 1.5 million Muslims, especially in the Bangladesh borders, where they have been known in recent years by the collective name of Rohingya. As a term of “ethnic” identity, however, this name has attracted much controversy.⁷⁰

Thus, in 2002, the name Rohingya was described by this NGO as a term that had been used in “recent years” as a “collective name” for Muslims living in northern Rakhine State.

C. Language

- 2.7 The Reply of The Gambia is not clear as to whether or not The Gambia claims that all Bengalis in Rakhine State:

- (1) speak an identical language or dialect; and/or
- (2) speak a language or dialect that is different to that spoken in neighbouring areas of Bangladesh.

- 2.8 As to the first of these matters, The Gambia appears to accept that there may be variations in the dialect spoken by Bengalis in northern Rakhine State. Myanmar has pointed out that the evidence does not show that all Bengali speakers in Rakhine State

⁶⁹ CMM, paras. 2.113-2.114.

⁷⁰ M. Smith, “Burma (Myanmar): The Time for Change”, Minority Rights Group International (2002), p. 18, RM, Vol. V, Annex 153.

speak the same dialect or language.⁷¹ The Gambia responds to this argument by saying that “what must be shown is a shared language ..., not [an] identical one[.]”.⁷²

2.9 As to the second of these matters, The Gambia also appears to accept that Bengalis in northern Rakhine State may speak the same language or dialect as that spoken in neighbouring areas of Bangladesh. The Gambia apparently rejects the suggestion that it needs to show that the language spoken in northern Rakhine State is “distinct from any other language or culture in the world”.⁷³ The Gambia argues instead that there is “a distinct language or dialect spoken by all members of the Rohingya group”.⁷⁴ The Gambia thereby suggests that it is immaterial whether or not the same language or dialect is also spoken in Bangladesh.

2.10 There is evidence that Bengalis in northern Rakhine State speak the same dialect of Chittagonian that is spoken in the neighbouring area of Bangladesh.⁷⁵ As has been noted, the *International Encyclopaedia of Linguistics*, published in 2003 by Oxford University Press, states that a “Rohinga” “speaks the Muslim variety of Chittagonian Bengali”.⁷⁶

2.11 Other evidence suggests that Chittagonian is a continuum of dialects that extends from the north of Chittagong District in Bangladesh to central Rakhine State in Myanmar.⁷⁷ It has been reported that:

According to a TWB [Translators Without Borders] language assessment last year, Rohingya speakers estimated that there was a 70 percent similarity between Chittagonian and Rohingya. It also noted that on the other hand, Chittagonian speakers

⁷¹ CMM, para. 13.10.

⁷² RG, para. 2.5.

⁷³ RG, para. 2.2.

⁷⁴ RG, para. 2.6. See also RG, para. 2.4.

⁷⁵ CMM, paras. 2.16-2.23. See also M. Tanha et al., “Rohingya refugees and its impact on informal economy: Cox’s Bazar, Bangladesh” (2023) *Journal of Governance and Accountability Studies*, p. 63, at p. 67, RM, Vol. II, Annex 48, citing M. Mukta, “Radio in the Lives of Rohingyas in Camps in Bangladesh”, *Citizenship, Nationalism and Refugeehood of Rohingyas in Southern Asia* (2020), 189-196: “The native dialect spoken in Cox’s Bazar area resembles the Rohingya language, which facilitates seamless communication and integration with the local population”.

⁷⁶ See paragraph 2.2(5) above, and CMM, para. 2.149.

⁷⁷ CMM, para. 2.17.

estimated a 90 percent similarity between the Cox's Bazar dialect of Chittagonian and Rohingya.

Similarities increase with geographical proximity. "The dialect spoken in southern Chittagong, such as in Teknaf, and townships in northern Rakhine are very similar," says Rahim [a socio-linguistic researcher]. Conversely, Chittagonian further north such as in Chittagong city and Rohingya spoken further down in Rakhine towards Sittwe, are "almost different languages because they are so geographically far apart". For example, the local dialect spoken in the Maungdaw area of Rakhine is particularly close to Chittagonian, while that spoken in Buthidaung, further inland, is slightly different.⁷⁸

- 2.12 Although The Gambia disputes the relevance of this,⁷⁹ it is significant. If each variation on this continuum were to be treated as a relevantly different language, then the result would be that Bengalis in different parts of northern Rakhine State in fact speak different languages. Those in Maungdaw would speak a different language to those in Buthidaung, despite both being in Rakhine State in Myanmar. If so, it would not be the case that all Bengali Muslims in northern Rakhine State "share a common language".⁸⁰ On the other hand, if the Chittagonian dialect of Bengali is treated as a single language or dialect, then Bengalis in northern Rakhine State speak the same language or dialect as others in the neighbouring region of Bangladesh.
- 2.13 Contrary to what The Gambia claims, Myanmar did not in its Counter-Memorial misrepresent what was said by Dr Elliott Prasse-Freeman.⁸¹ The words that The Gambia claims were omitted from Myanmar's Counter-Memorial are in fact reflected in the statement in paragraph 13.13 of the Counter-Memorial that "linguistic differences are relied on by those seeking to promote a 'Rohingya' identity ...". The statement by Dr Prasse-Freeman that "dialectal variation ... is held up by Rohingya themselves as a way of marking difference" cannot be read as saying anything more than this. Dr Prasse-Freeman states no more than that those seeking to promote a "Rohingya identity" *claim* that there is a dialectical variation which distinguishes those in Myanmar from those in Bangladesh. Dr Prasse-Freeman cannot be read as stating that *the generality* of Bengalis in northern Rakhine State perceive themselves

⁷⁸ M. Khan, "Chatgaya vs. Rohingya", *The Daily Star*, 7 September 2018, RM, Vol. V, Annex 202.

⁷⁹ RG, para. 2.6.

⁸⁰ RG, para. 1.12.

⁸¹ RG, para. 2.7, referring to CMM, para. 13.13.

to be speaking a language that is different from the language spoken in the neighbouring region of Bangladesh. On the contrary, Dr Prasse-Freeman concludes that “more research must be done on the extent of the dialectal differences along the continuum connecting Rohingya with Chittagongian Bengali”, and that “the fact of dialectal variation alone does not *prove* that a sociologically meaningful ethnic distinction exists”.⁸²

2.14 The Gambia says that it established in paragraphs 3.6 and 3.7 of its Memorial that “the Rohingya language has been spoken in what is now Myanmar for at least the last two centuries”.⁸³ That is incorrect.

(1) The only evidence cited by The Gambia for that statement is the 1799 publication by Francis Buchanan, which has already been dealt with above. Writing in his diary in 1795, Francis Buchanan said of the three people from Arakan who were brought to him that “Their language was evidently the same with that of Bengal”, and he added that “They said that the Bengala name for Arakan is Rooinga”.⁸⁴ The information in Buchanan’s publication does not mean that those people self-identified by the name “Rooinga” or that they called their language by that name: they were simply stating that they were from Arakan.⁸⁵ Apart from the 1799 publication of Francis Buchanan and three other 19th century publications that specifically cite Buchanan,⁸⁶ Myanmar is not aware of a single text published prior to the 1940s that refers to Bengalis in Arakan or their language by the name “Rohingya”, or any variation thereof.⁸⁷

(2) The 1891 census, speaking of Maungdaw Township (which until 1911 was known as Naaf Township), says that “Naaf township ... is largely populated

⁸² E. Prasse-Freeman and K. Mausert, “Two Sides of the Same Arakanese Coin: ‘Rakhine’, ‘Rohingya’, and Ethnogenesis as Schismogenesis”, in P. Chachavalpongpun, E. Prasse-Freeman and P. Strefford (eds), *Unraveling Myanmar: Critical Hurdles to Myanmar’s Opening Up Process* (Kyoto University Press 2020), MG, Vol. VIII, Annex 236, p. 12, quoted in CMM, para. 13.13.

⁸³ RG, footnote 18 and accompanying text. See also RG, footnote 37 and accompanying text, contending that “historical accounts going back centuries show references to the Rohingya language and identity”.

⁸⁴ CMM, para. 2.113.

⁸⁵ CMM, paras. 2.113-2.114.

⁸⁶ CMM, paras. 2.115-2.116.

⁸⁷ CMM, paras. 2.115-2.117.

by Bengalis knowing no Arakanese”, and that “[b]efore another census is taken it should be considered whether the Naaf schedules should not be prepared in Bengali”.⁸⁸

- (3) The 1891 census report further notes that in the 1872 census, the classification of “Arakanese” was determined by birth, while in the 1881 census it was determined by language spoken, with the result that “many who were returned as Arakanese by birth in 1872 were returned as speaking Burmese, Hindustani, or Bengali in 1881”.⁸⁹
- (4) An official British colonial publication in 1917 states, in relation to Sittwe Township (then known as Akyab Township) that “The Arakanese are in the minority in this locality, no less than 60 per cent being Natives of India, mostly Chittagonians”.⁹⁰
- (5) The 1921 census used the terms “Bengali-Mahomedans” and “Chittagonian-Mahomedans” to refer to populations formed by migrations to Akyab District from Bengal Province during the British colonial period, and used the term “Arakan-Mahomedans” to refer to the pre-colonial era Muslim communities”.⁹¹
- (6) The 1931 census referred to “speakers of Indian languages”, and said that in Akyab district (the territory of present-day northern Rakhine State), “many of the Arakan Mahomedans [that is, members of communities that were already in Arakan prior to the British colonial period] have apparently returned Bengali as their mother tongue”.⁹²
- (7) Both the 1921 and 1931 censuses indicated that the populations formed by migrations into Akyab District from Bengal Province during the British

⁸⁸ Government of India, Census of 1891, Volume IX, Burma Report (Superintendent, Government Printing, Burma, 1892), Vol. I, Appendix D, p. xcvi, RM, Vol. IV, Annex 107.

⁸⁹ *Ibid.*, p. 160, para. 186.

⁹⁰ Burma Gazetteer, Akyab District, Volume A, compiled by R.B. Smart (1917), p. 223, RM, Vol. IV, Annex 109.

⁹¹ CMM, paras. 2.122-2.129.

⁹² CMM, para. 2.133.

colonial period significantly outnumbered the pre-colonial era Muslim communities.⁹³

Thus, in fact, for some 200 years, the language spoken by the Muslims in northern Arakan / Rakhine State, including by the communities that existed prior to the British colonial period themselves, has been referred to as Bengali or Chittagonian.⁹⁴

- 2.15 As to the term “kala”,⁹⁵ it is noted that the Myanmar-English Dictionary defines this term to mean, as a noun, “a native of the Indian subcontinent”, or, as an adjective, “of foreign origin”.⁹⁶

D. Self-identity

- 2.16 In its Counter-Memorial, Myanmar presents clear and direct evidence, in the form of a report by the United States Institute of Peace, that as of 2018, the majority of Bengalis in northern Rakhine State did not self-identify by the name “Rohingya”.⁹⁷
- 2.17 The Gambia refers to the Final Report of the Inquiry Commission on Sectarian Violence in Rakhine State,⁹⁸ which was published in 2013, and which is cited by Myanmar.⁹⁹ The Gambia claims that this report found that 85% of interviewees self-identified as Rohingya. It is misleading of The Gambia to state this. What the report stated was the following:

During its first field visit in the second week of September 2012, the Commission visited Bengali IDP camps and Bengali villages in the townships of Sittwe, Pauktaw, Rathe-Taung [Rathedaung], Butheetaung [Buthidaung] and Maungdaw, conducting

⁹³ CMM, paras. 2.126-2.134.

⁹⁴ RG, footnote 18 and accompanying text. See also RG, footnote 37 and accompanying text, contending that “historical accounts going back centuries show references to the Rohingya language and identity”.

⁹⁵ See CMM, paras. 2.168-2.172.

⁹⁶ *Myanmar-English Dictionary*, Union of Myanmar, Ministry of Education, Department of the Myanmar Language Commission (2008), p. 10, “kala”, RM, Vol. II, Annex 53 (additional to the extract at CMM, Vol. III, Annex 82). During the reign of King Mindon (1853-1878), there were officials appointed to represent and advocate for the interests of various communities, one of whom was the *Kala Wun* (Minister for Kala). (Mya Kay Tu, *Records of Royal Tradition* (Myanma Padathar Publishing House, Yangon, 1966), p. 297, RM, Vol. II, Annex 34.)

⁹⁷ CMM, paras. 2.155-2.158.

⁹⁸ RG, para. 2.10.

⁹⁹ CMM, paras. 2.157-2.158.

interviews with the Bengali population. In all these interviews, Bengalis were asked, “What ethnic group (Lumyo) are you?” Most of the time, they answered, “I am of the “Muslim ethnic group” (Muslim Lumyo). However, in group meetings, when the question was posed to members of the group randomly selected by the research team, the leader of the group said something in Bengali language to the rest of the group and after that, no more answers were forthcoming; the group appeared to be intimidated by the leader. In the early part of the Commission’s visit, only a few respondents replied they were Rohingya, but later visits found increasingly greater numbers of Bengalis stating they were Rohingya. After the first visit by the Commission, the majority of Bengalis stated they were Rohingya (85 per cent of the 800 interviewed). Even so, around 60 per cent of those who stated they were Rohingya only did so in the first part of the interview. As the interview went on, they called themselves members of a “Muslim ethnic group,” and not Rohingya. ...

The Commission was informed that leaders of the Rohingya movement in Yangon, New York and London were calling the Bengali communities in Rakhine State on mobile phones and urging them to declare themselves “Rohingya”.¹⁰⁰

- 2.18 The obvious implication of this report is that the majority of Bengalis did not spontaneously self-identify as “Rohingya”, but did so only when pressured by leaders to do so. It is incorrect of The Gambia to say that this 2013 report presents no evidence that anyone was “pressured” to self-identify as “Rohingya”.¹⁰¹ The circumstances described in the quote above are the evidence. This report does not suggest that 85% permanently identify as “Rohingya”, but only that 85% stated that they did so for a short period during the Commission’s visits.

E. Repatriations from Bangladesh

- 2.19 The Reply of The Gambia contains a bare statement that Myanmar has made “inadequate efforts for the repatriation and resettlement of members of the Rohingya group having fled in huge numbers ... to Bangladesh”.¹⁰² No explanation or evidence is given by The Gambia in support of this statement, apart from references to The Gambia’s observations on Myanmar’s Third to Eighth Provisional Measures

¹⁰⁰ Inquiry Commission on Sectarian Violence in Rakhine State, Final Report, 8 July 2013, p. 55, MG, Vol. VI, Annex 161.

¹⁰¹ RG, para. 2.10.

¹⁰² RG, para. 9.114 third dot point.

Reports.¹⁰³ These observations of The Gambia in turn contain only references to very general statements made in various United Nations and other documents.

- 2.20 The Reply of The Gambia itself does not dispute any of the specific facts stated in paragraphs 2.94 to 2.106 of the Counter-Memorial of Myanmar dealing with the repatriation process. Nor does the Reply of The Gambia itself dispute any of the specific facts stated in the various Provisional Measures Reports of Myanmar in relation to the repatriation process.¹⁰⁴
- 2.21 As has been made clear in its Counter-Memorial and in its Provisional Measures Reports, Myanmar has consistently been making diligent and extensive efforts to repatriate displaced individuals from Bangladesh to Myanmar.
- 2.22 On 23 November 2017, the Governments of Myanmar and Bangladesh signed an Arrangement on Return of Displaced Persons from Rakhine State.¹⁰⁵ On 19 December

¹⁰³ On 23 January 2020, the Court indicated provisional measures in this case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Provisional Measures, Order of 23 January 2020*, I.C.J. Reports 2020, p. 3 (the “**Provisional Measures Order**”). The fourth of the provisional measures (*ibid.*, p. 31, para. 86(4)) states that Myanmar “shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court”. The reports submitted by Myanmar pursuant thereto are as follows: Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 22 May 2020 (“**First Provisional Measures Report**”); Second Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 November 2020 (“**Second Provisional Measures Report**”); Third Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 20 May 2021 (“**Third Provisional Measures Report**”); Fourth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 November 2021 (“**Fourth Provisional Measures Report**”); Fifth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 May 2022 (“**Fifth Provisional Measures Report**”); Sixth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 November 2022 (“**Sixth Provisional Measures Report**”); Seventh Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 May 2023 (“**Seventh Provisional Measures Report**”); Eighth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 November 2023 (“**Eighth Provisional Measures Report**”); Ninth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 23 May 2024 (“**Ninth Provisional Measures Report**”); Tenth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, 22 November 2024 (“**Tenth Provisional Measures Report**”).

¹⁰⁴ First Provisional Measures Report, paras. 118-133; Second Provisional Measures Report, paras. 70-74; Third Provisional Measures Report, paras. 43-47; Fourth Provisional Measures Report, paras. 60-68; Fifth Provisional Measures Report, paras. 55-60; Sixth Provisional Measures Report, paras. 35-46; Seventh Provisional Measures Report, paras. 39-53; Eighth Provisional Measures Report, paras. 77-105; Ninth Provisional Measures Report, paras. 33-57; Tenth Provisional Measures Report, paras. 50-62.

¹⁰⁵ CMM, paras. 1.18, 2.87 and 2.94; Arrangement on Return of Displaced Persons from Rakhine State between the Government of the People’s Republic of Bangladesh and the Government of the Republic of the Union of Myanmar, Nay Pyi Taw, 23 November 2017, CMM, Vol. II, Annex 9.

2017, the two Governments signed the Terms of Reference for the establishment of a Joint Working Group on the repatriation of displaced Myanmar residents from Bangladesh.¹⁰⁶ On 16 January 2018, the two Governments signed the Physical Arrangement for Repatriation of Displaced Myanmar Residents from Bangladesh.¹⁰⁷

- 2.23 Myanmar then requested the United Nations Development Programme (“UNDP”) and the United Nations High Commissioner for Refugees (“UNHCR”) to assist its efforts in the repatriation process, and to facilitate the implementation of the bilateral agreement between Myanmar and Bangladesh.¹⁰⁸
- 2.24 This led to the signing on 6 June 2018 of a Memorandum of Understanding (“MoU”) between Myanmar’s Ministry of Labour, Immigration and Population and UNDP and UNHCR.¹⁰⁹ The MoU set out the general operational modalities governing UNDP’s and UNHCR’s involvement in the repatriation process of displaced persons from Rakhine State who wish to return voluntarily, safely and in dignity to their own households and original places of residence or to a safe and secure place nearest to it of their choice.¹¹⁰ The MoU also provided for the parties to collaborate immediately to support the Government of Myanmar to find voluntary and safe solutions in dignity for the displaced persons residing along the international border between Myanmar and Bangladesh.¹¹¹

¹⁰⁶ CMM, para. 2.94.

¹⁰⁷ CMM, para. 2.94; Physical Arrangement for Repatriation of Displaced Myanmar Residents from Bangladesh under the Arrangement on Return of Displaced Persons from Rakhine State, 16 January 2018, CMM, Vol. II, Annex 10.

¹⁰⁸ United Nations, Security Council, Press Release no. SC/13331, “Security Council Press Statement on Security Council Visit to Bangladesh, Myanmar”, 9 May 2018, RM, Vol. IV, Annex 116; Myanmar News Agency, “State Counsellor receives UN officials”, *The Global New Light of Myanmar*, 1 May 2018, pp. 1 and 4, RM, Vol. V, Annex 200 (“... the State Counsellor underscored Myanmar’s readiness to receive the verified returnees and necessary cooperation of Bangladesh to expedite the repatriation process quickly”); Myo Myint, “UNSC delegation visits Rakhine”, *The Global New Light of Myanmar*, 2 May 2018, pp. 1 and 13, RM, Vol. V, Annex 201.

¹⁰⁹ Memorandum of Understanding Between the Ministry of Labour, Immigration and Population of the Government of the Republic of the Union of Myanmar (GoM) and The United Nations Development Programme and the Office of the United Nations High Commissioner for Refugees, 6 June 2018, RM, Vol. II, Annex 3.

¹¹⁰ *Ibid.*, para. 10.

¹¹¹ *Ibid.*, para. 11.

2.25 The MoU provided for UNHCR to undertake the following in view of supporting the efforts of the Government of Myanmar:

- (1) assist the process in the implementation of the voluntary repatriation programme and the reintegration of all those who return under the MoU, including through mandated protection activities, community consultations and site visits;
- (2) undertake visits to and assessments of potential pilot project sites in close consultation with the Government of Myanmar;
- (3) support pilot coexistence and other programmes benefitting all communities in potential return areas through quick impact projects (“QIPs”) to support measures that will make return sustainable; and
- (4) work with UNDP to prepare the conditions for recovery and resilience-based development in potential areas/places of origin and/or return, including through joint assessment and programming.¹¹²

2.26 The MoU further provided for UNDP to assist the Government of Myanmar:

- (1) to coordinate and support the necessary assessments related to community resilience-building, including sustainable livelihoods, conflict sensitivity and local institutional capacity building, at the selected project sites;
- (2) to undertake the planning process for resilience-based recovery and development that will benefit all returnees and host communities in the areas of potential return;
- (3) to promote social cohesion amongst returnees and host communities; and
- (4) to support access to livelihoods through the design and implementation of community based interventions.¹¹³

¹¹² *Ibid.*, para. 13.

¹¹³ *Ibid.*, para. 14.

- 2.27 On 28 May 2019, by an exchange of letters, the MoU was extended until 5 June 2020.¹¹⁴ On 11 May 2020, it was then extended for a further year until 5 June 2021.¹¹⁵ On 11 March 2022, the MoU was renewed by the parties until 10 March 2023.¹¹⁶ On 13 December 2023, a further MoU was signed for a one-year term with the same terms and conditions, extending until December 2024.¹¹⁷
- 2.28 A Technical Working Group (TWG), which is co-chaired by the representatives from relevant Ministries of Myanmar along with UNDP and UNHCR, was formed for the smooth implementation of the humanitarian and development assistance. It has held a total of 12 meetings to enhance cooperation and effectively tackle important matters related to their joint efforts.
- 2.29 Although repatriations under the bilateral agreement between Myanmar and Bangladesh have not occurred so far, this has not been due to any lack of willingness or readiness on the part of Myanmar.
- 2.30 One reason why repatriations under the bilateral agreement have not yet occurred is the presence of intimidation in the camps in Bangladesh. Displaced persons have not dared to return in accordance with the bilateral agreement because ARSA and their associates have threatened or killed those who promote the repatriation process.¹¹⁸ For

¹¹⁴ Exchange of Letters Between the Ministry of Labour, Immigration and Population of the Government of the Republic of the Union of Myanmar and United Nations High Commissioner for Refugees and the United Nations Development Programme, 28 May 2019, RM, Vol. II, Annex 4.

¹¹⁵ Exchange of Letters Between the Ministry of Labour, Immigration and Population of the Government of the Republic of the Union of Myanmar and United Nations High Commissioner for Refugees and the United Nations Development Programme, 11 May 2020, RM, Vol. II, Annex 5.

¹¹⁶ Memorandum of Understanding Between the Ministry of Immigration and Population of the Government of the Republic of the Union of Myanmar (GoM) and The United Nations Development Programme and The Office of the United Nations High Commissioner for Refugees, 11 March 2022, RM, Vol. II, Annex 6.

¹¹⁷ Memorandum of Understanding Between the Ministry of Immigration and Population of the Government of the Republic of the Union of Myanmar (GoM) and The United Nations Development Programme and The Office of the United Nations High Commissioner for Refugees, 13 December 2023, RM, Vol. II, Annex 7.

¹¹⁸ See CMM, paras. 1.18, 2.101; First Provisional Measures Report, paras. 124-125; Sixth Provisional Measures Report, paras. 38-41; *New Age*, “Bangladesh not to force Rohingyas for repatriation: FM”, 22 August 2019, CMM, Vol. IX, Annex 432 (“... [Bangladesh’s] foreign minister AK Abdul Momen said ... ‘We’ve heard some Rohingya leaders emerged there. They don’t want the return of any Rohingya (to their homeland). They’re trying to stop returnees. Some INGOs and NGOs are instigating them (Rohingyas)’”); Sometaya R., “Refugees from Myanmar cite attacks from their ‘protectors’”, *Asahi Shimbun*, 21 January 2020, CMM, Vol. IX, Annex 436 (“They [people who returned from Bangladesh to Myanmar via “unofficial routes”] also said ARSA members have threatened anyone who wanted to return to Myanmar”); S. Strangio, “Militant Group Responsible for Rohingya Advocate’s Murder, Say Bangladeshi

this reason, some displaced persons have returned quietly to Myanmar on their own initiative, rather than under the bilateral agreement. Those who have done so have been warmly welcomed by the authorities and have been provided with health care services, food and kitchen supplies.¹¹⁹

- 2.31 Another reason why repatriations under the bilateral agreement have not occurred is that activists in the camps in Bangladesh have made various demands, such as that Bengalis should be recognised as an ethnic group (under the name “Rohingya”) and automatically obtain citizenship, and have insisted that they would not return if the demands were not met.¹²⁰ In August 2019, the then Foreign Minister of Bangladesh,

Police”, *The Diplomat*, 15 June 2022, CMM, Vol. IX, Annex 453; S. Khiam and A. Rahman, “Refugees: ARSA rebels threaten Rohingya leaders who push for repatriation”, *Radio Free Asia*, 25 August 2022, CMM, Vol. IX, Annex 454 (“Jubair blamed ARSA for killing Rohingya leaders who call for refugees to repatriate to Rakhine state ... ‘All of us who are working in favor of repatriation and against various crimes in the camps, including drug and human trafficking, are in fear of losing our lives every moment,’ Khin said”); *Daily Star*, “ARSA presence at Rohingya camps: Everybody knows Few dare speak”, 20 October 2022, CMM, Vol. IX, Annex 457; T. M. Ripon, “Targeted Killings Spread Terror in Rohingya Refugee Camps”, *The Diplomat*, 15 November 2022, CMM, Vol. IX, Annex 460 (“... [A] spokesperson of the [Bangladesh] Armed Police Battalion in charge of the camp’s security (APBN-8), told The Diplomat, ... ‘ARSA is involved in these murders, and they are responsible for these murders... ARSA comes here from Myanmar and targets civil Rohingya leaders who work on repatriation.’ ... ARSA has become a name of terror for the Rohingya in the camp. It particularly seems to target Rohingya working for eventual repatriation to Myanmar. ... A Rohingya women leader ... recounted ... ‘ARSA has threatened me several times. They are ready to kill me. They said I am a woman, women’s work is not activism, not working for repatriation ...’ In September 2021, an armed group killed Mohibullah, a top Rohingya leader who had been leading a campaign called ‘Going Home.’ The goal was to allow Rohingya to return to Myanmar with rights and dignity. Mohibullah’s family blamed ARSA for the murder, saying he was killed on the orders of ARSA commander Ataullah Abu Ammar Jununi. ... [A] a former Major General and previously Bangladesh’s defense attaché to Myanmar ... explained that ... ARSA seems to [not want the Rohingya to return from Bangladesh] ..., based on its targeting of those who work for repatriation.”); Wai Mar Htun, “16 people were killed in Bangladesh refugee camps in 2023”, *Radio Free Asia*, 2 April 2023, RM, Vol. V, Annex 204.

¹¹⁹ First Provisional Measures Report, para. 126 (noting that from 14 April 2018 to 11 April 2020, 352 people had returned under their own arrangements); Fourth Provisional Measures Report, para. 65 (noting that a further 94 returned unofficially in April 2020); Fifth Provisional Measures Report, para. 58; *The Global New Light of Myanmar*, “Five family members return to Taung Pyo Letwe Reception Centre”, 11 October 2018, p. 6; *The Global New Light of Myanmar*, “Twenty-seven returnees from Bangladesh arrive back at Reception Centre in Maungtaw”, 30 September 2019, p. 6; *The Global New Light of Myanmar*, “29 persons return to Taung Pyo Letwe Reception Centre in Maungtaw”, 24 October 2019, p. 4; *The Global New Light of Myanmar*, “9 displaced persons return to Taung Pyo Letwe Reception Centre in Maungtaw”, 18 December 2019, p. 7; RM, Vol. V, Annex 203.

¹²⁰ CMM, para. 2.101.

Mr A. K. Abdul Momen suggested that non-governmental organisations were instigating displaced persons in Bangladesh not to return to Myanmar.¹²¹

- 2.32 More recently, Mr. A. K. Abdul Momen, now the Chairman of the Standing Committee on Ministry of Foreign Affairs of the Bangladesh National Parliament, stated in an interview with *Daily Jugantor* (a daily newspaper in Bangladesh) on 28 May 2024 that he believed that repatriation would be possible through bilateral discussions between Bangladesh and Myanmar.¹²² He noted that there had been previous occasions when large numbers of people from northern Rakhine State had gone to Bangladesh and then been repatriated. He expressed the view that the reason why repatriations were proving more difficult at present than it had been in the past was due to the role of the international community (international organisations and NGOs) and the media. He said that “conditions right now are much complex and difficult as there are many international organisations, including UNHCR, involved and also too many rules and regulations to follow”, and that “media outlets are more focus on this than it is necessary and some stories are exaggeratedly reported only on small case”.¹²³ He added that “some countries block the repatriation through various reasons”, including by saying that “there is no conducive environment there [in Myanmar] at present as well as raise the question of whether granting citizenship to them or not if they arrive back”.¹²⁴ He said that “there are many agencies running with various agendas inside the camps, which are financially aided by support from donor countries”, but added that “we do not know exactly what these agencies are doing, only Allah may know”.¹²⁵ He concluded that “to solve the issue, first step should be

¹²¹ *New Age*, “Bangladesh not to force Rohingyas for repatriation: FM”, 22 August 2019, CMM, Vol. IX, Annex 432 (“... [Bangladesh’s] foreign minister AK Abdul Momen said ... ‘Some INGOs and NGOs are instigating them (Rohingyas)’”).

¹²² “রোহিঙ্গা আমাদের জন্য একটা ক্যান্সারের মত হবে: সাবেক পররাষ্ট্রমন্ত্রী মোমেন: Rohingya will be like a cancer for us: Former Foreign Minister Momen”, *Daily Jugantor*, 18 May 2024, available at <https://www.youtube.com/watch?v=13EV1naQ0k4>, original video and English transcript at RM, Vol. V, Annex 205.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

NGOs to be banned”.¹²⁶ In no sense did he express the view that any fault lay on the part of Myanmar.

2.33 Other reasons why repatriations under the bilateral agreement have not yet occurred include Cyclone Mocha in Rakhine State and Bangladesh in May 2023, Cyclone Remal in Bangladesh in May 2024, and ongoing clashes with the Arakan Army, details of which have been given in Myanmar’s periodic reports pursuant to the Court’s Order on provisional measures of 23 January 2020.

2.34 For its part, Myanmar has never stopped preparations for the repatriation process pursuant to the bilateral agreement with Bangladesh. Measures taken by Myanmar have been described in its Counter-Memorial and in its Provisional Measures Reports. They include the following.

(1) To date, Bangladesh has provided Myanmar with six batches of verification forms, totalling 828,824 persons for verification. As of 31 October 2024, Myanmar has scrutinized a total of 223,152 of these persons. Myanmar conveyed the latest verification results to Bangladesh on 19 November 2024. Myanmar continues the process of verifying the remaining individuals.¹²⁷ The reason why only some 25% of the names have been scrutinised so far are as follows:

(a) According to the annual house to house survey in Buthidaung, Maungdaw and Rathedaung Townships,¹²⁸ before the terrorist attacks in 2016-2017, there were 84,664 household lists and 748,150 persons, of which 56,545 household lists and 540,770 persons left for Bangladesh. However, the lists sent by the Government of Bangladesh contain 182,350 household lists, and 829,192 persons, which is 288,413 more persons than left for Bangladesh. The verification forms sent by Bangladesh included persons

¹²⁶ *Ibid.*

¹²⁷ Tenth Provisional Measures Report, para. 51. The verification process is further explained in the Fourth Provisional Measures Report, paras. 61-63; and Seventh Provisional Measures Report, paras. 41-45.

¹²⁸ These surveys are called drawing a map (mapping)/ registration a building (registration)/ scrutinizing the household list (scrutinizing).

who were already in Bangladesh prior to the events in 2016 and 2017. The names on the lists sent by Bangladesh therefore need to be verified.

- (b) Bangladesh has not provided information in the form agreed between the two countries, which has impeded verification.
 - (c) Some people in Bangladesh have given personal and place names in their own language according to local pronunciation, and these have been recorded in Bangladesh in a way that does not conform with official spelling. Names of some villages have been transcribed in English, and then re-transcribed into the Myanmar language, causing divergences in spelling and problems in verification of information.
 - (d) Before travelling to Bangladesh, some people had moved villages within Myanmar or married without reporting this to the relevant authorities in Myanmar, such that the stated village of origin or marital status in the form provided by Bangladesh does not correspond with the information held by Myanmar, causing delays in verification.
 - (e) In some cases, the list of family members in the verification forms does not correspond with the family members registered with the authorities in Myanmar.
 - (f) In some cases, the information in the verification forms submitted by Bangladesh, upon verification, proves to be incorrect.
- (2) Myanmar has prepared two Reception Centres (Nga Khu Ya Reception Centre and Taungpyo Letwe Reception Centre), and the Hla Phoe Khaung Transit Centre.¹²⁹
- (3) A Pilot Project has been arranged for 2,933 verified displaced persons (575 households), to be repatriated as part of the initial phase of the project.¹³⁰

¹²⁹ Fourth Provisional Measures Report, para. 64; Fifth Provisional Measures Report, para. 94; Sixth Provisional Measures Report, para. 42; Ninth Provisional Measures Report, para. 39.

¹³⁰ First Provisional Measures Report, paras. 127-129; Second Provisional Measures Report, para. 72; Fourth Provisional Measures Report, para. 66; Fifth Provisional Measures Report, para. 57; Sixth Provisional

Returnees under the Pilot Project will be allocated for resettlement, with their consent as well as by their choice, either to Kyein Chaung (South) village, where more than 100 housing units with access to clean water are in place, or to one of 19 other designated villages where they will be provided with a 20 feet x 60 feet (7.62 x 18.28 metres) plot of land to take part in the Cash-for-Work Programme for the construction of their own houses. In order to provide more options for the returnees for their resettlement to their places of origin or to the nearest place to their places of origin, Myanmar has designated 60 additional villages which are currently inhabited and located within a 5-mile radius of the 20 designated villages, and informed Bangladesh of this on 29 February 2024. Those villages have been selected for their good conditions, security and access to a livelihood. This new initiative is a strong reflection of the political will and cooperation in good faith of the Government of Myanmar for the early commencement of the Pilot Project for repatriation.¹³¹

- (4) Returnees will be granted permission to farm on suitable land plots in designated villages in accordance with the existing Farm Land Law. They will receive paddy seeds, annual and perennial crops (seeds and saplings), fertilizers, farming tools, and cultivation trainings. Livestock breeders will be trained and educated on livestock production and livestock disease prevention and management through trainings and seminars, in order to contribute to their breeding profession. Fish and shrimp farmers and those who are interested in these occupations, will receive trainings in basic fish farming and induced breeding technology as well as shrimp farming techniques as needed. A variety of vocational trainings such as agricultural and animal husbandry training, bamboo handicraft training, tailoring, carpentry and masonry training, weaving training, and other trainings pertinent to local areas will be conducted selectively for the returnees under the Pilot Project in the designated villages. Livestock farmers will also receive genetic resources (breeds), animal food production technologies, and veterinary services along with the necessary trainings so that

Measures Report, paras. 42-43, 46; Seventh Provisional Measures Report, paras. 47-48; Eighth Provisional Measures Report, para. 89, 94; Ninth Provisional Measures Report, para. 38.

¹³¹ Ninth Provisional Measures Report, paras. 41-42.

they can start up their own livestock (chicken and goat), prawn and fish breeding businesses. Training courses in pastry making, cooking and sewing (basic and advanced courses) will be provided to the returnee women under the community-based programme.¹³²

- (5) In accordance with the existing Myanmar laws, relevant identification (ID) cards including National Verification Cards (NVCs) will be issued to the returnees. Returnees aged 18 or older with a NVC card or any identification card recognized by the Myanmar Government can apply for a Fishermen Identification Card, which permits them to work both inshore and offshore fishing boats.¹³³
- (6) Myanmar has organized Go-and-Talk visits (in which officials of Myanmar go to Bangladesh to explain the repatriation process to Bangladesh officials and representatives of displaced persons), as well as Come-and-See visits (under which representatives of displaced persons come from the camps in Bangladesh to Rakhine State to see the places for resettlement).¹³⁴ Even though there is no provision for such visits in the bilateral arrangements, Myanmar has made these visits possible based on good neighbourliness as well as its genuine goodwill for expeditious repatriation of displaced persons.¹³⁵ At these visits, a booklet called “Facts on the Arrangement of the Myanmar Government for Reception and Resettlement of Displaced Persons on their Return under the Pilot Project”, has been distributed.¹³⁶
- (7) Under the MoU between Myanmar, UNDP and UNHCR, UNDP have conducted field assessments, and have implemented Quick Impact Projects (“QIPs”).¹³⁷

¹³² Ninth Provisional Measures Report, paras. 44-49.

¹³³ Ninth Provisional Measures Report, para. 45.

¹³⁴ Ninth Provisional Measures Report, para. 56.

¹³⁵ Ninth Provisional Measures Report, para. 56.

¹³⁶ Tenth Provisional Measures Report, para. 57.

¹³⁷ First Provisional Measures Report, para. 132.

- (8) Myanmar is also closely engaged in collaborative efforts with the ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management (AHA Centre) in the repatriation process. The ASEAN Secretariat and the AHA Centre have been assisting Myanmar in the repatriation process, especially in the areas of enhancing the capacity of reception and transit centres, strengthening information dissemination and supporting the provision of basic services, including the implementation of projects under a Preliminary Needs Assessment (“PNA”).¹³⁸ Two of these projects have been successfully completed.¹³⁹ The Ministry of Agriculture, Livestock and Irrigation is seeking funding from the Thailand International Cooperation Agency (TICA) for a further project.¹⁴⁰ Funding for the remaining nine projects is still being sought.
- (9) Myanmar has participated in informal meetings of the Myanmar-Bangladesh-China Tripartite Working Group to facilitate the repatriation process, the most recent of which was convened in Bangladesh on 23 October 2023.¹⁴¹
- (10) Myanmar has continued to discuss the issue of repatriation bilaterally with Bangladesh.¹⁴²

2.35 On 8-9 March 2023, officials and diplomats of ASEAN countries, China, India and Bangladesh, and representatives of the AHA Centre, visited Rakhine State. They met with ministers and officials of the Union Government and Rakhine State Government, and were briefed on the arrangements for the repatriation of displaced persons, the pilot project and assistance to IDP camps. They also inspected the Ngakhuya reception

¹³⁸ First Provisional Measures Report, para. 133; Second Provisional Measures Report, para. 74; Third Provisional Measures Report, paras. 45-46; Fourth Provisional Measures Report, paras. 66-67; Ninth Provisional Measures Report, para. 53.

¹³⁹ Eighth Provisional Measures Report, para. 104.

¹⁴⁰ Third Provisional Measures Report, paras. 45-46; Fourth Provisional Measures Report, paras. 66-67; Fifth Provisional Measures Report, para. 60; Sixth Provisional Measures Report, paras. 44-45; Seventh Provisional Measures Report, paras. 50-53; Eighth Provisional Measures Report, para. 104; Ninth Provisional Measures Report, para. 54.

¹⁴¹ See First Provisional Measures Report, para. 129; Second Provisional Measures Report, para. 72; Third Provisional Measures Report, para. 43; Fourth Provisional Measures Report, para. 66; Ninth Provisional Measures Report, para. 50.

¹⁴² Second Provisional Measures Report, para. 70-72, Fifth Provisional Measures Report, para. 59; Sixth Provisional Measures Report, para. 43; Seventh Provisional Measures Report, paras. 47-48.

centre in Maungdaw Township, the Hla Phoe Khaung Transit Centre, and the Thet Kae Pyin IDP camps in Sittwe Township. The Ambassador of Thailand stated that “It is an excellent preparation by the Myanmar government for the returnees, and IDPs, so I wish Myanmar and Bangladesh, both countries can consult to move forward on preparations to materialize”.¹⁴³

F. Preservation of property

2.36 On 13 September 2019 (before The Gambia instituted the present proceedings), regional orders were issued in Maungdaw and Buthidaung Townships, prohibiting unaffiliated persons from entering or living in abandoned houses, compounds and agricultural lands (farms, gardens) of displaced persons, and prohibiting them from livestock breeding in their shrimp farming and fisheries.¹⁴⁴ Records have been kept of the land (agricultural lands and housing) abandoned by displaced persons.¹⁴⁵ Subsequently, on 8 April 2020 (after the Court issued the Provisional Measures Order in this case), the Office of the President issued Directive No. 2/2020, Preservation of evidence and property in areas of northern Rakhine State.¹⁴⁶ This Directive prohibits all Ministries and the Rakhine State Government, their agencies, departments, offices, and personnel from destroying, removing, or permitting the destruction or removal of any property, immovable or moveable, in any area of northern Rakhine State, that may provide evidence of events referred to in the ICOW’s Final Report, or anything that may provide evidence of acts referred to in Article II of the Genocide Convention. In relation to allegations of the construction of buildings on the sites of former Bengali villages, see paragraphs 7.112, 12.116-12.118 and 14.85 below.

¹⁴³ Myanmar, Ministry of Information, “Our main aim is to make every effort for the peace, stability and development of Rakhine State”, 24 March 2023, RM, Vol. III, Annex 73.

¹⁴⁴ Township General Administration Department Maungdaw, Regional order No. (2/2019), 13 September 2019, and Township General Administration Department Buthidaung Town, Regional Order No. (1/2019), 13 September 2019, RM, Vol. III, Annex 71.

¹⁴⁵ See Rakhine State, Maungdaw District, The total land ownership list of farms (agricultural land) abandoned by displaced persons, and Rakhine State, Maungdaw District, The total land ownership list of farms (agricultural lands and housing) abandoned by displaced persons, RM, Vol. III, Annex 80.

¹⁴⁶ See First Provisional Measures Report, paras. 89(2) and 91, and Annex 4.

- 2.37 There are no military bases of the Tatmadaw in Maungdaw Township. There are only deployments of military columns because of the threat of the Arakan Army and terrorist groups like ARSA and the Rohingya Solidarity Organisation (RSO). There has been no implementation of new commercial projects in Maungdaw District.

CHAPTER 3

THE ARAKAN ROHINGYA SALVATION ARMY (“ARSA”)

A. Introduction

- 3.1 As is demonstrated in Chapters 8 and 9 of the Counter-Memorial of Myanmar, and Chapters 8 and 9 below of this Rejoinder, the counter-terrorism operations conducted by Myanmar’s security forces in 2016 and 2017 were a response to deadly attacks carried out by the Arakan Rohingya Salvation Army (“ARSA”), particularly on or about 9 October 2016, 11 November 2016, and 24 to 25 August 2017. Almost all of the counter-terrorism operations occurred in the few days immediately following each of these series of ARSA attacks. The counter-terrorism operations took place in or near the locations of ARSA’s attacks. Most of the evidence relied on by The Gambia relates to events in three main locations, Min Gyi, Chut Pyin and Maung Nu. In most of the other 40 villages in which The Gambia alleges that there was violence against the civilian population, there is little or no evidence to support the allegations. In *hundreds* of other villages across northern Rakhine State, the evidence relied on by The Gambia does not even *allege* that anyone suffered bodily harm as a result of counter-terrorism operations.
- 3.2 Chapter 3 of the Counter-Memorial of Myanmar sets out background facts concerning ARSA. It explains the evolution of ARSA as a terrorist organisation; the events of October to November 2016 when ARSA mounted attacks on the Myanmar security services; the subsequent build-up to the widespread attacks by ARSA in August 2017; ARSA’s attacks of August 2017; the role of social media in the attacks; the marked absence of photographic and video evidence of alleged brutality that is inexplicable if the acts occurred as claimed; the massacre by ARSA-led terrorists of 105 Hindus at Kha Maung Seik; and the ongoing influence that ARSA has had from the beginning over those living in the camps in Bangladesh.
- 3.3 Rather than engage directly with the facts presented in Chapter 3 of the Counter-Memorial in a dedicated chapter of its Reply, The Gambia simply ignores many of these facts. The Reply of The Gambia instead maintains the approach taken in its

Memorial of presenting evidence related to the events of 2016 and 2017 in a selective and misleading way throughout its Reply.

- 3.4 In fact, the Memorial of The Gambia contains virtually no mention of the terrorist attacks by ARSA in 2016 and 2017, and indeed, almost entirely ignores the existence of ARSA altogether.¹⁴⁷ It must have been a conscious decision of The Gambia to avoid references in its Memorial to the ARSA attacks, since they are well-known, and are mentioned in the FFM reports on which The Gambia so heavily relies.¹⁴⁸ The Gambia's Memorial thereby gives the misleading impression that the Myanmar Defence Services conducted the operations for no reason other than to deliberately harm civilians living in the region.¹⁴⁹
- 3.5 The Counter-Memorial of Myanmar has presented an overwhelming body of largely *undisputed* evidence that these ARSA attacks were large-scale, well-planned, and violent, and that they were spear-headed and organised by ARSA terrorists, and actively supported by thousands of Bengali villagers throughout Rakhine State. The evidence also clearly shows that the counter-terrorism operations were undertaken by the Myanmar Defence Services to engage with those who were preparing for or in the course of committing ongoing terrorist attacks. In the face of this evidence, the Reply of The Gambia acknowledges, as it must, that the ARSA attacks occurred.
- 3.6 However, in its Reply, The Gambia now contends that ARSA's terrorist attacks were used as a "pretext"¹⁵⁰ by the Myanmar Defence Services to "destroy the Rohingya".¹⁵¹ In order to advance this narrative, The Gambia attempts to downplay the significance of this terrorist organization and the gravity of its actions. However, this attempt by The Gambia is wholly unsupported by the evidence. The evidence presented in the Counter-Memorial of Myanmar, and in this Rejoinder, overwhelmingly establishes that the perpetrators of violence in 2016 and 2017 were ARSA terrorists and

¹⁴⁷ CMM, paras. 1.12, 1.13, 13.90-13.98, and 13.212-13.216.

¹⁴⁸ See, for example, CMM, para. 3.8, referring to UN GA, Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2, 17 September 2018 ("**2018 FFM Detailed Findings**"), paras. 55-59 and 1013-1065 (not included in the extract at MG, Vol. II, Annex 40), CMM, Vol. VI, Annex 239.

¹⁴⁹ CMM, paras. 3.2-3.5.

¹⁵⁰ RG, paras. 1.17, 3.16, 3.21, 4.54, 5.23, 7.3, 7.4, 7.14, 7.18, 7.76, 7.133, 7.147, 9.9 and 9.142.

¹⁵¹ RG, para. 7.4.

supporters in villages across Rakhine State, and that the purpose of the counter-terrorism operations was to root out ARSA in order to prevent any future recurrence of the violence. **Section B of this Chapter** demonstrates that The Gambia is wrong to contend, as it does, that the ARSA attacks were merely a “pretext” used to “destroy the Bengali population in northern Rakhine State”.¹⁵²

3.7 **Section C of this Chapter** goes on to demonstrate that certain steps taken by the authorities after the violence of October 2016, such as the dismantling of fences, the removal of tools that could be used as weapons, and the imposition of curfews, were legitimate and understandable security measures that were proportionate to the risks presented. It will be demonstrated that there is no basis for The Gambia’s contentions that these measures were “conducted ... to heighten the Rohingya’s vulnerability” and were “preparations” for future counter-terrorism operations.¹⁵³ On the contrary, these measures were intended to deter and mitigate any future attacks by ARSA, and if there had been no further attacks by ARSA, there would have been no further counter-terrorism operations.

3.8 **Section D of this Chapter** then goes on to deal with the claim made in the Reply of The Gambia that “Myanmar offers no evidence that ... witnesses feared or were intimidated by ARSA, or that their testimonies were so influenced.”¹⁵⁴ There is simply no basis for that statement by The Gambia. Evidence that this is the case was set out in paragraphs 3.120 to 3.145 of the Counter-Memorial of Myanmar. Further evidence is set out in Section D of this Chapter below. It is quite clear from this wealth of evidence that ARSA continues to represent a serious threat to the Bengalis in the camps in Bangladesh, who live in fear of ARSA. As a result of these fears, many of those living in the camps in Bangladesh have been unwilling to speak about the role of ARSA in the events of 2016 and 2017, or have downplayed its significance. Evidence of those living in camps in Bangladesh therefore cannot be accepted as objective and reliable.

¹⁵² RG, para. 7.3.

¹⁵³ RG, para. 7.3.

¹⁵⁴ RG, para. 7.68.

B. Objective of the counter-terrorism operations

1. General

- 3.9 This Section of this Rejoinder responds to **paragraphs 7.4 to 7.22 (Chapter 7, Section I)** of The Gambia’s Reply, in which The Gambia wrongly contends that ARSA’s attacks were used as a “pretext”, and that the real objective of the counter-terrorism operations of 2016 and 2017 was “to destroy the Rohingya”.¹⁵⁵

2. The Gambia does not prove the claimed “objective”

- 3.10 The Reply of The Gambia claims that various statements made by Senior-General Min Aung Hlaing, by soldiers, and in witness statements of claimed victims, prove that the counter-terrorism operations had the objective to “destroy the Rohingya”.¹⁵⁶ However, the statements in question are isolated sentences, or even parts of sentences, taken from speeches or interviews. The Gambia quotes these isolated words out of context, and mischaracterizes and/or misrepresents their meaning and relevance. These quotes do not prove what The Gambia claims. Furthermore, no evidential weight can be given to the sources cited by The Gambia, for the reasons given in Chapter 7 of the Counter-Memorial of Myanmar and Chapter 7 below of this Rejoinder.
- 3.11 The statements made by Senior-General Min Aung Hlaing, the Commander-in-Chief of the Myanmar Defence Services, do not have the meanings attributed to them by The Gambia.
- (1) The Gambia refers to a speech given by the Senior General on 1 September 2017. This speech has already been dealt with in the Counter-Memorial of Myanmar.¹⁵⁷ The Gambia noted that he said in that speech that “[w]e openly declare that ‘absolutely, our country has no Rohingya race’”.¹⁵⁸ That cannot be

¹⁵⁵ RG, para. 7.4.

¹⁵⁶ RG, paras. 7.5-7.11.

¹⁵⁷ CMM, paras. 11.43-11.46.

¹⁵⁸ RG, para. 7.5, referring to “Entire government institutions and people must defend the country with strong patriotism”, 2 September 2017, MG, Vol. VI, Annex 150.

understood as a declaration of government policy to destroy the Rohingya.¹⁵⁹ The statement that “our country has no Rohingya race” reflects the fact that the name “Rohingya” is a political label rather than an established ethnic designation.¹⁶⁰ Even if The Gambia disagrees, there is no basis upon which The Gambia can assert that these words can only be understood as indicating a policy *to destroy* the Bengali population in Myanmar, as such.

- (2) The Gambia refers to a media article¹⁶¹ according to which, The Gambia says, the Senior-General expressed the view that the “presence of those who call themselves Rohingya was unacceptable for the State as a whole”.¹⁶² This media article has already been dealt with in the Counter-Memorial of Myanmar.¹⁶³ In fact these words do not appear anywhere in that article. On the contrary, according to the article, the Senior-General said that Bengalis in Myanmar should “participate in the citizenship scrutiny process in accord with the existing laws”, and that “they would get citizenship status and could enjoy citizens’ rights”.¹⁶⁴ This article does not suggest any intention *to destroy* the Bengali population in Myanmar, as such.
- (3) The Gambia refers to two other statements of Senior-General Min Aung Hlaing as reported in media articles.¹⁶⁵ According to The Gambia, these statements express the view that the “procreation [of Bengalis] constituted an existential threat to other ‘national races’ legally recognized in Myanmar”.¹⁶⁶ That is incorrect. These statements have already been addressed in the Counter-Memorial of Myanmar,¹⁶⁷ which is not unnecessarily repeated.

¹⁵⁹ RG, para. 7.5.

¹⁶⁰ CMM, paras. 2.160-2.161, and 13.7, and this Rejoinder, paragraph 2.2(4) above.

¹⁶¹ RG, para. 7.5, referring to “Crisis in Rakhine State Can Be Solved Only Through Comprehensive Knowledge of the Historical Facts”, 16 October 2017, MG, Vol. VI, Annex 153.

¹⁶² RG, para. 7.5.

¹⁶³ CMM, para. 11.48.

¹⁶⁴ “Crisis in Rakhine State Can Be Solved Only Through Comprehensive Knowledge of the Historical Facts”, 16 October 2017, p. 2, MG, Vol. VI, Annex 153.

¹⁶⁵ RG, para. 7.5 footnotes 547-548 and accompanying text.

¹⁶⁶ RG, para. 7.5.

¹⁶⁷ CMM, paras. 11.43-11.46, 11.52-11.60, and 13.177.

3.12 The statements said to have been made by soldiers do not have the meanings attributed to them by The Gambia, and/or cannot be given evidential weight.

- (1) The Gambia quotes from a video clip disseminated on Facebook.¹⁶⁸ This video clip has already been dealt with in the Counter-Memorial of Myanmar.¹⁶⁹ The video demonstrates an intent to confront particular individuals who were threatening non-Muslim civilians through the use of gunfire, and expresses a wish to see the perpetrators “flee”, *not* be destroyed.
- (2) The Gambia refers to a media article, which reports that “one soldier” said that “the central government sent us specially to kill you Bengali people”.¹⁷⁰ This media article has already been dealt with in the Counter-Memorial of Myanmar,¹⁷¹ which is not unnecessarily repeated. This information that is said to have been provided by “one soldier” is not corroborated by any other source, and no witness statement of this soldier has been produced.
- (3) The Reply of The Gambia repeats the treatment in its Memorial of the statements of two claimed Tatmadaw deserters.¹⁷² For reasons already given in the Counter-Memorial of Myanmar, these statements cannot be given any meaningful evidential weight.¹⁷³

3.13 The statements made in witness statements of victims do not have the meanings attributed to them by The Gambia, and/or cannot be given evidential weight.

- (1) Nazmul Islam¹⁷⁴ is neither reliable nor credible as a witness, for reasons given in Chapters 7 and 8 below.¹⁷⁵ He was undoubtedly aware of ARSA’s deadly and

¹⁶⁸ RG, paras. 7.7-7.8.

¹⁶⁹ CMM, paras. 13.82-13.84.

¹⁷⁰ RG, para. 7.9, citing S. Lewis, Z. Siddiqui, C. Baldwin and A. R. C. Marshall, “Tip of the Spear”, *Reuters*, 26 June 2018, MG, Vol. IX, Annex 284.

¹⁷¹ CMM, paras. 11.146-11.147.

¹⁷² RG, para. 7.10.

¹⁷³ CMM, paras. 7.101-7.118.

¹⁷⁴ RG, para. 7.10 footnote 558 and accompanying text.

¹⁷⁵ See paragraphs 7.155-7.163 and 8.81-8.88 below.

unlawful violence, yet fulsomely supported its activities, saying: “what they [ARSA] are doing is right”.¹⁷⁶

- (2) The witness statement of Mohammadul Hassan cannot be given evidential weight, for the reasons given in paragraphs 7.99 to 7.100 of the Counter-Memorial of Myanmar, and in paragraphs 7.94 and 7.95 below. He says that he heard a soldier say to his colleagues “We will kill them”.¹⁷⁷ This allegedly occurred on 27 August 2017, at a time when Maung Nu had been subjected to numerous confrontations between ARSA and its supporters and the Myanmar Security Forces.¹⁷⁸ Even if this evidence were to be fully accepted at face value without question (which it cannot be), it is impossible to ascertain who the soldier expressed an intention to kill. In spite of the overwhelming evidence of ARSA activity in Maung Nu at the time, neither Mohammadul Hassan nor any of the other people interviewed by LAW make any reference to ARSA’s violent activities. The Gambia estimates that 100 people died in the fighting in Maung Nu¹⁷⁹ and it is unknown how many of these were ARSA fighters or supporters.

- 3.14 There are numerous examples of where the security forces indicated that their intention was to identify the “bad people” in villages, which was clearly a reference to ARSA and its supporters.¹⁸⁰ For example, The Gambia relies on evidence to the effect that in early August 2017 in Min Gyi (also known as Tula Toli), a meeting was held between the Chairman, the Head of Police and all the villagers, at which they said “that there were bad people in Tula Toli ... if you have bad people here, if you do something bad, we will line you up, shoot you and kill you”.¹⁸¹ Even if this evidence were to be fully accepted at face value without question (which it cannot be), this was a statement that action would only be taken by the security forces in response

¹⁷⁶ Video and transcript of interview of Nazmul Islam (28 February 2018), at Part 1, from [02:23:35:04], RG, Vol. III, Annex 41.

¹⁷⁷ RG, para. 7.11.

¹⁷⁸ CMM, paras. 8.88-8.101.

¹⁷⁹ RG, para. 8.111.

¹⁸⁰ CMM, paras. 9.125, 9.221, 11.148 and 11.149; and this Rejoinder, paragraphs 8.97, 8.128, 8.129, 13.103 and 13.105 below.

¹⁸¹ Legal Action Worldwide, Witness statement No. 008, para. 12, MG, Vol. X, Annex 345.

to any action by the “bad people” (ARSA). Further examples are set out in paragraphs 3.52, 3.54, 3.74 and 3.75 below.

- 3.15 Accordingly, this evidence does not establish that the purpose of the counter-terrorism operations was to destroy the Bengali population as such.

3. The objective was to respond to ARSA terrorist attacks

- 3.16 The military operations in northern Rakhine State in 2016 and 2017 were counter-terrorism operations.¹⁸² As the evidence in this case makes plain, ARSA was capable of inflicting significant loss of life and damage to Myanmar’s security infrastructure. The ARSA attacks in 2016 and 2017 indubitably represented a serious threat to the security and stability of Myanmar. It was in direct response to those attacks that Myanmar pursued the counter-terrorism operations.

- 3.17 On 16 October 2017, in a meeting with the Under Secretary-General for Political Affairs of the United Nations, Senior-General Min Aung Hlaing addressed the issue of the ARSA attacks in which members of the security forces had been killed. He stated that the Tatmadaw were acting in accordance with the Rules of Engagement for Counter-Terrorism Operations.¹⁸³

- 3.18 Myanmar has produced documentary evidence of the Rules of Engagement which were issued and distributed to the Myanmar military before the operations commenced.¹⁸⁴ This evidence is not disputed by The Gambia. Myanmar therefore took appropriate steps to ensure that its troops understood the manner in which they were to carry out the operations. If, which is not accepted, there were any isolated incidents where soldiers acted disproportionately to the threat posed, there is no evidence to support the contention that they were acting under orders from the Government or senior military leaders to use disproportionate force.

- 3.19 The Gambia continues to deny that Myanmar was conducting legitimate counter-terrorism operations, despite reluctantly and belatedly accepting that ARSA was

¹⁸² CMM, para. 13.92.

¹⁸³ “Crisis in Rakhine State Can Be Solved Only Through Comprehensive Knowledge of the Historical Facts”, 16 October 2017, MG, Vol. VI, Annex 153.

¹⁸⁴ CMM, paras. 3.85-3.86.

engaged at the time in a widespread campaign against the state security apparatus.¹⁸⁵ However, it is beyond dispute that coordinated deadly attacks were carried out by ARSA terrorists and its supporters at many locations. It was self-evidently necessary and legitimate for the Myanmar Defence Services to respond to ensure the peace and security of the population. Nothing less would be expected where a state's sovereignty is under attack. The Gambia appears to adopt the bizarre stance of criticising Myanmar for seeking to stop the violence and root out the perpetrators. In order to avoid repeated attacks by ARSA, it was self-evidently essential to identify the terrorists and its supporters hidden within the general population.

- 3.20 The threat posed by ARSA was real. The FFM, on which The Gambia places so much reliance, itself referred to ARSA as a “non-State armed organisation”. ARSA was officially declared a terrorist organisation by Myanmar on 25 August 2017.¹⁸⁶ The FFM considered that ARSA evidenced the following characteristics:

... a command structure allowing instructions to pass from decision makers to members and supporters at ground level, who complied with them; an ability to coordinate between an operational group in Rakhine State and groups based abroad; an ability to stage coordinated or simultaneous attacks across different locations in a tightly controlled environment; an ability to mobilise widely among the Rohingya community at the time of the attacks; the organisation of village cells according to different roles and responsibilities; an ability to provide at least a core group of members with some military training and others with basic defence training, albeit limited; an ability to obtain some firearms and produce some improvised explosive devices and other hand-made weapons; an ability to articulate and communicate its positions and demands in a seemingly unified manner; and at least a stated willingness to abide by international law.¹⁸⁷

- 3.21 While the Reply of The Gambia can no longer avoid any discussion of ARSA, The Gambia now tries to describe ARSA as a “small, poorly organised militia”.¹⁸⁸ The

¹⁸⁵ RG, paras. 7.12-7.14.

¹⁸⁶ CMM, para. 3.66.

¹⁸⁷ 2018 FFM Detailed Findings, paras. 56-57 (not included in the extract at MG, Vol. II, Annex 40), CMM, Vol. VI, Annex 239.

¹⁸⁸ RG, para. 7.16.

Gambia thereby simply ignores, and fails to engage with, the facts set out in Chapter 3 of the Counter-Memorial of Myanmar.¹⁸⁹

3.22 As is demonstrated in Chapter 3 of the Counter-Memorial, by 2016, ARSA had evolved into a “professional, well-organised and trained group”, which “operated from cells within villages”, and was “supported by mobilised Bengali villagers from the local communities and clerics”.¹⁹⁰ Throughout the 2016-2017 period, ARSA engaged in the “killing of Rohingya informants”, the “killing[] of members of other ethnic groups” and the “burning of non-Rohingya villages”.¹⁹¹ In October-November 2016, ARSA were responsible for a series of coordinated “deadly attacks” upon the Myanmar Defence Services, involving “more than 400 Bengali Muslims”, armed with explosives, swords, knives and firearms.¹⁹² Contrary to the Gambia’s assertion, Myanmar has not sought to inflate the role of ARSA,¹⁹³ it has simply presented the relevant evidence.

3.23 In relation to the October and November 2016 attacks, the International Crisis Group observed that the violence was “qualitatively different from anything in recent decades”, and that it “threatens the prospects of stability and development in the state and has serious implications for Myanmar as a whole”.¹⁹⁴ It is wholly unrealistic for The Gambia to suggest that Myanmar should not have responded to this violence perpetrated by ARSA, which caused loss of life of Myanmar’s security personnel and civilians, and was accompanied by the seizure by ARSA of weapons and ammunition. It is clear that, had ARSA not instigated the violence, there would have been no response from the military.

3.24 It is also evident that the limited counter-terrorism operations conducted by the Myanmar Defence Services immediately following the October 2016 attacks, in which

¹⁸⁹ CMM, paras. 3.16-3.25.

¹⁹⁰ CMM, para. 3.6(1).

¹⁹¹ CMM, para. 3.8. See also Myanmar News Agency, “Rakhine Slayings by Insurgents”, *The Global New Light of Myanmar*, 22 July 2017, p. 1, RM, Vol. V, Annex 192: “It is clear that Muslim militants are taking out Muslim villagers who are believed to be collaborating with the Government”.

¹⁹² CMM, paras. 3.26–3.41.

¹⁹³ RG, para. 7.15.

¹⁹⁴ International Crisis Group, *Myanmar: A New Muslim Insurgency in Rakhine State*, Asia Report No. 283, 15 December 2016 (“**International Crisis Group, New Muslim Insurgency**”), p. i, CMM, Vol. VII, Annex 296; CMM, para. 3.40.

a number of their personnel were killed, did not cause ARSA to desist from further deadly attacks just over a month later in mid-November 2016.¹⁹⁵ Nor was ARSA discouraged or prevented from developing and expanding its military ventures over the next several months. Rather, ARSA “set about consolidating its authority in Rohingya villages in northern Rakhine and preparing for the next rounds of attack”.¹⁹⁶

- 3.25 A factor that contributed to Myanmar being caught off-guard by the ARSA attacks of October 2016 and August 2017 was that, in 2013, the Border and Immigration Control Command (“Na Sa Ka”) was disbanded. As a result, the Government “lacked intelligence on separatist sentiments and illegal operations in Northern Rakhine State”.¹⁹⁷
- 3.26 The Gambia contends that ARSA did not have sufficient resources to mount a true challenge to the Myanmar Defence Services.¹⁹⁸ This contention is wrong and unsupported by evidence. When the source of this contention, the FFM, is checked, it transpires that what the FFM was actually referring to was the fact that ARSA initially did not have clearly defined goals.¹⁹⁹ The contention is also undermined by the simple, bare facts. ARSA launched three coordinated attacks in October 2016 and mounted further attacks in November 2016. The Reply of The Gambia fails to mention that ARSA’s arsenal of weapons included guns and IEDs which were capable of having a considerable impact, killing people and damaging property.²⁰⁰ Furthermore, ARSA proved a significant enough force to be able to murder 105 Hindus at Kha Maung Seik and Ye Bauk Kyar on 25 August 2017,²⁰¹ a fact not disputed by The Gambia. A resident of Kha Maung Seik describes ARSA in his village as having sticks and knives and bombs (IEDs) which were placed on the road where the military would pass. The

¹⁹⁵ CMM, paras. 2.79 and 3.31-3.41.

¹⁹⁶ CMM, para. 3.42; International Crisis Group, *Myanmar’s Rohingya Crisis Enters a Dangerous New Phase*, Asia Report No. 292, 7 December 2017 (“**International Crisis Group, Dangerous New Phase**”), p. 2, CMM, Vol. VII, Annex 297.

¹⁹⁷ ISEAS Perspective: “A Background to the Security Crisis in Northern Rakhine”, 23 October 2023, Issue 2017, No. 79, Yusof Ishak Institution, p. 1, RM, Vol. V, Annex 168.

¹⁹⁸ RG, para. 7.16.

¹⁹⁹ 2018 FFM Detailed Findings, para. 1010, MG, Vol. II, Annex 40.

²⁰⁰ CMM, paras. 3.32, 3.33 and 3.63.

²⁰¹ CMM, para. 3.108.

villagers were warned “there are bombs, don’t go there”. ARSA moved around the village getting people to join them.²⁰²

- 3.27 Witness P2032, who was a Bengali Imam in a hamlet in Maungdaw township, states as follows.²⁰³ In January 2016, he was assigned by Ata Ullah (the leader of ARSA) to be one of its leaders in his hamlet. The leaders in each such village were assisted by eight assistant leaders and controlled by a regional leader of ARSA who, through the WhatsApp communications network, coordinated the activities of multiple groups in different regions, each region having its own regiment. Each hamlet might have several different wings of ARSA. Every group of 20 ARSA members had its own leader and could operate independently. The same structure was to be found in both Maungdaw and Buthidaung.²⁰⁴ P2032 said there was no age restriction for membership of ARSA.²⁰⁵
- 3.28 P2032 describes how, after ARSA’s 9 October 2016 attacks, some ARSA members were able to capture weapons from the military facilities that were attacked. These captured weapons were used in his village and elsewhere.²⁰⁶ P2032 said that orders from ARSA were communicated through a wireless or mobile phone.²⁰⁷ Ata Ullah, the ARSA leader, had said in a video on Twitter, “As long as they do not give us our rights, we will kill them with their own weapons”.²⁰⁸
- 3.29 Finally, on 24 August 2017, P2032 received instructions through a WhatsApp message for all villagers to be cautious, and to stand up with whatever they could, and to plant bombs and to fight the military if attacked.²⁰⁹ The bombs that were to be used had been provided some months before.²¹⁰ One of several bombs planted was

²⁰² Fortify Rights, “First-hand Testimonies from August-September ‘Clearance Operations’ in Myanmar”, August-September 2017 (“**Fortify Rights Document**”), #19, pp. 26-29 (not included in the extract at MG, Vol. X, Annex 338), RG, Vol. III, Annex 43.

²⁰³ IIMM, Witness Statement No. IIMM0028503937, paras. 13 and 18, RM, Vol. IV, Annex 149.

²⁰⁴ *Ibid.*, paras. 36-52. See also Witness Statement of U Zaw Htoo, 25 October 2017, p. 1, RM Vol. III, Annex 94, which describes the role of religious teachers in the organisation of ARSA’s activities.

²⁰⁵ IIMM, Witness Statement No. IIMM0028503937, para. 58, RM, Vol. IV, Annex 149.

²⁰⁶ *Ibid.*, para. 127.

²⁰⁷ *Ibid.*, para. 52.

²⁰⁸ *Ibid.*, para. 74.

²⁰⁹ *Ibid.*, paras. 112-116.

²¹⁰ *Ibid.*, paras. 113-114.

detonated on 27 August 2017 at a time when the military were collecting supplies delivered by helicopter.²¹¹ The information provided by this witness significantly undermines The Gambia's arguments regarding the poor organisation and capability of ARSA.

- 3.30 Information about ARSA's activities in Maung Nu during 2017 is provided by another IIMM witness, P1496, and equally does not fit with The Gambia's narrative.²¹² P1496, who is a villager from Maung Nu, describes the recruitment of the youth in significant numbers by named individuals and of the meetings which took place regularly in the mosques where ARSA youths, dressed in black, were encouraged to "resist" the Myanmar Defence Services. He also describes the ARSA training sessions that were undertaken. According to P1496, ARSA had weapons in the form of swords and knives as well as sticks, preparations were underway for many months prior to August 2017, and ARSA killed suspected informants.²¹³
- 3.31 The Gambia does not deny the significance of the use of social media by ARSA to further its activities. However, no explanation is offered about how the group's ability to inform the population about its activities and, more crucially, to mobilize and to inform ARSA members and supporters about the latest military movements, sits alongside the picture it attempts to present to the Court of "a small, poorly organized militia that did not have the skill or resources to launch an attack that could truly challenge Myanmar's security forces."²¹⁴ This picture is contradicted by P2101.
- 3.32 P2101, describes how, in the period leading up to the attacks of 25 August 2017, Al Yaqin [ARSA] encouraged recruitment to its ranks through social media, in particular WhatsApp:

In this same period leading up to 25 August 2017, I was receiving forwarded videos and audio clips in WhatsApp groups about and purportedly from a group that people referred to as Al-Yaqin. I now understand that this is another name for ARSA. In

²¹¹ *Ibid.*, paras. 135-136.

²¹² See paragraph 8.161 below.

²¹³ IIMM, Witness Statement No. IIMM0019628625, paras. 53-68, RM, Vol. IV, Annex 131. See also Myanmar News Agency, "Terrorist training camps, guns uncovered in Mayu Mountains", *The Global New Light of Myanmar*, 22 June 2017, CMM, Vol. VIII, Annex 386 (a tunnel was found with weapons, huts and utensils).

²¹⁴ RG, para. 7.16.

the video and audio clips, the Al-Yaqin members were encouraging Rohingya people to stand up for their rights, sending messages like, “We are living like slaves. We have to rise up. It is time.” I do not know from whom these audio and video clips originated.²¹⁵

- 3.33 P2101 goes on to describe the information being transmitted from ARSA via WhatsApp groups when the attacks commenced in August 2017:

There were a lot of messages coming through the WhatsApp groups. I remember seeing lots of news, video and audio clips coming through that night. Members of these groups were forwarding messages that they had received. People started forwarding messages that were allegedly from Al-Yaqin saying that all the noise was coming from Al-Yaqin shooting guns and not from the government. I remember that these messages that appeared to be coming from Al-Yaqin members were voice clips The voice said things such as, “We are firing at the security forces. Everyone get ready. We need your help. We are attacking the security forces. All the noise you hear is from our side. We have seized many checkpoints. We are continuously fighting and attacking. We already control many police posts. We are firing.” The voice came from a man speaking in the Rohingya language. While he did not identify himself directly as a member of Al-Yaqin or indicate his location, the context and content of his message made me believe he was a member of Al-Yaqin.²¹⁶

- 3.34 The same witness, who was from Nga Yant Chaung, then describes a group of armed Bengalis, aged between 12 and 35, from different villages, shouting as they went along the main road in the direction of the police post. According to P2101, shooting was then heard coming from the same direction.²¹⁷
- 3.35 Mobilisation of young persons to join ARSA’s activities was equally noted by the International Crisis Group who recorded that, on the evening of 24 August 2017, ARSA leaders sent messages to cell leaders who then rounded up able-bodied males over the age of 15 and brought them to designated locations armed with weapons in preparation for attack.²¹⁸

²¹⁵ IIMM, Witness Statement No. IIMM0019915259, para. 69, RM, Vol. IV, Annex 151.

²¹⁶ *Ibid.*, para. 76.

²¹⁷ *Ibid.*, para. 99.

²¹⁸ International Crisis Group, *Dangerous New Phase*, p. 6, CMM, Vol. VII, Annex 297.

- 3.36 Therefore, contrary to the assertion of The Gambia,²¹⁹ the evidence in Chapter 3 of the Counter-Memorial of Myanmar and in this Chapter of this Rejoinder establishes that ARSA was planning its deadly attacks for many months prior to October 2016, and this planning continued into August 2017. Further, by August 2017 ARSA had become a well-established terrorist organisation with a significant membership and extensive support base interwoven into the villages of northern Rakhine State. ARSA was a highly organised group, with clear lines of command, and one which made prominent use of communications such as WhatsApp to coordinate its activities.²²⁰
- 3.37 The objective of this well-established and organised terrorist group was to attack Myanmar security apparatus with a view to gaining “complete control” over northern Rakhine State.²²¹ As set out in the Counter-Memorial of Myanmar, Reuters had a Skype video call with Ata Ullah in March 2017, in which he made clear his intention to fight the State of Myanmar.²²² This is not disputed by The Gambia. Tellingly, however, the Gambia excludes from its Memorial paragraphs in the 2018 FFM Detailed Findings, in which further comments are made by the FFM about the role and actions of ARSA.²²³
- 3.38 There is evidence cited by the International Crisis Group that ARSA instructed its personnel to burn down Rakhine villages on 28 August 2017, which contradicts the claim of ARSA that it only attacked Myanmar’s security infrastructure and not civilians.²²⁴
- 3.39 The threat posed by ARSA is also evident from a fair assessment of the number of ARSA terrorists that there were at the time of the attacks. The Gambia fails to undertake any meaningful assessment.²²⁵ The FFM noted that it is difficult to ascertain the total number of ARSA supporters, not least given that there was a further large-

²¹⁹ RG, paras. 7.16-7.17.

²²⁰ Fortify Rights Document, #24, pp. 38-41, RG, Vol. III, Annex 43.

²²¹ CMM, para. 3.24. See also 2018 FFM Detailed Findings, paras. 1009-1013, MG, Vol. II, Annex 40.

²²² CMM, para. 3.46.

²²³ 2018 FFM Detailed Findings, paras. 1014-1028 (not included in the extract at MG, Vol. II, Annex 40), CMM, Vol. VI, Annex 239.

²²⁴ International Crisis Group, *Dangerous New Phase*, p. 6, CMM, Vol. VII, Annex 297.

²²⁵ RG, para. 7.16.

scale mobilization of supporters very shortly before ARSA's August 2017 attacks.²²⁶ Indeed, following its attacks in October 2016, ARSA's support grew. Bengalis were encouraged to support the organisation and to become members. By August 2017, its membership and supporter base had increased with support varying from village to village.

- 3.40 A factor which makes it genuinely difficult to ascertain the number of members and supporters is that secrecy shrouded the organisation, and members took an oath to this effect.²²⁷ Furthermore, it is self-evidently a feature of terrorist organisations generally that its members/supporters/sympathizers hide within the population and cannot easily be detected.
- 3.41 Since the events of 2016-2017, several NGOs, the FFM and The Gambia have sought to put a figure on the number of ARSA members and supporters that there were in 2017, based on information they have obtained more recently. There is still no definitive figure. What is relevant is that at the actual time the violence was unfolding, Myanmar had no way of knowing how many ARSA terrorists, supporters and sympathizers it faced, but knew that active recruiting and training was taking place, and that ARSA had shown the capacity to mount widespread, coordinated attacks.²²⁸
- 3.42 One of the accounts in the Fortify Rights Document is by a person who claims to have been an ARSA recruit who had indirect contact with the leader of ARSA. This person, who is said to have been interviewed by Fortify Rights in September 2017, estimates that prior to the August 2017 attacks, there were 10,000 members of ARSA in Maungdaw Township alone.²²⁹ This figure is consistent with Amnesty International's early assessment that there were "around several thousand" ARSA fighters.²³⁰ The

²²⁶ 2018 FFM Detailed Findings, paras. 1021-1022 (not included in MG, Vol. II, Annex 40), CMM, Vol. VI, Annex 239.

²²⁷ 2018 FFM Detailed Findings, para. 1027 (not included in the extract at MG, Vol. II, Annex 40), CMM, Vol. VI, Annex 239.

²²⁸ CMM, para. 3.43. See also Myanmar News Agency, "Terrorist training camps, guns uncovered in Mayu Mountains", *The Global New Light of Myanmar*, 22 June 2017, CMM, Vol. VIII, Annex 386.

²²⁹ Fortify Rights Document, #24, pp. 38-41 (not included in the extract at MG, Vol. X, Annex 338), CMM, Vol. VII, Annex 278.

²³⁰ Amnesty International, *"We Will Destroy Everything": Military responsibility for crimes against humanity in Rakhine State*, 27 June 2018 ("**Amnesty International, Destroy Everything**"), p. 23, CMM, Vol. VI, Annex 269.

Gambia claims, without any justification, that records of Myanmar’s Ministry of Home Affairs, which note that 17,600 Bengalis were involved in ARSA’s attacks, are “inflated”.²³¹

- 3.43 What is clear is that people were put under pressure by ARSA to join (and did join), a fact which The Gambia in its Reply does not dispute. One man describes how ARSA threatened to kill him if he did not join. “The lower ranking people threatened me, communicating the message from Ata Ullah. ... ‘If you join us, we will give you money, but if you don’t we will kill you’” by beheading.²³² This person says that he was paid 20,000 Kyat, and that he had seen an alleged informer killed by ARSA previously, so did not doubt the credibility of ARSA’s threat.
- 3.44 Even if Amnesty International were correct in stating that “the overwhelming majority of Rohingya did not participate” in the attacks,²³³ this statement is not inconsistent with the conclusion that 17,600 out of a population many times that size *did* participate in the attacks as part of a large-scale mobilisation of the local community.
- 3.45 In support of its assertion that ARSA “represented no more than a *tiny fraction* of the Rohingya population” at the time of the August 2017 attacks,²³⁴ The Gambia cites to the 2018 FFM Detailed Findings. In fact, in the cited passage, the FFM did *not* state that ARSA represented “no more than a *tiny fraction* of the Rohingya population”. What the FFM in fact stated was, “overall membership and support for ARSA represented *a minority* of the total population”.²³⁵ A “minority” of the overall population of Bengali Muslims in northern Rakhine State could have numbered in the hundreds of thousands. Indeed, the figure of 17,600 ARSA terrorists and supporters given by the Ministry of Home Affairs would have been a “tiny fraction” of the total population at the time.

²³¹ RG, para. 7.16.

²³² Fortify Rights Document, #24, pp. 38-41 (not included in the extract at MG, Vol. X, Annex 338), CMM, Vol. VII, Annex 278. See also *ibid.*, #44, pp. 84-86.

²³³ Amnesty International, *Destroy Everything*, p. 40, CMM, Vol. VI, Annex 269.

²³⁴ RG, para. 7.17 (emphasis added).

²³⁵ 2018 FFM Detailed Findings, para. 1022 (emphasis added) (not included in the extract at MG, Vol. II, Annex 40), CMM, Vol VI, Annex 239.

3.46 The Gambia’s own evidence, in the form of the IIMM witness statement of Andrew Riley,²³⁶ contradicts its own position. Mr Riley says as follows. He was present in Rakhine State between May and late August 2017. He had worked in Rakhine State during the relevant period in 2017 on behalf of, *inter alia*, Fortify Rights, LAW and Action Contre La Faim (“ACF”). He learned from Bengali colleagues and from his own observations that “many Rohingya ... supported ARSA”,²³⁷ and that there was “strong support for ARSA” in Rakhine State.²³⁸ There was a strong ARSA presence in Ta Man Thar when he visited the area. ARSA instructed husbands not to permit their wives to go on the motorbike transports provided by ACF.²³⁹ Due to his “active interest in this issue”, Mr Riley spoke in detail to his “Rohingya colleagues” at ACF, one of whom stated that “95% of Rohingya people support ARSA.”²⁴⁰ In addition to Mr Riley, and even many months after ARSA’s August 2017 terrorist attacks, another of The Gambia’s own purported witnesses said: “what they [ARSA] are doing is right”.²⁴¹

4. The objective was not to target the “entire Rohingya population”

3.47 The Gambia argues that Myanmar was not engaged in a counter-terrorism operation because it targeted the “entire Rohingya population”.²⁴² Again, this is a statement without substance or accuracy.

3.48 First, a vast number of villages and villagers in Maungdaw, Buthidaung and Rathedaung Townships were untouched by violence in 2016 and 2017, and many villagers (hundreds of thousands) remained in northern Rakhine State.²⁴³

3.49 Furthermore, even the isolated and selective quotes relied on by The Gambia in fact demonstrate that the military distinguished the ARSA terrorists and its supporters

²³⁶ IIMM, Witness Statement No. IIMM0001557475 (Andrew Riley), RG, Vol. IV, Annex 48.

²³⁷ *Ibid.*, para. 52.

²³⁸ *Ibid.*, para. 120.

²³⁹ *Ibid.*, para. 46.

²⁴⁰ *Ibid.*, para. 120.

²⁴¹ Video and transcript of interview of Nazmul Islam (28 February 2018), at Part 1, from [02:23:25], RG, Vol. III, Annex 41.

²⁴² RG, para. 7.18.

²⁴³ CMM, Chapters 6, 7, 8 and 9. See also this Rejoinder, Chapters 6, 7, 8 and 9 below.

involved in the attacks, who were the “bad people”, from the rest of the population of Bengalis.²⁴⁴ The Gambia’s case also continues to be eroded by the conflicting evidence provided by IIMM witnesses (some of whom are witnesses relied on by The Gambia in its Reply), who provide accounts of the events of 2017, and who note that the Myanmar Defence Services attempted to distinguish between those committing, or who were suspected of committing, acts of terrorism, referring to them as the “bad guys”/“bad people” (ARSA), and the rest of the Bengali population.²⁴⁵

- (1) One witness says that after the October 2016 attack on the security headquarters (Htar Nar Shoak), the Myanmar military came to the village of Ah Htet Nan Yar and said “bad people” were behind the attacks and were being sheltered.²⁴⁶
- (2) Another witness states that the villagers agreed to inform the military of those who were part of ARSA.²⁴⁷
- (3) Yet another witness says that Lon Htein (the Myanmar Police Force) came looking for “bad people”, namely Al Yaqin, who were being given armed training and whose names were on a list after the October 2016 attacks, but that sometimes informants gave false information in order to obtain money.²⁴⁸
- (4) Legal Action Worldwide Witness 007, who is not an IIMM witness but whose statement is cited by The Gambia, says as follows. He is Bengali, and has family and friends who remained in Myanmar at an unstated location. He heard firing from the direction of the army camp known as “Nay May 7”, the day before Qurban. This was before the military entered the village.²⁴⁹ He was not an eye-witness to the few killings he heard about. People who were arrested were stated to have “links with the Bangladeshi terrorists”.²⁵⁰ It is clear from his statement

²⁴⁴ RG, para. 7.20. See also this Rejoinder, paragraph 3.14 above.

²⁴⁵ IIMM, Witness Statement No. IIMM0019629206, paras. 60, 66, 68 and 72, RG, Vol. IV, Annex 50;; IIMM, Witness Statement No. IIMM0027992990, paras. 123 and 145, RG, Vol. IV, Annex 51; IIMM, Witness Statement No. IIMM0027871404, para. 96, RG, Vol. IV, Annex 55.

²⁴⁶ IIMM, Witness Statement No. IIMM0028059653, paras. 60 and 62, RM, Vol. IV, Annex 139.

²⁴⁷ IIMM, Witness Statement No. IIMM0019629206, para. 66, RG, Vol. IV, Annex 50.

²⁴⁸ *Ibid.*, paras. 42, 60, 66, 69 and 72.

²⁴⁹ Legal Action Worldwide, Witness statement No. 007, paras. 24 and 26, MG, Vol. X, Annex 344.

²⁵⁰ *Ibid.*, para. 36.

that most of the villagers were not targeted by the Myanmar Defence Services. It was by no means all the Bengalis in that village who were targeted.

- 3.50 The Gambia states that “an unnamed officer” of the 33rd Light Infantry Division posted on Facebook: “If they’re Bengali, they’ll be killed”.²⁵¹ The Gambia fails to point out that, as is clear from the Reuters article, the “unnamed officer” is one Kyi Nyan Lynn, of the 33rd Division, who had posted under the pseudonym of “Mai Naung Lynn”. He said the army reaction was justified because soldiers were under attack from “Bengali terrorists” who had terrorized them first. He denied being involved in any killings and claimed that as they cracked down, whole villages fled.²⁵² What is quite clear is that the army were looking for terrorists and those villagers who were harbouring them, and not seeking to attack the whole Bengali population.²⁵³
- 3.51 The Reply of The Gambia itself cites examples of a commander who reportedly told a group of Bengalis what would happen “if we find any terrorists...”, and of a village Chairman who reportedly told villagers what would happen “if you do something bad, if you have bad people here.”²⁵⁴ Both of these reported statements make it clear that the people sought were the “bad people”, that is, ARSA, and that the entire Bengali population was not targeted.
- 3.52 In its Reply, The Gambia cites entries in Operational Reports which refer to four Bengali villages in which there is also a Rakhine village of the same name.²⁵⁵ For operational purposes, it was essential to distinguish between the Bengali and the Rakhine village of the same name and this was done by reference to the term “kalar” to denote the Bengali village. The Gambia seeks to describe this as a “derogatory” term that depicts Bengalis as “non-humans”.²⁵⁶ It is not accepted that this word is intended as a derogatory term, as explained in the Counter-Memorial of Myanmar.²⁵⁷

²⁵¹ RG, para. 7.19.

²⁵² S. Lewis, Z. Siddiqui, C. Baldwin and A. R. C. Marshall, “Tip of the Spear”, *Reuters*, 26 June 2018, pp. 3-4, MG, Vol. IX, Annex 284.

²⁵³ RG, para. 7.20.

²⁵⁴ RG, para. 7.20.

²⁵⁵ RG, para. 7.20.

²⁵⁶ RG, para. 7.20.

²⁵⁷ CMM, paras. 2.168-2.171.

The Gambia has inserted into its narrative in its Reply the word “dogs”, as if that is the accepted translation of “kalar”, which it is not.

- 3.53 The Reply of The Gambia points out that, according to a media article, a purported deserter said that he was ordered to conduct “clearance operations”.²⁵⁸ However, the meaning of that expression has been explained in the Counter-Memorial of Myanmar.²⁵⁹ In any event, this claimed deserter has provided no witness statement.
- 3.54 Given the foregoing, The Gambia’s new case theory that the “primary objective of the ‘clearance operations’ ... was to destroy the Rohingya in whole or in part under the pretextual umbrella of countering the ARSA attacks” does not withstand scrutiny and should, therefore, be dismissed.²⁶⁰

C. The planning of the counter-terrorism operations

1. General

- 3.55 This Section of this Rejoinder responds to **paragraphs 7.23 to 7.30 (Chapter 7, Section II)** of The Gambia’s Reply, in which The Gambia wrongly contends that the counter-terrorism operations were “preceded by months of systematic efforts to prepare its attack on Rohingya villages and render the Rohingya defenceless”.²⁶¹ This contention ignores the undisputed evidence. As will be demonstrated below, measures taken prior to the counter-terrorism operations were legitimate responses to the violent activities of the terrorist organisation, ARSA.

2. Myanmar’s military activities were a legitimate response to terrorist attacks

- 3.56 In its Reply, The Gambia is fixated on what it claims to be a sinister “build-up of military capacity” in northern Rakhine State²⁶² in the months after ARSA’s deadly

²⁵⁸ RG, para. 7.21, citing Reuters Investigates, “Planned Purge: New evidence shows how Myanmar’s military planned its brutal purge of the Rohingya”, 4 August 2022 (not annexed to the Reply of The Gambia as required by Article 50, paragraph 1, of the Rules of Court).

²⁵⁹ CMM, paras. 1.40-1.41.

²⁶⁰ RG, para. 7.3.

²⁶¹ RG, para. 7.23.

²⁶² RG, para. 7.30.

attacks of October 2016. However, it must be obvious that, following the terrorist attacks of October 2016, it was entirely appropriate to increase the capacity of the security forces in the area given that ARSA and other groups continued to be present there. It was reasonable for the Myanmar Defence Services to anticipate that further terrorist attacks could be expected. The alternative would have been for the military to sit back, do nothing, and risk allowing the State to be taken over by a terrorist organisation. Such a proposition is absurd. It is surprising that at no point does The Gambia acknowledge that it is the responsibility of the State of Myanmar, as it is of any state, to ensure the safety and security of its citizens.

- 3.57 ARSA was embedded within the Bengali villages. In the circumstances, it was to be expected that the Myanmar Defence Services would take measures, such as the imposition of curfews and the confiscation of dual use tools, to restrict attacks mounted from within the villages.

3. Myanmar did not improperly target Bengali leaders

- 3.58 The Gambia claims, without providing any evidence, that Myanmar targeted leaders within the Bengali community.²⁶³ In fact, the evidence shows that it was *ARSA* who targeted Bengali leaders (and other Bengali civilians), frequently killing them in the belief that they were colluding with the Government. ARSA also killed large numbers of people from other communities, including Rakhine, Mro, Daignet and Hindus.²⁶⁴
- 3.59 Certain Bengalis were lawfully arrested by the military or the police and detained because they were suspected of being part of ARSA.²⁶⁵ The Reply of The Gambia

²⁶³ RG, para. 7.23. See also RG, para. 9.73. Myanmar also addresses the allegation that it targeted Bengali leaders in Chapter 13 of this Rejoinder. Specifically, Myanmar argues that The Gambia fails to prove that acts were committed that constituted the *actus reus* of genocide through the alleged targeting of leaders.

²⁶⁴ CMM, paras. 3.6(9) and 3.144. See also 2018 FFM Detailed Findings, paras. 1052-1060 (not included in the extract at MG, Vol. II, Annex 40), CMM, Vol. VI, Annex 239.

²⁶⁵ Myanmar News Agency, “Five arrested on suspicion of attending terrorist training”, *The Global New Light of Myanmar*, 23 June 2017, p. 9, RM, Vol. V, Annex 190; Myanmar News Agency, “Six more suspects arrested in connection with October Rakhine State attack”, *The Global New Light of Myanmar*, 17 July 2017, p. 2, RM, Vol. V, Annex 190; Myanmar News Agency, “Two more suspects arrested in connection with October Rakhine State attack”, *The Global New Light of Myanmar*, 18 July 2017, p. 2, RM, Vol. V, Annex 191; Myanmar News Agency, “31 suspects arrested in Maungdaw Township”, *The Global New Light of Myanmar*, 24 July 2017, p. 6, RM, Vol. V, Annex 193.

states that “in many cases the arrests were without a legal or factual basis”.²⁶⁶ However, The Gambia provides no evidence of this.

- (1) The Reply of The Gambia cites the claim of CK0200 to have been abused by three drunken soldiers on 10 January 2017 after refusing to provide them with women. However, nowhere in the account of CK0200 is it suggested that he was arrested. Indeed, he says that he knew the soldiers and accompanied them to a nearby village.²⁶⁷
- (2) The Reply of The Gambia also cites the claim of CK0320, who says that he was a community leader, and that his home was surrounded by Border Guard Police who entered and searched his house and accused him of supporting ARSA and feeding them. He says that he was detained and questioned at the police station about his support for ARSA.²⁶⁸ This evidence is to the effect that the Border Guard Police acted due to CK0320’s suspected involvement with ARSA, and not that they acted “without a legal or factual basis”.

3.60 Many of those arrested as suspected ARSA members and supporters were detained and taken through court proceedings. Buthidaung Township Court dealt with 416 such defendants on 25 January 2018. Their cases arose out of an incident in Maungdaw Township in which a group of armed terrorists and supporters opened fire on the Border Guard Police, killing one officer and injuring two others. Simultaneously, another attack was being mounted by a group of terrorists which resulted in the death of an officer. Twenty-five of the defendants were acquitted, and the remainder were each convicted of one or more offences.²⁶⁹

3.61 The Gambia’s arguments are also undermined by P1540 who states that the Border Guard Police searched his house, and that he was detained for questioning. He says that the Border Guard Police thought that he was a supporter and fundraiser for the

²⁶⁶ RG, para. 7.24.

²⁶⁷ RG, para. 7.24; Legal Action Worldwide, “Collated Information from Victims/Witnesses” (“**Legal Action Worldwide, Collated Information**”), pp. 81-82 (CK0200), MG, Vol. X, Annex 336.

²⁶⁸ RG, para. 7.24; Legal Action Worldwide, Collated Information, pp. 85-86 (CK0320), MG, Vol. X, Annex 336.

²⁶⁹ Buthidaung Township Court, 2017 Criminal Case No. 22, Judgement Form, 25 January 2018, RM, Vol. II, Annex 32.

Rohingya Solidarity Organisation (“RSO”), and that he had been involved in the attacks on 9 October 2016 and 25 August 2017. He was charged with murder, bombing and treason, and was acquitted.²⁷⁰ The fact that a person is tried for a crime and acquitted does not mean that the person was arrested “without a legal or factual basis”.

- 3.62 Religious leaders within the Bengali communities inevitably came to the attention of the Myanmar security forces due to the prominent roles many held in ARSA. The International Crisis Group conducted a detailed investigation into the events of October/November 2016. It concluded that at a time in 2016, when ARSA was known as Harakah al Yaqin (Faith Movement, HaY), it was led by a committee of Bengali émigrés in Saudi Arabia and was commanded by Bengalis on the ground with international training and experience in modern guerilla war tactics.²⁷¹ International Crisis Group also concluded that several hundred men from Bangladesh had joined the main fighting force of Muslim villagers in northern Rakhine State, who were led by young Islamic clerics (Mullahs) or scholars (Hafiz). International Crisis Group additionally found that Harakah al Yaqin sought religious legitimacy for its attacks, for example, by the use after 9 October 2016 of *Fatwas* (religious rulings), which decreed that the violence against Myanmar was legal.²⁷²
- 3.63 After the attacks of August 2017, the authorities warned locals that they would be brought to justice if they cooperated with or supported terrorists,²⁷³ but that innocent Bengalis need not be apprehensive.²⁷⁴ Again, the authorities thereby drew a clear distinction between ARSA and its supporters and the rest of the Bengali population.
- 3.64 Against this background of widespread, coordinated and unprovoked violent attacks perpetrated by ARSA against the sovereignty of Myanmar, it is unsurprising that other members of the international community—Japan, the United Nations, the United States of America, India, Turkey and the United Kingdom—all condemned ARSA’s

²⁷⁰ IIMM, Witness Statement No. IIMM0019922094, paras. 43, 69, 109 and 115, RM, Vol. IV, Annex 128.

²⁷¹ International Crisis Group, *New Muslim Insurgency*, CMM, Vol. VII, Annex 296.

²⁷² *Ibid.*, p. 13.

²⁷³ Myanmar News Agency, “Order for Rule of Law in Maungdaw”, *The Global New Light of Myanmar*, 10 September 2017, p. 1, RM, Vol. V, Annex 196.

²⁷⁴ Myanmar News Agency, “Issuing notification of acknowledging and urging the people not to encourage, support and abet extremist terrorists”, *The Global New Light of Myanmar*, 28 August 2017, p. 2, RM, Vol. V, Annex 194.

terrorist attacks.²⁷⁵ So did the All Myanmar Islamic Religious Organization, which urged Muslims to cooperate with the authorities concerned for peace and stability.²⁷⁶

4. The legitimate confiscation of multi-purpose tools

- 3.65 In the circumstances prevailing at the time, it is entirely understandable that the authorities would confiscate household tools which could also be used as weapons, in order to prevent “clandestine terrorist preparations and weapons storage”,²⁷⁷ and to reduce the chance of further ARSA violence. The Gambia fails to acknowledge that ARSA was at the time intent on building up a cache of weapons. The removal of items which had the potential to be used as weapons was an important precautionary measure. Any assertion that it was not is contradicted by other sources.²⁷⁸
- 3.66 As the FFM observed, one of the goals of the attacks by ARSA in October 2016 was to seize weapons, and indeed, ARSA had success in this regard.²⁷⁹ One witness said that those recruited to fight with ARSA were promised weapons and training.²⁸⁰
- 3.67 Contrary to the contention of The Gambia,²⁸¹ Bengalis were allowed to keep small knives when the Government collected the larger weapons.²⁸²

5. The legitimate removal of fences

- 3.68 Contrary to The Gambia’s claims, fences were not removed for any nefarious purpose but as one part of a larger package of legitimate counter-terrorism measures.

²⁷⁵ Myanmar News Agency, “UN, foreign countries, embassies and organisations denounce ARSA terrorist attacks in Rakhine State”, *The Global New Light of Myanmar*, 1 September 2017, p. 9, RM, Vol. V, Annex 195.

²⁷⁶ Myanmar News Agency, “All Myanmar Islamic Religious Organization strongly condemns ARSA terrorist group, urges Muslims to cooperate with authorities concerned for peace and stability”, *The Global New Light of Myanmar*, 11 September 2017, p. 2, RM, Vol. V, Annex 197.

²⁷⁷ RG, para. 7.26.

²⁷⁸ IIMM, Witness Statement No. IIMM0027992947, paras. 62-63, RM, Vol. IV, Annex 152.

²⁷⁹ 2018 FFM Detailed Findings, para. 1031 (not included in the extract at MG, Vol. II, Annex 40), CMM, Vol. VI, Annex 239.

²⁸⁰ *Ibid.*, para. 1033 (not included in the extract at MG, Vol. II, Annex 40), CMM, Vol. VI, Annex 239.

²⁸¹ RG, para. 7.26.

²⁸² Fortify Rights Document, # 9, pp. 9-11, RG, Vol. III, Annex 43.

- 3.69 The legitimate practice of removing fences pre-dates the terrorist attacks of 2016 and 2017. While fences made out of zinc roofing sheets were prohibited in June 2016, fences were nevertheless still permitted to be installed by Bengali villagers around their houses which were constructed out of “concrete polls and barbed wire”.²⁸³ As a response to the violence of October 2016, steps were taken to have fences removed again.
- 3.70 The assertion that fences were removed for reasons other than legitimate security concerns is contradicted by this evidence. The terms of the prohibition²⁸⁴ were on the types of materials which could be used rather than ordering that fences were to be removed completely. Permitting Bengalis to make use of barbed wire around their homes took account of the particular security needs of Bengalis, and in no way could be viewed as seeking to render them vulnerable to attack.
- 3.71 Further contradicting The Gambia’s argument that the removal of fences was to render the Bengali population vulnerable is The Gambia’s own evidence. Villagers were told to remove fences, and they understood that this was so that the military “could see from one side of the village to the other” and people could not hide behind fences.²⁸⁵ Villagers were allowed to retain fencing around the toilets.²⁸⁶
- 3.72 Another witness said that “Ma Ya Ka [the head of the township] ...told all of them [the villagers] that bad people lived among them. We were then ordered to remove all fencing for our houses so that the military could see clearly into our properties”.²⁸⁷
- 3.73 Accordingly, not only were the fence-removal orders consistent with being a direct response to ARSA’s attacks on state-security apparatus, but it would have been plainly known and understood by the local Bengali population that the measure was aimed at preventing further “sneak attacks” by terrorists.
- 3.74 The orders were proportionate security measures in the circumstances.

²⁸³ Township Administration Office, Letter No. 3/ 21-1/6 (2174), 9 June 2016, RM, Vol. III, Annex 57.

²⁸⁴ *Ibid.*

²⁸⁵ IIMM, Witness Statement No. IIMM0027992990, paras. 5, 116 and 119, RG, Vol. IV, Annex 51.

²⁸⁶ IIMM, Witness Statement No. IIMM0027971404, para. 32, RG, Vol. IV, Annex 55.

²⁸⁷ IIMM, Witness Statement No. IIMM0027995869, para. 62, RM, Vol. IV, Annex 138.

6. The legitimate imposition of curfews

- 3.75 Another measure used at various times by authorities in northern Rakhine State in response to the violence in the region was the imposition of curfews. Curfews were imposed simply and legitimately as a counter-terrorism measure, and not for any purpose such as to place civilians under “house arrest” or to make them “sitting ducks”.²⁸⁸
- 3.76 According to Amnesty International, curfews were imposed in several townships, including in predominantly ethnic Rakhine areas in 2012. This was a way of maintaining law and order in the wake of the inter-communal violence.²⁸⁹ Curfews were also imposed in other parts of Myanmar in response to a deteriorating security situation.²⁹⁰ Any argument to the contrary is contradicted by P1477²⁹¹ (whose witness statement is relied on by The Gambia in its Reply) who states that, in 2012, a curfew was placed on his village for a year and then became more flexible. The legal basis for the imposition of curfews is set out in section 144 of the Code of Criminal Procedure.²⁹² This provision gives the authorities discretionary powers if the restrictions are likely to prevent “disturbances of the public tranquillity”.²⁹³ Amnesty International notes that “Rakhine and Rohingya” alike were not allowed to leave their respective areas or to enter restricted areas.²⁹⁴
- 3.77 The imposition of curfews in the aftermath of the violence of October 2016 was clearly a necessary and proportionate measure at that time. Restrictions were not uniform within northern Rakhine State, but were imposed as a tailored response to the security needs of particular areas at particular times.²⁹⁵

²⁸⁸ RG, paras. 7.23, 7.26 and 7.27.

²⁸⁹ Amnesty International, “*Caged without a Roof*”: *Apartheid in Myanmar’s Rakhine State*, November 2017 (“**Amnesty International, *Caged without a Roof***”), p. 44 (not included in the extract at MG, Vol. IV, Annex 104), RM, Vol. V, Annex 156.

²⁹⁰ *Ibid.*

²⁹¹ IIMM, Witness Statement No. IIMM0019629206, para. 54, RG, Vol. IV, Annex 50.

²⁹² Amnesty International, *Caged without a Roof*, p. 45 (not included in the extract at MG, Vol. IV, Annex 104), RM, Vol. V, Annex 156.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*, pp. 44-45.

²⁹⁵ *Ibid.*, pp. 47, 48 and 56, MG, Vol. IV, Annex 104.

- 3.78 A curfew is a measure commonly used at times of threats to security within a population. It was to be expected that following the 9 October 2016 attacks, the Myanmar authorities would need to restrict the movements of those living in northern Rakhine State. In the immediate aftermath of the violence, the curfew which was imposed in the region was between the hours of 11 p.m. and 4 a.m.²⁹⁶ After the events of 25 August 2017, it was extended to between the hours of 6 p.m. and 6 a.m.²⁹⁷
- 3.79 Despite the imposition of a curfew, travel was not banned between villages but, from October 2016, it was necessary to obtain a travel permission.²⁹⁸
- 3.80 In its Reply, The Gambia erroneously claims “that at the start of the August 2017 ‘clearance operations’” the curfew was extended to 24 hours a day.²⁹⁹ As the source of this information, The Gambia cites a witness statement provided by the International State Crime Initiative of a person who says that he was a village administrator. This witness statement says that “we were ordered not to leave our homes ... the curfew was no longer limited it was 24 hour.” However, the witness statement then contradicts itself. This person states that he attended “two important village meetings” on 18 and 22 August 2017 “with 50 Rohingya villagers present”, so he and others were clearly not subject to a 24-hour a day curfew or house arrest.³⁰⁰
- 3.81 According to the International State Crime Initiative, at meetings held in August 2017, people were ordered to abide by the curfew and not to meet in groups of more than five people. Villagers were encouraged to accept the NVC and to cooperate with the security forces.³⁰¹ In other words, they were not subject to house arrest.

²⁹⁶ Independent Rakhine Initiative, “Freedom of Movement in Rakhine State”, March 2020, p. 32, MG, Vol. V, Annex 129.

²⁹⁷ *Ibid.*

²⁹⁸ International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar’s Annihilation of the Rohingya*, by P. Green, T. MacManus and A. de la Cour Venning, 2018 (“**ISCI, Genocide Achieved**”), p. 33, MG, Vol. IV, Annex 109.

²⁹⁹ RG, para. 7.27.

³⁰⁰ ISCI, *Genocide Achieved*, p. 46.

³⁰¹ *Ibid.*, p. 45.

3.82 The curfews did not apply to Bengalis alone, but also affected Maramagyi and Rakhine communities in Buthidaung, Mrauk U and Rathedaung.³⁰² The Gambia's narrative regarding the illegitimate use of curfews is also contradicted by two IIMM witnesses who state that a curfew was imposed on both Bengalis and Rakhines in 2017 after one of the military personnel stepped on a mine.³⁰³ This curfew meant that people could only go out between 8 a.m. and 6 p.m.

7. Rakhine ethnic groups

3.83 In its Reply, The Gambia asserts that Myanmar “recruited and trained auxiliary forces, armed and trained militias from ethnic Rakhine groups”.³⁰⁴ This is comprehensively denied by Myanmar. The Gambia has merely restated its position as set out in its Memorial that there was “arming of ethnic Rakhine groups and militia”,³⁰⁵ which does no more than repeat an assertion of the FFM.³⁰⁶ Nowhere does The Gambia or the FFM provide any evidential support for this claim. It is totally unsupported by any credible or reliable evidence, or indeed, any evidence at all.

3.84 It may well have been the case that ethnic Rakhine joined in the violence which erupted after the ARSA attacks, but it does not follow that they had been recruited or trained as a militia to act alongside the Myanmar Defence Services. There is simply not a scintilla of evidence to back up this allegation.

8. Humanitarian assistance

3.85 Myanmar did not deny humanitarian assistance to the Bengalis as part of a process to “render the Rohingya defenceless”.³⁰⁷ The Gambia's assertion to this effect is untenable. The Gambia fails to take into account the inevitable interruption to normal life that occurs when terrorist actions take root. The Gambia ignores the simultaneous attacks on Myanmar at multiple locations and the resultant loss of life. This is a further

³⁰² Independent Rakhine Initiative, “Freedom of Movement in Rakhine State”, March 2020, p. 127, MG, Vol. V, Annex 129.

³⁰³ IIMM, Witness Statement No. IIMM0028059653, para. 65, RM, Vol. IV, Annex 139.

³⁰⁴ RG, para. 7.23.

³⁰⁵ MG, para. 10.26.

³⁰⁶ 2018 FFM Detailed Findings, para. 1430, MG, Vol. II, Annex 40.

³⁰⁷ RG, para. 7.23.

example of The Gambia's refusal to take account of the context in which the events occurred.³⁰⁸

- 3.86 This context is critical. The various curfews imposed at various different times, as legitimate measures to try to maintain security within northern Rakhine State, inevitably impacted on the ability to travel and distribute aid at the height of the troubles.
- 3.87 At the time of the events of 2016-2017, Myanmar had been the recipient of humanitarian assistance from a range of organisations for many years. At times of heightened violence, it became more difficult for some people and aid agencies to operate but there was not a time when all humanitarian assistance was denied by Myanmar. The ARSA attacks of October 2016 temporarily disrupted the ability to provide aid, but this resumed by early November 2016, although initially the supply of aid was more limited than prior to the violence. By the beginning of 2017, international humanitarian organisations were able to resume their work in northern Rakhine State.³⁰⁹
- 3.88 On 9 January 2017, the World Food Programme was given access to a number of villages in the northern part of Maungdaw Township.³¹⁰ Aid from the Indonesian humanitarian organization, Dompot Dhuafa, had already reached internally displaced persons in camps in Sittwe, Rakhine State, on 10 December 2016.³¹¹ Together with local authorities, the Indonesian aid organization delivered 70 bags of rice to Aung Mingalar Ward, and 71 bags of rice to Darpaing IDP camp, and visited the IDP Camp in Mingan Ward.³¹²
- 3.89 In relation to the period May 2017 to August 2017, Andrew Riley, on whose witness statement The Gambia relies, contradicts the argument that Myanmar deliberately

³⁰⁸ RG, para. 7.29.

³⁰⁹ Myanmar, Ministry of Foreign Affairs, Humanitarian Assistance to Rakhine State (As of 2 August 2018), RM, Vol. III, Annex 69; UN GA, Situation of Human Rights in Myanmar, Note by the Secretary-General, UN Doc. A/72/382, 8 September 2017, para. 73, RM, Vol. IV, Annex 115.

³¹⁰ Letter from the Permanent Mission of the Republic of the Union of Myanmar to the United Nations Office and other International Organizations, 2 January 2017, para. 13, RM, Vol. III, Annex 59.

³¹¹ *Ibid.*

³¹² *Ibid.*

denied Bengalis humanitarian assistance. He states that he commenced working for Action contre la Faim (“ACF”) in May 2017. He had previously spent more than two years in the Yangon area but was based in Maungdaw during his work with ACF which ended in August 2017.³¹³ ACF had a staff of about 500, mainly Bengalis.³¹⁴ Its mandate was to increase the nutrition levels of all children in the north and central part of Rakhine State.³¹⁵ ACF served all ethnicities, but those who benefited most in northern Rakhine State were Bengalis.³¹⁶ Other agencies working in the area included Médecins Sans Frontières (“MSF”), UNHCR, World Food Program (“WFP”) and the ICRC.³¹⁷ Travel restrictions in the area, which had become stricter after the violence of October 2016, were opening up. He was able to obtain travel authorisation to travel around northern Rakhine State,³¹⁸ and he regularly travelled from Maungdaw to Buthidaung³¹⁹ until shortly before August 2017 when the permissions were revoked.³²⁰

- 3.90 The Ministry of Social Welfare and Resettlement and the Rakhine State Government distributed rice, beans, clothing and tents for shelters to affected areas from time to time. The UN agencies and international NGOs delivered tons of rice, cooking oil, salt, biscuit and nourishment foods, in consultation with relevant government ministries and agencies. Assistance also came from Thailand and Indonesia.³²¹
- 3.91 Shortly before August 2017, Myanmar discovered that World Food Program (“WFP”) biscuits had been found at an ARSA camp, which suggested that the UN agency might have supporters of ARSA terrorists among its number.³²² Restrictions were

³¹³ IIMM, Witness Statement No. IIMM0001557475 (Andrew Riley), para. 29, RG, Vol. IV, Annex 48.

³¹⁴ *Ibid.*, para. 35.

³¹⁵ *Ibid.*, para. 41.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*, paras. 55 and 68. See also Myanmar, Ministry of Health and Ministry of Social Welfare, Relief and Resettlement, “The list of INGOs remaining tenure on MoU/LoA validity collaborating with the Union of Myanmar in Rakhine State from August 2016 to October 2017”, 16 October 2024, RM, Vol. III, Annex 77.

³¹⁸ IIMM, Witness Statement No. IIMM0001557475 (Andrew Riley), para. 73, RG, Vol. IV, Annex 48.

³¹⁹ *Ibid.*, para. 77.

³²⁰ *Ibid.*, para. 96.

³²¹ Letter from the Permanent Mission of the Republic of the Union of Myanmar to the United Nations Office and Other International Organizations, 2 January 2017, paras. 14 and 16, RM, Vol. III, Annex 59.

³²² IIMM, Witness Statement No. IIMM0001557475 (Andrew Riley), para. 93, RG, Vol. IV, Annex 48.

temporarily imposed on the provision of humanitarian aid,³²³ and the 2017 ARSA attacks occurred very shortly thereafter. These restrictions were in place only for a very short period. The Gambia fails to acknowledge that, by early September 2017, Myanmar had re-established the provision of humanitarian assistance in the form, *inter alia*, of food aid.³²⁴

3.92 Following the deadly attacks of 25 August 2017, at Myanmar's request, the Red Cross Movement – which comprises the International Committee of the Red Cross, the Myanmar Red Cross Society and the International Federation of Red Cross and Red Crescent Societies – continued actively providing humanitarian assistance in Maungdaw and Sittwe. The Red Cross Movement acts on the principles of neutrality, impartiality and independence, providing food, health care, shelter, water, sanitation and hygiene promotion. It has reached all the areas affected by violence.³²⁵

3.93 The Red Cross Movement coordinated its efforts with the Humanitarian Country Team [Myanmar] to avoid duplication of efforts with international organizations.³²⁶

Over the past few months, Red Cross teams conducted rapid assessments in order to understand the needs of communities whose economic activity was disrupted during the aftermath of the violence and upheaval. Based on these assessments, teams distributed rations of food to villages throughout Rakhine in parcels that included rations include rice, cooking oil, sadaw peas (butter beans), fish cans, a wheat-soya cereal blend, iodized salt and tea.³²⁷

3.94 In a statement of 13 October 2017, His Excellency U Thaung Tun, a former national security advisor, said that:

Humanitarian Assistance is being provided to all affected communities [in northern Rakhine State] without discrimination. The Myanmar government is partnering with the Red Cross Movement to distribute the aid. With the participation of the WFP, FAO, ASEAN Coordinating Centre for Humanitarian

³²³ *Ibid.*

³²⁴ Amnesty International, *Destroy Everything*, p. 108, MG, Vol. IV, Annex 112. See also International Federation of Red Cross and Red Crescent Societies, Red Cross Movement, Rakhine Operational Response, January 2018, RM, Vol. V, Annex 158.

³²⁵ International Federation of Red Cross and Red Crescent Societies, Red Cross Movement, Rakhine Operational Response, January 2018, p. 1, RM, Vol. V, Annex 158.

³²⁶ *Ibid.*, p. 3.

³²⁷ *Ibid.*, p. 4.

Assistance on Disaster Management and private donors more aid is expected to flow to the displaced communities in the coming days.³²⁸

- 3.95 This is confirmed by the Red Cross Movement report of June 2018 which states that it had a continued involvement in northern Rakhine State in assessing the needs of the communities and distributing rations of food and other essentials, including water.

Since the crisis in Rakhine began on 25 August 2017, the Red Cross Movement has been actively responding to the humanitarian needs of affected communities in areas of northern Rakhine. In the initial phase of our operation in 2017, the Red Cross reached 180,000 people in 3.5 months.

Cash grants were distributed to those with access to markets and temporarily relocated people.³²⁹

- 3.96 Myanmar affirmed that the Red Cross Movement would continue to provide assistance and protection in northern Rakhine State in 2018.³³⁰ The assistance was in the form of food and water and non-food aid.
- 3.97 Médecins Sans Frontières (“MSF”) has had a presence in Myanmar since 2014. It signed a Memorandum of Understanding with the Myanmar Ministry of Health on 26 May 2017 for two years and its clinics continued to operate until the attacks by ARSA upon Maungdaw Border Guard Police posts on 25 August 2017.³³¹ As soon as the immediate violence subsided, MSF was able to resume its work in northern Rakhine State.

³²⁸ Myanmar News Agency, “Statement of His Excellency U Thaung Tun”, *The Global New Light of Myanmar*, 15 October 2017, p. 3, RM, Vol. V, Annex 198.

³²⁹ International Federation of Red Cross and Red Crescent Societies, Red Cross Movement, Rakhine Operational Response, June 2018, p. 3, RM, Vol. V, Annex 160.

³³⁰ International Federation of Red Cross and Red Crescent Societies, Red Cross Movement, Rakhine Operational Response, June 2018, p. 3, RM, Vol. V, Annex 160; ICRC, Joint Three Month Report for Response in Rakhine State (15 September 2017 to 31 December 2017), 31 January 2018, RM, Vol. V, Annex 157.

³³¹ Memorandum of Understanding between Department of Health, Ministry of Health, Myanmar and Médecins Sans Frontières, 8 September 2014 to 8 September 2016, RM, Vol. II, Annex 1; Memorandum of Understanding between Department of Public Health, Ministry of Health and Sports, Myanmar and Médecins Sans Frontières—Holland, 26 May 2017 to 26 May 2019, RM, Vol. II, Annex 2; Memorandum of Understanding between Ministry of Health and Sports, Myanmar and Médecins Sans Frontières—Holland, 9 September 2020 to 9 September 2024, RM, Vol. II, Annex 8.

- 3.98 The Gambia is incorrect in its assertion that there were often fatal results due to a lack of access to health care.³³² In spite of restrictions imposed during the period of ARSA activity, it was always the case that the local population could obtain emergency medical care and treatment from a hospital.³³³ The Gambia misleadingly does not fully cite the findings of the Independent Rakhine Initiative, which note that while, inevitably, the necessary imposition of curfews, for reasons of security, impacted on the ability of the population to move about at night time, access to healthcare during this period could be obtained with the assistance of the Village Administrator who would contact the checkpoints which were passed *en route* to the hospital.³³⁴ Travel was facilitated by a Village Departure Certificate which was applicable not only to Bengalis but also to Hindu and Kaman communities.³³⁵
- 3.99 A significant number of NGOs, in collaboration with the Ministry of Health, were authorized to care for and treat Muslims in northern Rakhine State.³³⁶ In 2016, 282,362 out-patients were treated and 7,648 in-patients. There was a fall in the numbers in 2017 at a time of significant disruption to security in northern Rakhine State due to ARSA's activities (213,124 out-patients and 5,070 in-patients), but in 2018 the numbers rose to 305,901 out-patients and 7,090 in-patients.³³⁷
- 3.100 When the counter-terrorism operations ceased in early September 2017, the Myanmar National Human Rights Commission ("MNHRC") undertook a mission to northern Rakhine State, between 24 and 29 September 2017, to evaluate the situation and it issued a statement on 3 October 2017.³³⁸ A full report of its findings, review and

³³² RG, para. 7.29.

³³³ Myanmar, Ministry of Health, Letter No. 120, 29 July 2024, RM, Vol. III, Annex 75.

³³⁴ Independent Rakhine Initiative, "Freedom of Movement in Rakhine State", March 2020, p. 126, MG, Vol. V, Annex 129.

³³⁵ *Ibid.*, p. 37.

³³⁶ Myanmar, Ministry of Health, Letter No. 120, 29 July 2024, RM, Vol. III, Annex 75. See also Myanmar, Ministry of Health and Ministry of Social Welfare, Relief and Resettlement, "The list of INGOs remaining tenure on MoU/LoA validity collaborating with the Union of Myanmar in Rakhine State from August 2016 to October 2017", 16 October 2024, RM, Vol. III, Annex 77.

³³⁷ Myanmar, Ministry of Health, Letter No. 120, 29 July 2024, RM, Vol. III, Annex 75; Rakhine State, State Medical Service Director, The Health Care Services to Muslim Patients in Rakhine State (2014-2023) Table, RM, Vol. III, Annex 74.

³³⁸ Myanmar National Human Rights Commission, Statement No. 11/2017, Statement by the Myanmar National Human Rights Commission with regard to the terrorist attacks that occurred in Maung Daw and Buthidaung townships of Rakhine State, 3 October 2017, RM, Vol. III, Annex 63.

recommendations was also issued.³³⁹ It noted concerns for the remaining Bengali population. The report after the visit indicates that proposals were put forward to provide for health care and food, *inter alia*, to be made available to the Bengalis.³⁴⁰

3.101 The MNHRC made a second visit to the region between 12 and 15 December 2017, after which an additional report was prepared in which proposals were set out for the health, welfare and livelihood of the Bengalis still in the region.³⁴¹

3.102 In sum, all the measures and actions of the Myanmar Defence Services were necessary, reasonable and proportionate, and were responsive to the violence perpetrated against the State and civilian population by ARSA. The Myanmar Defence Services were not the generators of the violence.

D. ARSA influence in camps in Bangladesh

3.103 The Gambia fails to meaningfully engage with the facts set out in detail in Section I of Chapter 3 of the Counter-Memorial of Myanmar, relating to the pervasive influence of ARSA within the camps in Bangladesh, and the fear engendered by its presence and its criminal activities.³⁴² The Counter-Memorial of Myanmar gives clear examples of how a fear of ARSA has an intimidatory or chilling effect on what witnesses are prepared to say about ARSA, and has caused them to make false claims about the military.

3.104 The Gambia seeks to justify the failure of witnesses in camps in Bangladesh to mention ARSA on the basis that they “describe events that occurred after the ARSA insurgents had fled.”³⁴³ This self-evidently does not adequately explain the lack of

³³⁹ Myanmar National Human Rights Commission, Field Visit Report by the Commission’s team on the terrorist attack incidents in Maungdaw and Buthidaung Townships in Rakhine State, 2 October 2017, RM, Vol. III, Annex 62.

³⁴⁰ Myanmar National Human Rights Commission, Statement No. (No. 12/2017), Statement by the Myanmar National Human Rights Commission Regarding Field Visits to Maungdaw and Buthidaung Townships in Rakhine State Following the Terrorist Attacks, 10 November 2017, para. 5, RM, Vol. III, Annex 64.

³⁴¹ Myanmar National Human Rights Commission, Report of the Additional Field Investigation of the Commission regarding the terrorist attacks occurred in Maungdaw and Buthidaung Townships of Rakhine State, 20 December 2017, para. 10, RM, Vol. III, Annex 65.

³⁴² CMM, paras. 3.120-3.145.

³⁴³ RG, para. 7.67.

any reference by these witnesses to ARSA, as it recruited and trained villagers and built up an arsenal of weapons prior to the attacks of October 2016 and August 2017.

3.105 The Gambia goes on to state that “Myanmar offers no evidence that ... witnesses feared or were intimidated by ARSA, or that their testimonies were so influenced”.³⁴⁴ This is manifestly wrong. There is ample credible evidence that witnesses have been, and remain, fearful of ARSA, and that this fear is a deterrent to witnesses giving a true and accurate account of events where this would contradict the narrative of ARSA.

3.106 It is obvious that witnesses who are fearful of ARSA are unlikely to admit that they are withholding the truth, or being untruthful, about its activities because of these fears. Nevertheless, some witnesses have done so in clear contradiction to The Gambia’s position.

3.107 According to one witness, whose statement is not referred to by The Gambia:

After October 2016 attack (*Htar Nar Shoak*), I heard that a group called Al Yaqin was formed and they were killing educated and/or respectable Rohingya people like me in Maungdaw areas... *I am afraid of these groups still as they are in the camps but have not seen them. I am afraid to talk about them at this time.*³⁴⁵

“RSO” [Rohingya Salvation Army] is still in the camps and also Al Yaqin.³⁴⁶

The witness explained that by RSO he meant a group from Bangladesh with weapons.³⁴⁷

3.108 In a similar vein, the Deputy Chairman (“Tawankan”) of Min Gyi said that:

I can’t speak about the names of the people in this group [ARSA], it is *not possible for me to speak about this, these people are still around in the camps here now.*

³⁴⁴ RG, para. 7.68.

³⁴⁵ IIMM, Witness Statement No. IIMM0028050361, para. 76, RM, Vol. IV, Annex 140.

³⁴⁶ *Ibid.*, para. 75.

³⁴⁷ *Ibid.*

I know that these people were involved in the attack on the security outposts on 25th August 2017, but *I can't speak more about this.*"³⁴⁸

- 3.109 If a person in such a position of authority was afraid to speak about ARSA, it is reasonable to conclude that the Bengali population of northern Rakhine State as a whole would have entertained similar fears.
- 3.110 Yet another witness, P2894, demonstrates The Gambia's untenable position. When confronted by her interviewers with a previous inconsistent account that she had given, she accepted the falsity of a claim that she had made in her earlier statement. In her earlier statement, she had said that the military had been responsible for taking "Sultan away and chopped him into pieces". In her later statement she admitted that, in truth, her fellow villager had been abducted and then dismembered by Al-Yaqin, and she then described the actions of Al-Yaqin in detail. She said that "When I saw this, I felt so afraid."³⁴⁹
- 3.111 In addition to being completely contradicted by the foregoing witnesses, The Gambia's position on the influence of ARSA in the camps ignores what is stated in its own evidence. For example, another resident of a camp in Bangladesh confirmed to Fortify Rights that Al Yaqin was already in the camps, and stated that nobody will "disclose these things because they are very afraid ... even some of the aid workers don't want to share because they are really afraid now".³⁵⁰
- 3.112 Moreover, despite relying in its Reply on the witness statement of Andrew Riley, an individual who spent time in the camps in Bangladesh in 2017 and 2018, The Gambia fails to acknowledge his evidence that ARSA were active in the camps and had "consolidated power".³⁵¹
- 3.113 A powerful example of ARSA's impact on witness testimony, set out in the Counter-Memorial of Myanmar, concerns the Massacre at Kha Maung Seik,³⁵² in which ARSA

³⁴⁸ IIMM, Witness Statement No. IIMM0027992990, paras. 194-196 (emphases added), RG, Vol. IV, Annex 51.

³⁴⁹ IIMM, Witness Statement No. IIMM0028123039, para. 24, RM, Vol. IV, Annex 142.

³⁵⁰ Fortify Rights Document, #19, pp. 26-29, RG, Vol. III, Annex 43.

³⁵¹ IIMM, Witness Statement No. IIMM0001557475 (Andrew Riley), para. 121, RG, Vol. IV, Annex 48.

³⁵² CMM, paras. 3.108–3.119.

terrorists murdered 105 Hindus (dismissively described by The Gambia as “several Hindus”³⁵³) just to the north of Min Gyi on 25 August 2017.

- 3.114 Following the massacre, ARSA kidnapped eight women from the village and transported them to the Bangladesh camps. There, upon threat of death, they were forced to give false video-recorded statements to Reuters news agency blaming ethnic Rakhines and the Myanmar Defence Services for the massacre.³⁵⁴ As noted by Amnesty International, the survivors continued “to receive threatening calls and messages when quoted by media outlets implicating ARSA or other Rohingya as the perpetrators.”³⁵⁵ Presented with such evidence, it is bizarre that The Gambia suggests that “Myanmar offers no evidence that these witnesses feared or were intimidated by ARSA, or that their testimonies were so influenced”.³⁵⁶
- 3.115 The International Crisis Group reports that the RSO, which had formed in the early 1980s and became defunct, has re-emerged in the camps in Bangladesh in 2022 and is now challenging ARSA for control, ARSA having previously established a firm grip throughout the camps. Latterly, motivated by the killing of a Bangladeshi military officer by ARSA, Dhaka has acknowledged the role of ARSA in the assassination of Mohib Ullah and has arrested some members of ARSA.³⁵⁷ There is no indication that the influence of ARSA is waning.
- 3.116 That the role of ARSA has not diminished is also illustrated by recent reports of the activities in the camps. It is said that ARSA and the RSO enter the camps at night and parade with their arms leading to exchanges of gunfire. Furthermore, ARSA is one of many groups engaged in criminal activities such as murder, kidnap, drugs and extortion.³⁵⁸

³⁵³ RG, para. 9.45.

³⁵⁴ CMM, paras. 3.112–3.117.

³⁵⁵ CMM, para. 3.114, citing Amnesty International, *Destroy Everything*, p. 57, CMM, Vol. VI, Annex 269. The pages of this report dealing with this incident (pp. 50-55) were not included by The Gambia in the extract of that report that it annexed to its Memorial at MG, Vol. IV, Annex 112.

³⁵⁶ RG, para. 7.68.

³⁵⁷ International Crisis Group, *Breaking Away: The Battle for Myanmar’s Rakhine State*, Crisis Group Asia Report No. 339, 27 August 2024, p. 16, RM, Vol. V, Annex 169.

³⁵⁸ A. Rahman, “Separatist groups behind escalating violence in Rohingya Camps”, *Dhaka Tribune*, 13 September 2024, RM, Vol. V, Annex 206.

3.117 According to DW (Deutsche Welle):

In the camps ARSA is a name that quickly ends conversations, leading to monosyllabic, nervous answers. There are believed to be informers in every camp, including children...even the fear of an all pervasive network of informers is enough to silence many.³⁵⁹

3.118 According to the Dhaka Tribune, “the armed criminal gangs active in the camps do not want the Rohingya to return to Myanmar. When the subject of repatriation is brought up, killings and other terrorist activities increase”.³⁶⁰

3.119 The Gambia relies on the witness statement of Jonathan Head, a journalist with the BBC, who said that he spoke to no one who was afraid of ARSA in Maungdaw.³⁶¹ However, there is an abundance of uncontradicted and reliable evidence that ARSA, no doubt due to its violent actions and pervasive control, is feared by many of the Bengali community in the camps and elsewhere.

E. Conclusion

3.120 The Gambia fails to produce credible and reliable evidence in support of its proposition that the primary objective of the “clearance operations” was to “destroy the Rohingya in whole or in part under the pretextual umbrella of countering the ARSA attacks”.³⁶²

3.121 Furthermore, The Gambia fails to demonstrate that “preparations” were conducted for the counter-terrorism operations to heighten the “Rohingya’s vulnerability so that their destruction would be easier to achieve and more extensive”.³⁶³

3.122 The evidence overwhelmingly establishes that the perpetrators of the violence in 2016 and 2017 were ARSA terrorists and its supporters. If widespread and coordinated

³⁵⁹ N. Conrad, S. Czimmek and A. Islam, “Rohingya militants active in Bangladeshi refugee camps”, *Deutsche Welle*, 24 September 2019, CMM, Vol. IX, Annex 434.

³⁶⁰ Siam Sarower Jamil, “Rohingyas find safe haven in rented houses”, *Dhaka Tribune*, 13 September 2024, RM, Vol. V, Annex 206bis.

³⁶¹ RG, para. 4.49. However, evidential weight cannot be given to the witness statement of Jonathan Head, for the reasons given in paragraphs 7.105-7.112 below.

³⁶² RG, para. 7.3.

³⁶³ RG, para. 7.3.

deadly attacks had not been mounted then by ARSA, there would not have been any need for the counter-terrorism operations. The operations aimed to root out ARSA in order to prevent any future recurrence of the violence. The evidence shows that by 2017 ARSA had become an integral part of the community in many of the villages across northern Rakhine State so that they were hidden from view. The measures taken by Myanmar in the form of the dismantling of fences, the removal of tools that could be used as weapons, and the imposition of curfews were proportionate to the security risks faced.

- 3.123 The Gambia also fails to recognise the reality that the evidence overwhelmingly shows that ARSA continues to represent a serious threat to the Bengalis living in the camps in Bangladesh, with a concomitant impact on the willingness of Bengalis to speak fully and truthfully about events in 2016 and 2017.

PART TWO

CHAPTER 4

APPLICABLE LAW: THE GENOCIDE CONVENTION

A. Introduction

- 4.1 The applicable law in this case, the Genocide Convention, is dealt with in Chapter 4 of the Counter-Memorial of Myanmar, to which The Gambia replies in Chapter 3 of its Reply.
- 4.2 Contrary to what The Gambia claims, Myanmar does not contend “that nothing post-dating the adoption of the Convention can be relevant to its interpretation and application”.³⁶⁴ In its Counter-Memorial, Myanmar states clearly that “The jurisprudence of central importance to this case consists of the Court’s judgments on the merits in the *Bosnia Genocide* case and the *Croatia Genocide* case”.³⁶⁵ These two judgments were delivered in 2007 and 2015, some 60 and nearly 70 years respectively after the adoption of the Convention.
- 4.3 What Myanmar does argue in its Counter-Memorial is as follows.
- (1) The Court only has jurisdiction in this case to interpret and apply the Genocide Convention of 1948.
 - (2) The definition of genocide under the 1948 Convention may not be the same as the definition of genocide as it exists today:
 - (i) under customary international law;
 - (ii) in the Statutes of international criminal courts and tribunals such as the ICC, ICTY and ICTR; and
 - (iii) in the domestic legislation of States.
 - (3) Judgments of international criminal courts and tribunals interpreting and applying the concept of genocide as it exists under their Statutes, and judgments

³⁶⁴ RG, para. 3.1.

³⁶⁵ CMM, para. 4.10.

of domestic courts interpreting and applying the concept of genocide as it exists in their domestic legislation, are therefore not of direct relevance to the interpretation of the concept of genocide under the Genocide Convention.

- (4) In contrast, the judgments of this Court in the *Bosnia Genocide* case and the *Croatia Genocide* case deal specifically with the interpretation and application of the Genocide Convention of 1948. These judgments constitute the Court's settled case law, from which the Court should not depart.

4.4 The first of these points is undisputed. The Gambia expressly agrees "that the Court does not have jurisdiction to rule on anything other than breaches of the Genocide Convention".³⁶⁶

4.5 As to the second of these points, even The Gambia itself does not contend expressly that the definitions of genocide under the Statutes of each of the different international criminal courts and tribunals are identical to the definition of genocide under the Convention of 1948.

4.6 Nevertheless, The Gambia advances three arguments as to why the case law of international criminal courts and tribunals should be a reliable guide to the interpretation and application of the Genocide Convention.

4.7 First, The Gambia argues that in the *Croatia Genocide* case, the Court "recognised that the approach to genocide taken by international criminal tribunals is consistent with ('in substance identical to') the Court's own approach under the Convention".³⁶⁷ That is not so. In fact, what happened in the *Croatia Genocide* case was the following.

- (1) There was disagreement between the parties concerning the circumstances in which the Court can infer the existence of the *dolus specialis* of genocide from a pattern of conduct.³⁶⁸
- (2) Croatia argued that the finding of the Court in relation to this question in the *Bosnia Genocide* case was excessively restrictive. In the *Bosnia Genocide* case,

³⁶⁶ RG, para. 3.3 first sentence.

³⁶⁷ RG, para. 3.5. See also RG, para. 3.7.

³⁶⁸ *Croatia Genocide* case, p. 66, para. 145.

the Court held that “for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent”.³⁶⁹ Croatia asked the Court to reconsider this approach, by drawing inspiration from the *Tolimir* Trial Judgment given by a Trial Chamber of the ICTY in 2012.³⁷⁰ According to that ICTY Trial Judgment, “it is permissible to infer the existence of genocidal intent based on ‘all of the evidence taken together’, as long as this inference is ‘the only reasonable [one] available on the evidence’”.³⁷¹

- (3) Serbia for its part argued that the approach taken in the *Bosnia Genocide* case and the approach taken in the *Tolimir* Trial Judgment “come to the same thing”.³⁷²
- (4) The Court ultimately agreed with Serbia that “the criterion applied by the ICTY Trial Chamber in the Judgment in the *Tolimir* case is in substance identical with that laid down by the Court in its 2007 Judgment [in the *Bosnia Genocide* case]”.³⁷³

4.8 That was hardly a finding by the Court that the definitions of genocide under the Statutes of the ICTY and ICTR are in all respects identical to the definition of genocide under the 1948 Genocide Convention, or that judgments of the ICTY or ICTR dealing with genocide should always be considered to be a reliable guide to the interpretation and application of the Genocide Convention of 1948.

- (1) In this part of the *Croatia Genocide* case, the Court was not dealing with any issue of construction of the Genocide Convention. Rather, it was dealing with principles of evidence in cases before the Court, in particular with principles concerning the standard of proof, and the situations in which the Court might

³⁶⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 4 (“**Bosnia Genocide case**”), at pp. 196-197, para. 373.

³⁷⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3 (“**Croatia Genocide case**”), at p. 66, paras. 145-146.

³⁷¹ See *Croatia Genocide* case, p. 66, paras. 145-146, citing *Tolimir*, IT-05-88/2-T, Trial Chamber, Judgment of 12 December 2012 (“**Tolimir Trial Judgment**”), para. 745.

³⁷² *Croatia Genocide* case, pp. 66-67, para. 147.

³⁷³ *Ibid.*, p. 67, para. 168.

draw a particular inference of fact (in this case, the existence of genocidal intent) from the circumstances. This part of the *Croatia Genocide* case establishes only that the standard of proof for allegations of genocide in cases before this Court is the same as the “beyond reasonable doubt” standard of proof applied by the ICTY.³⁷⁴

- (2) In any event, the Court found only one specific point of similarity between cases involving the Genocide Convention and cases involving genocide under the Statute of the ICTY. The Court did not find that the two are identical in all respects.

4.9 Secondly, The Gambia invokes what it claims is “the Court’s own approach to interpreting and applying ... treaties that use generic terms”.³⁷⁵ The Gambia does not say, but seeks to convey the impression, that the Court has a “general approach” of interpreting “generic terms” in treaties as having an evolving meaning that will change in accordance with subsequent changes in international law. That is not the case.

4.10 In fact, in the *Navigational and Related Rights* case, on which The Gambia relies,³⁷⁶ the Court said only that “there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law”.³⁷⁷

4.11 The Gambia does not even seek to address the question why the Genocide Convention is an example of a situation where the parties had such an intent. Indeed, contrary to what The Gambia suggests, the Genocide Convention does not use “generic language”. It contains specific and closed lists of the types of groups that are protected by the Convention (chapeau to Article II), of the kinds of acts that will amount to genocide (Article II (a) to (e)), and of the prohibited forms of participation in genocide

³⁷⁴ See paragraphs 5.21 to 5.40 below.

³⁷⁵ RG, para. 3.8.

³⁷⁶ RG, footnote 67 and accompanying text, referring to *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 243, para. 66.

³⁷⁷ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 242, para. 64.

(Article III). Other obligations under the Convention, such as the duty to prevent genocide (Article I), to punish genocide (Articles I and IV), and to “enact ... the necessary legislation” (Article V), are also spelled out specifically rather than generically. The precise wording of the provisions of the Convention were carefully negotiated.

- 4.12 Thirdly, The Gambia also argues that provisions of Statutes of international criminal courts and tribunals dealing with genocide are “congruent and identical provisions” to the terms of the Genocide Convention, and that case law of international criminal courts and tribunals that interpret these provisions of their Statutes is therefore necessarily an aid to the interpretation of the Convention.³⁷⁸
- 4.13 The Gambia thereby simply assumes what it seeks to prove, namely that all of these provisions are “congruent and identical”. The Gambia states this, without mentioning, let alone addressing, the examples given in the Counter-Memorial of how the concept of genocide under customary international law and under the Statutes of international criminal courts and tribunals may differ from the concept of genocide as it exists under the 1948 Genocide Convention.³⁷⁹ Further examples could also be given.³⁸⁰
- 4.14 The Gambia does not appear to deny that the concept of genocide as it exists in customary international law could develop further over time. Nor does The Gambia appear to deny that the concept of genocide as it exists in the Statutes of international criminal courts and tribunals could reflect (or develop upon) such changes in customary international law that have occurred since the Convention was adopted.
- 4.15 The Gambia does not expressly seek to argue that the terms of a treaty dealing with a particular subject-matter will be retrospectively changed by subsequent developments

³⁷⁸ RG, paras. 3.7 and 3.8.

³⁷⁹ CMM, paras. 4.7 (footnote 448 and accompanying text), 12.8 and 12.9, 12.45 to 12.47.

³⁸⁰ See, for instance, G. Mettraux, *International Crimes: The Law and the Practice, Volume 1: Genocide* (Oxford University Press, 2019), pp. 53-54, RM, Vol. II, Annex 45, noting that “The crime of genocide raises particular problems of interpretation before the International Criminal Court”, and that “The interpretation of the crime of genocide before the ICC is ... complicated by the fact that, in the application of that regime, three sets of provisions will be relevant to identifying the applicable *mens rea* of participants in the commission of such acts: Article 6 [of the ICC Statute, dealing with genocide], Articles 25/28 [of the ICC Statute, dealing with individual criminal responsibility and responsibility of commanders and other superiors], and Article 30 [of the ICC Statute, dealing with the mental element of crimes under the ICC Statute generally]”, as well as by the absence in the ICC Statute of any provision corresponding to Article III of the Genocide Convention.

in customary international law in relation to that subject-matter. Obviously, that is not the case.

- 4.16 It is therefore not the case, or at least, cannot be assumed to be the case, as The Gambia contends, that “The materials which are relied on in the Memorial [such as judgments of the ICTY and ICTR] apply definitions of genocide consistent with the definition in Article II of the Convention”.³⁸¹
- 4.17 Myanmar accepts that the Court, when interpreting and applying the Genocide Convention, will apply the rules of general international law on treaty interpretation, and the rules of general international law on responsibility of States for internationally wrongful acts.³⁸² However, these principles and rules do not lead to the conclusion that the interpretation and application of the Genocide Convention is necessarily identical to the interpretation and application of the provisions dealing with genocide in statutes of international criminal courts and tribunals and in domestic legislation. Indeed, The Gambia appears to accept this in relation to provisions of domestic legislation.³⁸³
- 4.18 As to the third of the points in paragraph 4.3 above, The Gambia does not dispute that this is correct if the first and second of the points in paragraph 4.3 above are correct.
- 4.19 As to the fourth of the points in paragraph 4.3 above, this does not appear to be disputed by The Gambia.

³⁸¹ RG, para. 3.8, referring to *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, para. 66.

³⁸² RG, para. 3.5, referring to *Croatia Genocide* case, p. 68, para. 148.

³⁸³ See RG, para. 3.8, accepting that “decisions relating to materials such as national legislation which define genocide more broadly or otherwise differently from the definition under the Convention are not relevant to the Court’s application and interpretation of the Convention”.

B. The definition of genocide in the Convention

1. The *mens rea* (*dolus specialis*) of genocide

a. Definition of the *dolus specialis*

- 4.20 Both parties agree that each of the individual acts specified in Article II of the Genocide Convention has its own individual *mens rea* (*dolus generalis*).³⁸⁴ Additionally, and distinct from this, in order for an act to be genocide within the meaning of the Convention, it must be committed with the overarching specific intent (*dolus specialis*) in the chapeau to Article II, that is to say, the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.³⁸⁵
- 4.21 The Gambia apparently suggests that the *dolus specialis* requires only an “intent ... to destroy at least a substantial part of the particular group”.³⁸⁶ The Gambia also apparently suggests that the *dolus specialis* may be satisfied by “qualitative factors such as [the victims’] geographical location or prominence in the targeted group”.³⁸⁷ Any such suggestions by The Gambia are wrong.
- 4.22 “Substantiality” and “qualitative factors” are not criteria for determining whether the *dolus specialis* of genocide is satisfied. Rather, they are criteria for determining whether a particular sub-set of members of a protected group constitutes a “part” of the protected group for purposes of Article II of the Convention. This is an entirely different question.
- 4.23 In the *Bosnia Genocide* case, the Court found as follows:
- (1) A “part” of a protected group must be at least a substantial part of the overall protected group. “Substantial part” means that the part targeted must be significant enough to have an impact on the group as a whole. “That is demanded

³⁸⁴ See MG, paras. 4.11 and 4.14; CMM, para. 4.18; RG, para. 3.27.

³⁸⁵ See RG, paras. 3.26 and 3.27.

³⁸⁶ RG, paras. 3.18 (quoting *Bosnia Genocide* case, p. 126, para. 198) and 3.20 last sentence.

³⁸⁷ RG, para. 3.19 first sentence.

by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups”.³⁸⁸

- (2) The substantiality requirement is the essential starting point, but it may of itself not be sufficient.³⁸⁹
- (3) Provided that the substantiality criterion is met, a sub-set of the members of the protected group consisting of those found within a geographically limited area (such as the “Bosnian Muslims of Srebrenica”) may be a “part” of a protected group, especially where the geographic area in question is the area of the perpetrator’s activity and control, and thus, the area of opportunity available to the perpetrators.³⁹⁰
- (4) If a specific sub-set of members of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that it is a “part” of the protected group for purposes of Article II, although this qualitative approach cannot stand alone.³⁹¹ Thus, “in evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group, the Court will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group”.³⁹²

4.24 Furthermore, a “part” of a protected group for purposes of Article II must be an *identifiable* part of the protected group.³⁹³ Thus, for instance, in the *Bosnia Genocide* case, the Court found that “Bosnian Muslims of Srebrenica” were a “part” of the protected group of “Bosnian Muslims” for purposes of Article II. However, a number

³⁸⁸ *Bosnia Genocide* case, p. 126, para. 198; see also *Croatia Genocide* case, p. 65, para. 142.

³⁸⁹ *Ibid.*, p. 127, para. 200.

³⁹⁰ *Ibid.*, pp. 126-127, para. 199; see also *Ibid.*, p. 65, para. 142.

³⁹¹ *Bosnia Genocide* case, p. 127, para. 200.

³⁹² *Croatia Genocide* case, p. 65, para. 142.

³⁹³ CMM, paras. 4.25 and 4.26.

of isolated Bosnian Muslim individuals, even a large number, collectively would not have been a “part” of the protected group.³⁹⁴

- 4.25 The wording of Article II expressly requires an intent to destroy a protected group “in whole ..., as such”, or an intent to destroy a “part” of the protected group, as such.
- 4.26 An intent merely to destroy a substantial number of members of a protected group (as opposed to an intent to destroy the *protected group, as such*) will therefore *not* satisfy the *dolus specialis* of genocide, unless the targeted members collectively constitute a specific “part” of the protected group for purposes of Article II. If they do not, the commission of acts within Article II of the Convention with intent to destroy only a substantial number of members of the protected group is not genocide within the meaning of the Convention.
- 4.27 Furthermore, even if the targeted members *do* collectively constitute a “part” of the protected group, an intent merely to destroy substantial numbers of members of that “part” of the protected group (as opposed to an intent to destroy *that “part” of the protected group, as such*) will also *not* satisfy the *dolus specialis* of genocide.³⁹⁵
- 4.28 The Gambia argues that genocide may be committed, even if the perpetrators ultimately do not succeed in destroying the whole of the targeted protected group (or the whole of the targeted part of the protected group). The Gambia argues that acts falling within Article II therefore do not need to be committed in respect of every single member of the protected group (or part of the protected group) for genocide to be established.³⁹⁶ However, for there to be genocide within the meaning of the Convention, the acts must be committed with the *intent* to destroy the protected group

³⁹⁴ CMM, para. 4.26. Although the definition of genocide in the ICTY Statute is not necessarily the same as that in the Genocide Convention, it is noted that case law of the ICTY is consistent with this requirement. See International Criminal Tribunal for the former Yugoslavia, *Stakić*, IT-97-24, Judgment, Trial Chamber, 31 July 2003, para. 524, RM, Vol. II, Annex 11, quoting *Krstić*, IT-98-33-T, Trial Chamber Judgment, Trial Chamber, 2 August 2001, para. 590: “the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it”.

³⁹⁵ This Chapter of this Rejoinder deals solely with the applicable law. As will be demonstrated in Chapter 13 below of this Rejoinder, in this case The Gambia has not established that Bengalis in Myanmar (or in (northern) Rakhine State), or Bengali Muslims in Myanmar (or in (northern) Rakhine State), are a protected group, and The Gambia does not allege that they are part of a protected group that consists also of others.

³⁹⁶ See RG, para. 3.18 third sentence. However, acts under Article II must nonetheless be capable of, or must be part of a wider campaign that is capable of, bringing about the destruction of the protected group as such: see paras. 4.72 to 4.85 below.

“in whole ..., ... as such”, or an *intent* to destroy a particular “part” of the protected group, as such.

- 4.29 In the present case, The Gambia does not allege that the “Rohingya” are merely “part” of a protected group that includes also others. Nor does The Gambia claim that the alleged genocidal intent was directed at only a “part” of the “Rohingya group”. Rather, The Gambia claims that the “Rohingya” constitute a protected group in their own right, and that the genocidal intent was directed against that protected group. The case law of the Court dealing with the definition of a “part” of a protected group is thus simply irrelevant to this case.
- 4.30 To establish the *dolus specialis* of genocide, The Gambia therefore needs to establish that the “Rohingya” are a protected group in their own right, and then needs to establish the existence of an intent to destroy that protected group “in whole ..., ... as such”.

b. Proof of the *dolus specialis*

i. General

- 4.31 The section of the Reply of The Gambia dealing with the *dolus specialis* for genocide³⁹⁷ speaks of the intent, motive and “mindset” of “the perpetrator”,³⁹⁸ and refers to case law of the ICTY and ICTR.³⁹⁹ However, in cases before the ICTY and ICTR, the alleged perpetrator is an individual not a State, and the role of the tribunal is to determine questions of individual criminal responsibility, and not questions concerning the international responsibility of States. Cases of the former kind are “quite different” from those of the latter kind.⁴⁰⁰
- 4.32 In order for a Contracting Party to the Genocide Convention to bear international responsibility for acts under Article III of the Convention, it is not enough that specific individual perpetrators acted with the requisite *dolus specialis* for individual criminal

³⁹⁷ RG, paras. 3.26 to 3.48.

³⁹⁸ See especially RG, paras. 3.29, 3.30, 3.32, 3.34, 3.37, 3.39 and 3.43.

³⁹⁹ See especially RG, paras. 3.29-3.31, 3.34 and 3.41-3.43.

⁴⁰⁰ *Bosnia Genocide case*, p. 114, para. 167.

responsibility. Rather, in order for a *State* to bear international responsibility for acts under Article III, the State *itself* must have the intent to “destroy, in whole or in part, a ... [protected] group, as such”.

4.33 Thus, in the *Croatia Genocide* case, the Court said that:

The Parties agree that the *dolus specialis* is to be sought, first, in the State’s policy, while at the same time accepting that such intent will seldom be expressly stated. ... In the absence of a State plan expressing the intent to commit genocide, it is necessary, in the Court’s view, to clarify the process whereby such an intent may be inferred from the individual conduct of perpetrators of the acts contemplated in Article II of the Convention.⁴⁰¹

It is apparent that in this quotation, the expressions “State’s policy” and “intent” are used synonymously. The Court (1) states that the *dolus specialis* must be found in *the State’s* policy or intent, (2) acknowledges that the State’s policy or intent will seldom be expressly stated, and (3) accepts that the existence of the State’s policy or intent may be inferred from circumstances (provided that this is the “the only inference that could reasonably be drawn from the acts in question”⁴⁰²). Thus, the Court in that case examined the question whether “the only reasonable conclusion to be drawn is an intent of *the Serb authorities* to destroy that substantial part of the group”.⁴⁰³ In that case, no such State policy or intent was found to have been established, either on the part of the Respondent (in relation to the Applicant’s claim), or on the part of the Applicant (in relation to the Respondent’s counter-claim).

4.34 In the earlier *Bosnia Genocide* case, the Court similarly did not examine whether there was a genocidal intent on the part of individual soldiers. Indeed, the Court stated clearly that it is not for the Court to determine the individual criminal responsibility

⁴⁰¹ *Croatia Genocide* case, pp. 65-66, paras. 143 and 145.

⁴⁰² *Ibid.*, p. 67, para. 148.

⁴⁰³ *Ibid.*, p. 119, para. 407 (emphasis added).

of any person for such acts.⁴⁰⁴ Instead, the Court looked for the existence of a policy, plan or intent at the level of State leadership.

- (1) The only location where the Court found that genocide had been committed was Srebrenica. In making that finding, the Court considered that a policy or intent had been established on the part of the army of the Republika Srpska (VRS) itself, rather than simply on the part of individual perpetrators. The Court agreed with the finding of the ICTY Trial Chamber in the *Krstić* case, which was endorsed by the ICTY Appeals Chamber, that “*the VRS Main Staff ... targeted ... the Bosnian Muslims of Srebrenica*”.⁴⁰⁵
- (2) Despite this, the Court found that the Respondent, Serbia and Montenegro (formerly known as the Federal Republic of Yugoslavia (FRY)), did *not* bear international responsibility for any of the acts of genocide themselves.⁴⁰⁶ This was because the VRS was not one of the Respondent’s organs, because the Respondent’s own army had not taken part in the acts, and because the Respondent’s “*political leaders*” had not “*had a hand in preparing, planning or in any way carrying out the massacres*”.⁴⁰⁷ Instead, the Respondent was found to be internationally responsible only for a breach of its obligation to prevent the genocide,⁴⁰⁸ on the basis that “[*t*]he FRY leadership, and President Milošević above all, were fully aware ...[of] dangers [that] seemed to be of an order that could suggest intent to commit genocide”, yet failed to take any initiative to prevent what happened.⁴⁰⁹

4.35 Thus, for purposes of State responsibility, it is necessary to prove a policy, plan or intent on the part of the Contracting State itself to “destroy, in whole or in part, a ... [protected] group, as such”. This is so, regardless of whether the policy, plan or intent

⁴⁰⁴ *Ibid.*, p. 61, para. 129.

⁴⁰⁵ *Bosnia Genocide* case, p. 166, para. 296 (emphasis added), quoting *Krstić*, IT-98-33-A, Judgment, Appeals Chamber, 19 April 2004, para. 15.

⁴⁰⁶ *Bosnia Genocide* case, pp. 215, 216, 219, paras. 414, 417, 424.

⁴⁰⁷ *Ibid.*, p. 202, para. 386.

⁴⁰⁸ *Ibid.*, pp. 225-226, para. 438.

⁴⁰⁹ *Ibid.*, p. 225, para. 438.

on the part of the Contracting State is proved by direct evidence, or is inferred from the circumstances such as a pattern of conduct.

ii. Standard of proof

- 4.36 The parties agree that in order to infer the existence of the *dolus specialis* of genocide from a pattern of conduct, it is necessary that this be the only inference that could reasonably be drawn.⁴¹⁰
- 4.37 This requirement reflects the fact that the standard of proof to be applied when determining the existence of a genocidal intent is the same as, or at least in substance identical to, the beyond reasonable doubt standard applied by international criminal courts and tribunals.⁴¹¹ In the *Croatia Genocide* case, the Court said that the standard of proof for establishing the existence of a genocidal intent from a pattern of conduct is “in substance identical” with “the criterion applied by the ICTY Trial Chamber in the Judgment in the *Tolimir* case”.⁴¹² The ICTY Trial Chamber said in the *Tolimir* case that “it is permissible to infer the existence of genocidal intent based on ‘all of the evidence taken together’, as long as this inference is ‘the only reasonable [one] available on the evidence’”.⁴¹³ The ICTY Trial Chamber further indicated in that case that this conclusion was an aspect of the “beyond reasonable doubt” standard applied by international criminal courts and tribunals.⁴¹⁴
- 4.38 As has been explained above, the difference between cases before international criminal courts and tribunals, and cases before this Court, is that the former require proof of the *dolus specialis* solely on the part of the individual perpetrator, while the latter requires proof of intent on the part of the Contracting State itself to “destroy, in

⁴¹⁰ *Croatia Genocide* case, p. 67, para. 148, referring to *Bosnia Genocide* case, pp. 196-197, para. 373; CMM, paras. 4.35-4.37; RG, para. 3.28. See also RG, paras. 1.5, 1.19, 3.33, 3.34-3.36, 3.48, 5.31, 9.5, 9.25, 9.33 and 9.98.

⁴¹¹ See CMM, paras. 1.50(2), 5.17, 5.67 and 16.8, and see also this Rejoinder, paragraphs 5.21-5.40 below.

⁴¹² *Croatia Genocide* case, p. 67, para. 148.

⁴¹³ *Tolimir* Trial Judgment, para. 745, quoted in *Croatia Genocide* case, p. 66, para. 146.

⁴¹⁴ *Tolimir* Trial Judgment, para. 34, RM, Vol. II, Annex 21: “Direct evidence supports the truth of an assertion, that is, without an intervening inference. Circumstantial evidence is evidence of circumstances surrounding an event from which a fact at issue may be reasonably inferred. Such evidence alone may be sufficient for a finding of fact beyond reasonable doubt. Such a finding must be the only reasonable conclusion available from the evidence.” (Footnotes omitted.)

whole or in part, a ... [protected] group, as such”. However, the standard of proof is materially identical for both.⁴¹⁵

iii. Multiple intents or motives

- 4.39 The Gambia argues that it is necessary to maintain a distinction between intent and motive, and that the perpetrator of an act of genocide may have more than one simultaneous motive. Thus, says The Gambia, a person may act with the *intent* to destroy a group, even though the person acts with the motive of, for instance, obtaining personal economic benefits, or political advantage or some form of power.⁴¹⁶ The Gambia adds that an actor with a genocidal intent may have multiple simultaneous motives.⁴¹⁷
- 4.40 The Gambia also argues that an *intent* to destroy a group may come into existence only after a course of conduct has already commenced, and that an actor may have the intent to commit crimes other than genocide in addition to the intent to commit genocide.⁴¹⁸
- 4.41 According to The Gambia, this means that even if the purpose of the counter-terrorism operations in 2016 and 2017 was to respond to terrorist attacks by ARSA, this would “not exclude the conclusion that genocidal intent is the only reasonable inference that can be drawn from a given pattern of conduct”.⁴¹⁹
- 4.42 According to The Gambia, Myanmar “seeks to generate confusion from the ‘only reasonable inference’ language used by the Court”, by suggesting that the evidence must *exclusively* support the existence of a genocidal intent to the exclusion of any other motive, and by suggesting that a perpetrator must have “a single motive in a world where human behaviour can rarely be attributed to any one motive alone”.⁴²⁰

⁴¹⁵ See paragraphs 5.21-5.40 below.

⁴¹⁶ RG, paras. 3.28-3.30.

⁴¹⁷ RG, para. 3.31.

⁴¹⁸ RG, paras. 3.31-3.33.

⁴¹⁹ RG, para. 3.33.

⁴²⁰ RG, para. 3.34.

- 4.43 In fact, it is The Gambia which thereby generates confusion.
- 4.44 As a matter of law, it may well be possible for an individual or a State to act with a genocidal intent (intent A), while simultaneously seeking to achieve an ulterior purpose that has nothing to do with genocide (intent or motive B). As The Gambia says, the conclusion that an individual or State is acting with intent B would not necessarily exclude the conclusion that the individual or State is also acting with intent A.
- 4.45 However, where a *pattern of conduct* is consistent both with intent A and intent B, in many cases all of following three inferences would be consistent with the evidence as a whole:
- (1) the individual or State acted with intent A only;
 - (2) the individual or State acted with both intent A and intent B; and
 - (3) the individual or State acted with intent B only.
- 4.46 In such a case, the inference that the individual or State acted with intent A would not be the only inference that could reasonably be drawn. The first two of the three possible inferences, if drawn, would lead to the conclusion that the individual or State acted with intent A (the genocidal intent). However, the third inference, if drawn, would lead to the conclusion that the individual or State acted without intent A (that is, without genocidal intent). As long as the third inference is one of the possible inferences that could reasonably be drawn from the evidence as a whole, then the existence of a genocidal intent will not be the only reasonable inference that can be drawn.
- 4.47 This is demonstrated by the examples from the *Croatia Genocide* case given in paragraphs 4.41 to 4.46 of the Counter-Memorial of Myanmar. Thus, for instance, The Gambia says that as a matter of law the existence of an ethnic cleansing motive does not preclude the existence of genocidal intent.⁴²¹ However, in the *Croatia Genocide* case, the Court found, in relation to Serbia's counterclaim, that "ethnic cleansing"

⁴²¹ RG, para. 3.32.

does not in itself constitute a form of genocide”,⁴²² and that the pattern of conduct was not such that it could only reasonably be understood as reflecting the intention physically to destroy the group of Serbs living in Croatia.⁴²³

- 4.48 The Gambia may be seeking to suggest that the Court should ignore all possible intents and motives other than a genocidal intent, on the ground that all other possible intents and motives could co-exist with a genocidal intent. If so, this would be to turn the “only reasonable inference test” into a “one possible inference test”. Any such suggestion would be directly contrary to the Court’s established jurisprudence and wrong.

iv. Pattern of conduct

- 4.49 The Gambia suggests that a genocidal intent can be inferred not only from the number of persons killed, but also from other features such as a common *modus operandi*.⁴²⁴ However, in the *Croatia Genocide* case, the Court said that “for a pattern of conduct to be accepted as evidence of intent to destroy the group, in whole or in part, it must be ‘such that it could only point to the existence of such intent’”.⁴²⁵ The Court found in that case that there was “a pattern of conduct that consisted, from August 1991, in widespread attacks by the JNA and Serb forces on localities with Croat populations in various regions of Croatia, according to a generally similar *modus operandi*”.⁴²⁶ Despite this, the Court concluded that Croatia had not established that the only reasonable inference that could be drawn from the pattern of conduct it relied upon was the intent to destroy, in whole or in part, the Croat group.⁴²⁷
- 4.50 Ultimately, The Gambia accepts, as it must, that the existence of a genocidal intent will not be the only reasonable inference unless “the pattern of conduct cannot reasonably be understood without it”.⁴²⁸

⁴²² *Croatia Genocide* case, p. 150, para. 5.10.

⁴²³ *Ibid.*, p. 151, para. 5.11.

⁴²⁴ RG, para. 3.20.

⁴²⁵ *Croatia Genocide* case, p. 122, para. 417.

⁴²⁶ *Ibid.*, p. 122, paras. 415-416.

⁴²⁷ *Ibid.*, p. 128, para. 440.

⁴²⁸ RG, para. 3.36.

v. Failure to punish and destruction of evidence

4.51 The Gambia points to statements in case law of the ICTY and ICTR in support of an argument that failure to investigate and punish conduct, and destruction of evidence, “can” be evidence of the existence of a genocidal intent.⁴²⁹ These cases are of no assistance to The Gambia.

- (1) Even if it were correct that certain things “can” be evidence of the existence of a genocidal intent, that does not mean that those things always *are* evidence of a genocidal intent.⁴³⁰ The question whether or not something makes it more likely that a genocidal intent exists will always depend on the specific circumstances of each particular case.
- (2) The Gambia suggests that a failure of the authorities to investigate and punish particular conduct is of itself evidence of a genocidal intent.⁴³¹ The Gambia also suggests that destruction of evidence of a crime is of itself evidence of a genocidal intent.⁴³² These suggestions are untenable. If a crime has been committed (and this cannot simply be assumed), the failure of authorities to investigate and punish that crime obviously does not somehow prove that the crime must have been genocide as opposed to some other kind of crime.⁴³³ Similarly, if evidence of a crime is deliberately destroyed (and again, it cannot simply be assumed either that a crime has been committed or that the purpose of particular conduct was to destroy evidence of that crime), this again does not somehow prove that the crime must have been genocide as opposed to some other kind of crime.⁴³⁴
- (3) Where a finding has already been made that genocide has been committed by a large number of people, then acts of a particular individual such as failing to

⁴²⁹ RG, para. 3.36.

⁴³⁰ See for instance RG, para. 3.44, stating that “identification cards and other forms of official documentation ... *can* play an instrumental role in the genocidal process” (emphasis added). It can hardly be suggested that “identification cards and other forms of official documentation” *must* always be treated as evidence of a genocidal intent.

⁴³¹ RG, paras. 3.41-3.42.

⁴³² RG, paras. 3.41-3.42.

⁴³³ See CMM, paras. 12.3-12.5.

⁴³⁴ See CMM, paras. 12.6-12.15.

report the commission of those crimes or destroying evidence of them may be relevant to the question whether *that particular individual* shared the genocidal intent of the genocidal campaign that has already been found to have been committed. However, for the reasons given above, such acts of an individual are not capable of establishing that genocide has been committed in the first place.

- (4) The *Akayesu*, *Karemera* and *Krstić* Trial Judgments relied on by The Gambia do not support the contentions of The Gambia, for the reasons given in paragraphs 12.8 to 12.12 of the Counter-Memorial of Myanmar.
- (5) The additional paragraph of the *Karemera* Trial Judgment cited in the Reply of The Gambia deals with superior responsibility (or command responsibility) under Article 6(3) of the Statute of the ICTR (that is, the criminal responsibility of a superior for crimes committed by a subordinate in circumstances where the superior fails to take steps to prevent or punish those crimes).⁴³⁵ This does not assist The Gambia because the concept of superior responsibility does not exist under the Genocide Convention.⁴³⁶
- (6) Case law of the ICTY and the ICTR is in any event not a reliable guide to the interpretation and application of the Genocide Convention of 1948,⁴³⁷ including for the reason that such cases are concerned with individual criminal responsibility of individual perpetrators, and not the international responsibility of the Contracting State itself.

vi. Drawing inferences from small numbers of victims

- 4.52 The Gambia suggests that the killing of even two or three people may be sufficient to establish the existence of genocidal intent.⁴³⁸ That argument cannot be accepted.
- 4.53 In cases where a finding has already been made that a genocidal campaign has been committed by a large number of people, then the killing by an individual perpetrator

⁴³⁵ RG, para. 3.43 third and fourth sentences, referring to International Criminal Tribunal for Rwanda, *Karemera and Ndirumpatse*, ICTR-98-44-T, Trial Judgment and Sentence, Trial Chamber, 2 February 2012, para. 1618, RM, Vol. II, Annex 19.

⁴³⁶ CMM, paras. 12.9 and 12.45-12.47.

⁴³⁷ CMM, paras. 4.1-4.11; and this Rejoinder, paragraphs 4.1-4.16 and 4.31-4.35 above.

⁴³⁸ RG, para. 3.19.

of two or three victims may be found to have been committed with the intent to contribute to that genocidal campaign, such that those two or three killings are committed with genocidal intent on the part of *that individual perpetrator*. However, evidence of the killing by an individual perpetrator of two or three victims could hardly establish by itself that larger-scale events of which they formed part were genocidal in the first place,⁴³⁹ or that the State in which the events occurred itself had a policy, plan or intent to “destroy, in whole or in part, a ... [protected] group, as such”.

- 4.54 The Gambia states that the ICTY Trial Chamber in the *Tolimir* case “found that the killing of three community leaders, combined with the forcible transfer of other group members out of an area, was sufficient to support an inference of genocidal intent because of the prominence of the three individuals who were killed”.⁴⁴⁰ The Gambia omits to mention that the conviction for genocide for these three killings was overturned by the ICTY Appeals Chamber,⁴⁴¹ which found that “the evidence does not allow for the conclusion that the murders of the three Žepa leaders had a significant impact on the physical survival of the group as such so as to amount to genocide”, and that “[t]here is, in sum, no sufficient evidentiary support for the finding that Hajrić, Palić, and Imamović were killed “with the specific genocidal intent of destroying part of the Bosnian Muslim population as such”.⁴⁴² In any event, that case dealt with genocide under the ICTY Statute and not under the Genocide Convention, and dealt with genocidal intent of an individual alleged perpetrator and not genocidal intent of the State itself.⁴⁴³
- 4.55 The Gambia also states that the ICTR Trial Chamber in the *Nizeyimana* case “concluded that genocidal intent to destroy a substantial part of the group was present

⁴³⁹ See paragraph 4.51(3) above.

⁴⁴⁰ RG, para. 3.19, third sentence, referring to *Tolimir* Trial Judgment, paras. 781-782, RM, Vol. II, Annex 21.

⁴⁴¹ International Criminal Tribunal for the former Yugoslavia, *Tolimir*, IT-05-88/2-A, Judgment, Appeal Chamber Judgment, 8 April 2015, paras. 257-270, RM, Vol. II, Annex 24.

⁴⁴² *Ibid.*, para. 269.

⁴⁴³ See paragraphs 4.31-4.35 above.

in an incident resulting in the death of two Tutsis”.⁴⁴⁴ However, the fact that the Trial Chamber found that two people were killed at a roadblock with genocidal intent does not mean that the Trial Chamber found that the killing of the two people of itself established the existence of that genocidal intent. In that case, the Trial Chamber had already decided in an interlocutory decision that it would take judicial notice of the fact that “genocide against the Tutsi ethnic group occurred in Rwanda”.⁴⁴⁵ In the Trial Judgment, the genocidal intent of *one individual perpetrator* was inferred from the fact that the two killings were typical⁴⁴⁶ of the “systematic nature in which Tutsi civilians were identified and killed on an ongoing basis at this roadblock and others”.⁴⁴⁷ In other words, it was only after the existence of a genocidal campaign had already been established that the Trial Chamber found the two specific killings to be part of it on the basis that their *modus operandi* was consistent with what was typical of that genocidal campaign. The two specific killings did not establish the genocidal intent of the broader genocidal campaign. In any event, that case dealt with genocide under the ICTR Statute and not under the Genocide Convention, and dealt with genocidal intent of an individual alleged perpetrator and not genocidal intent of the State itself.⁴⁴⁸

- 4.56 The Gambia then appears to suggest that the *Bosnia Genocide* case demonstrates that the killing of a very small percentage of the overall protected group can be evidence of a genocidal intent directed at the protected group as a whole.⁴⁴⁹ That is incorrect. The paragraph of the *Bosnia Genocide* case quoted by The Gambia deals with the definition of a “part” of a protected group for purposes of Article II of the Convention, not with the definition of the *dolus specialis*. The Court found that the 40,000 Bosnian Muslims in Srebrenica constituted a “part” of the protected group of Bosnian Muslims

⁴⁴⁴ RG, para. 3.19 fourth sentence, referring to International Criminal Tribunal for Rwanda, *Nizeyimana*, ICTR-00-55C-T, Judgment and Sentence, Trial Chamber, 19 June 2012 (“*Nizeyimana Trial Judgment*”), para. 1521, RM, Vol. II, Annex 20.

⁴⁴⁵ International Criminal Tribunal for Rwanda, *Nizeyimana*, ICTR-2001-55C-PT, Decision on Prosecutor’s Motion for Judicial Notice of Facts of Common Knowledge, 3 March 2010, para. 2 and *dispositif*, RM, Vol. II, Annex 17.

⁴⁴⁶ The Trial Chamber used the word “emblematic”: *Nizeyimana Trial Judgment*, para. 1521, RM, Vol. II, Annex 20.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ See paragraphs 4.31-4.35 above.

⁴⁴⁹ RG, para. 3.19 fifth sentence.

(which numbered some 1.4 million), and that the killings of one fifth of those 40,000 people were committed with intent to destroy that “*part*” of the protected group, as such.⁴⁵⁰ In the *Bosnia Genocide* case, the Court did *not* find that there was any intent to destroy the protected group of 1.4 million Bosnian Muslims in whole, as such.⁴⁵¹

- 4.57 The above cases therefore do not support The Gambia’s apparent suggestion⁴⁵² that an intent to kill 10,000 Bengali Muslims (even if this could be proved), which would amount to 0.7% of the total of approximately 1.4 million Bengali Muslims living in Rakhine State prior to 2017,⁴⁵³ and to commit other crimes against similar numbers of others (even if this could be proved), could amount to an intent to destroy the population of some 1.4 million Bengali Muslims in northern Rakhine State “in whole ..., ... as such”.

2. The *actus reus*

a. General

- 4.58 The Gambia expressly agrees that the list of acts that constitute the *actus reus* of genocide, found in Article II of the Convention, is a closed list.⁴⁵⁴
- 4.59 In its Counter-Memorial, at paragraph 4.49, Myanmar gives examples of where the Memorial of The Gambia alleges the commission of types of acts which are not found in the list in Article II of the Convention. Contrary to what The Gambia suggests, Myanmar does not identify these allegations as “deserving special attention or status”.⁴⁵⁵ On the contrary, Myanmar simply points out examples of the repeated

⁴⁵⁰ See *Bosnia Genocide* case, p. 166, para. 296 (finding that “the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia” were a “part” of the protected group of Bosnian Muslims), and para. 297 (“The Court concludes that the acts committed at Srebrenica falling within Article II (a) and (b) of the Convention were committed with the specific intent to destroy *in part* the group of the Muslims of Bosnia and Herzegovina as such” (emphasis added)).

⁴⁵¹ See *Bosnia Genocide* case, p. 155, para. 277 (“The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such”). See further, paragraph 4.76 below.

⁴⁵² RG, para. 3.19 sixth to ninth sentences.

⁴⁵³ See CMM, para. 13.151.

⁴⁵⁴ RG, para. 3.9 first sentence.

⁴⁵⁵ RG, para. 3.11 third sentence.

instances in which The Gambia alleges acts that do not fall within Article II of the Convention.

- 4.60 The Gambia now confirms that where it alleges acts not listed in Article II of the Convention, The Gambia “does *not* rely on each of them individually as constituting genocidal acts and does not treat them as a category in its Memorial”.⁴⁵⁶
- 4.61 Indeed, The Gambia appears to accept that its allegations referred to in sub-paragraphs (1)-(8) of paragraph 4.49 of the Counter-Memorial of Myanmar would be incapable of amounting to the *actus reus* of genocide in Article II of the Convention. The Gambia says that it relies on these alleged acts only as evidence of an alleged genocidal intent, or as “part of the Memorial’s description of what occurred without being specifically relied on as constituent elements of genocide”.⁴⁵⁷ These alleged acts therefore should be excluded from consideration by the Court when determining whether The Gambia has proved the commission of the *actus reus* of genocide.
- 4.62 In relation to the other allegations of The Gambia referred to in sub-paragraphs (9)-(16) of paragraph 4.49 of the Counter-Memorial of Myanmar, The Gambia says that these are “*capable* of constituting, or *may* be an example of”, acts falling within Article II of the Convention.⁴⁵⁸ Thus, The Gambia says for instance that “cause[ing] grave and long-term disadvantage to the ability of the members of the protected group to lead a normal and constructive life” (one of the new categories of acts invented by The Gambia) is “*capable* of constituting”, or “*may* be an example of”, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part within the meaning of Article II (c) of the Convention.
- 4.63 However, even if an act falling within one of the new categories formulated by The Gambia could theoretically be *capable* of constituting one of the acts specified in Article II of the Convention, this would not mean any act falling within one of The Gambia’s new categories *does* constitute one of the acts specified in Article II. By inventing these new categories, The Gambia does indeed appear to be seeking to

⁴⁵⁶ RG, para. 3.11 fourth sentence (emphasis in original).

⁴⁵⁷ RG, para. 3.11 footnote 73 and accompanying text. See also *ibid.*, paras. 3.13-3.14, indicating that The Gambia alleges that some of these acts “*preceded or facilitated* genocidal acts”, and not that they are to be treated as genocidal acts as such.

⁴⁵⁸ RG, paras. 3.10 first dot point, 3.11 footnote 72 and accompanying text, 3.12 first and second dot points.

expand the list in Article II of acts that constitute the *actus reus* of genocide. Whether or not a specific act falls within Article II will depend solely on whether the evidence establishes that all of the elements of one of the acts specified in Article II have been established. The invention of new categories of acts by The Gambia is not relevant to, and does not assist in, the determination of that question. The Gambia's newly invented categories should be ignored.

b. Article II (a): “Killing”

i. Deaths in armed conflict / law enforcement operations

4.64 The position taken by Myanmar in its Counter-Memorial is that Article II (a) of the Convention does not apply to the legitimate killing of insurgents or terrorists in battle in an armed conflict or in a law enforcement operation, and does not extend to civilian deaths caused by such operations, if they are exclusively directed at legitimate targets, and the civilian casualties are not caused deliberately.⁴⁵⁹

4.65 Thus, as the Court said in the *Croatia Genocide* case:

... if one takes the view that the attacks were exclusively directed at military targets, and that the civilian casualties were not caused deliberately, one cannot consider those attacks, inasmuch as they caused civilian deaths, as falling within the scope of Article II (a) of the Genocide Convention.⁴⁶⁰

In that case, Croatia had acknowledged that the shelling of towns by Croatian forces may have caused civilian casualties.⁴⁶¹ However, the Court found that the *actus reus* of Article II (a) of the Convention was not satisfied because the shelling was not indiscriminate and was not deliberately intended to cause civilian casualties.⁴⁶²

⁴⁵⁹ CMM, paras. 4.51-4.53.

⁴⁶⁰ *Croatia Genocide* case, p. 138, para. 474 last sentence.

⁴⁶¹ *Ibid.*, p. 134, para. 463 second last sentence.

⁴⁶² *Ibid.*, pp. 137-138, paras. 472 first sentence, 474 last sentence, 475.

4.66 In its Reply, The Gambia apparently accepts that the killing of members of a protected group in the course of armed conflict in a manner compatible with international humanitarian law would not be caught by Article II (a).⁴⁶³

4.67 However, The Gambia nonetheless says that acts would fall within Article II (a) if:

- (1) those killed “were not engaged in any hostile activity or could have been arrested and detained”; and
- (2) there is “compelling evidence” that they were targeted because of their membership of a particular protected group.⁴⁶⁴

Unfortunately, The Gambia does not spell out precisely how it says that its position differs from that of the Court in the *Croatia Genocide* case and of Myanmar.

4.68 By using the words “not engaged in any hostile activity”, The Gambia might be arguing that Article II (a) of the Convention includes any killing of any civilian in an armed conflict, even when lawful under international humanitarian law (for instance, in the case of legitimate collateral civilian casualties in an armed conflict). If so, that argument should be rejected. It is unrealistic, and contrary to the Court’s finding in the *Croatia Genocide* case, to suggest that deaths caused in an armed conflict or police action that are legitimate under international humanitarian law or international human rights law could amount to killings for purposes of Article II (a) of the Genocide Convention.

4.69 By using the words “could have been arrested and detained”, The Gambia might be arguing that Article II (a) of the Convention includes the killing of an enemy combatant in an armed conflict or a terrorist engaged in an ongoing terrorist operation if the enemy combatant or terrorist “could have been arrested and detained”. If so, that argument should similarly be rejected. In an armed conflict, there is no obligation for a combatant to consider whether it would be possible to arrest or detain an enemy combatant rather than to kill them, in circumstances where the enemy combatant is

⁴⁶³ RG, para. 3.16.

⁴⁶⁴ RG, para. 3.16.

still taking an active part in hostilities and has not surrendered.⁴⁶⁵ The same must apply in circumstances of an ongoing armed engagement against terrorists.

4.70 The Gambia appears to accept that Article II (*a*) will not apply unless those killed “were targeted ... because of their membership in a [protected group]”. Of course, the mere fact that a person is a member of a protected group does not mean that they are targeted by reason of that fact. A member of a protected group who is engaged in an armed terrorist attack, and who is killed by security forces responding to that attack, is killed because of their participation in the armed terrorist attack, not because of their membership of a particular protected group. A member of a protected group, who is killed as a collateral civilian casualty in an armed conflict or police operation, is not killed deliberately, and is therefore not killed because of their membership of a particular protected group.

4.71 The result is that in a case such as the present, Article II (*a*) will only apply to killings of persons who were not engaged in the terrorist operation, and who were deliberately targeted by the Myanmar security forces despite them knowing this to be the case, because of their membership of a protected group.

ii. Numeric threshold

4.72 The position taken by Myanmar in the Counter-Memorial is that killings of members of a protected group will not satisfy the *actus reus* of genocide under Article II (*a*) unless the killings are part of a wider campaign that is capable of bringing about the destruction of the protected group as such.⁴⁶⁶ Given that the object of the Genocide Convention is “to safeguard the very existence of certain human groups”,⁴⁶⁷ acts will not fall within its provisions if they pose no threat to the very existence of any protected group (or any “part” of any protected group). In the *Croatia Genocide* case,

⁴⁶⁵ See, for instance, International Committee of the Red Cross, International Humanitarian Law Databases, Customary IHL Database, Rule 47, Attacks against Persons Hors de Combat, RM, Vol. II, Annex 52, relevantly indicating that attacking an enemy combatant becomes unlawful only if the enemy combatant “clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape”. The commentary indicates that there must be “a clear indication of unconditional surrender”, which is “generally shown by laying down one’s weapons and raising one’s hands”, or by “emerging from one’s position displaying a white flag”.

⁴⁶⁶ CMM, paras. 4.54-4.62.

⁴⁶⁷ *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23; *Bosnia Genocide* case, p. 125, para. 194; *Croatia Genocide* case, p. 64, para. 139.

the Court held that acts will not fall within Article II (*b*) of the Convention unless they are “such as to contribute to the physical or biological destruction of the group, in whole or in part”.⁴⁶⁸ The Court thereby referred to a statement of the representative of the United Kingdom made in the negotiations leading to the adoption of the Convention, that “[i]t would not be appropriate to include, in the list of acts of genocide, acts which were of little importance in themselves and were not likely to lead to the physical destruction of the group”.⁴⁶⁹ The Court also referred to a statement of the International Law Commission that such acts must be “of such a serious nature as to threaten [the group’s] destruction in whole or in part”.⁴⁷⁰ Those observations are equally applicable to all paragraphs of Article II.

- 4.73 This means that a small number of killings by a lone perpetrator, or a small number of perpetrators, in the absence of any broader campaign capable of bringing about the destruction of the group as such, cannot satisfy the *actus reus* of genocide under Article II (*a*).⁴⁷¹ Such acts of themselves pose no threat to the existence of the protected group, as such.
- 4.74 The Gambia disputes this, claiming that “there is no numeric threshold that must be met for the *actus reus* of genocide”.⁴⁷² The Gambia contends that its position is confirmed by the fact that in the *Bosnia Genocide* case, the Court made a finding that genocide had occurred in circumstances where there had been 7,000 killings, which was a tiny percentage (some 0.5%) of the protected group of Bosnian Muslims, which in total numbered some 1.4 million.⁴⁷³
- 4.75 However, that is a completely incorrect analysis of what the Court found in the *Bosnia Genocide* case.

⁴⁶⁸ *Croatia Genocide* case, pp. 69-70, para. 157.

⁴⁶⁹ *Ibid.*, referring to United Nations, Official Documents of the General Assembly, Part I, Third Session, Sixth Committee, Minutes of the Eighty-First Meeting, UN doc. A/C.6/SR.81, p. 175.

⁴⁷⁰ *Croatia Genocide* case, referring to Report of the International Law Commission on the Work of Its Forty-Eighth Session, Yearbook of the International Law Commission, 1996, Vol. II, Part Two, p. 46, para. 14.

⁴⁷¹ CMM, para. 4.62.

⁴⁷² RG, para. 3.17.

⁴⁷³ The figure of 1.4 million for the Muslim population of Bosnian and Herzegovina in 1995 is given in *Krstić*, IT-98-33-A, Judgment, Appeals Chamber, 19 April 2004, para. 15 footnote 27, RM, Vol. II, Annex 10.

- 4.76 In the *Bosnia Genocide* case, the Court did *not* find that the intent was to destroy the protected group of 1.4 million Bosnian Muslims as a whole. Rather, the Court found that the intent was to destroy a “*part*” of that protected group. The relevant “*part*” consisted of “the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia”.⁴⁷⁴ That part of the protected group consisted of only some 40,000 people.⁴⁷⁵ The 7,000 killings thus constituted about a fifth of the part of the protected group that was intended to be destroyed.⁴⁷⁶ Furthermore, the Court accepted the finding of the ICTY Trial Chamber, upheld on appeal by the ICTY Appeals Chamber, that the perpetrators knew that these 7,000 killings would “inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica”.⁴⁷⁷ That is to say, although only one fifth of the part of the protected group was killed, the killings were such that they would inevitably lead to the destruction of that part of the protected group.
- 4.77 The *Bosnia Genocide* case is thus consistent with the proposition that killings of members of a protected group (or part of a protected group) will not satisfy the *actus reus* of genocide under Article II (a) unless the killings are of themselves capable, or are part of a wider campaign that is capable, of bringing about the destruction of the protected group (or part of the protected group) as such.
- 4.78 Myanmar does not suggest that the *actus reus* of Article II (a) requires every single member of the protected group (or part of the protected group) to be killed. The crime of genocide may be committed, even if the intention of destroying the whole group (or the whole of the relevant part of the protected group) is ultimately not realised. However, given that genocide is by definition a crime against *groups* rather than a crime against *individuals*, it requires by definition that the *actus reus* of any act of genocide must pose a real threat to the group. The killing by a perpetrator of a small number of individuals normally of itself could pose no real threat to the continued

⁴⁷⁴ *Bosnia Genocide* case, p. 166, para. 296.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*, p. 164, para. 293: “... one fifth of the overall Srebrenica community ...”

⁴⁷⁷ *Ibid.*, p. 164, para. 293: “The Appeals Chamber [of the ICTY in the *Krstić* case] ... held that the Trial Chamber was entitled to conclude that the destruction of such a sizeable number of men, one fifth of the overall Srebrenica community, “would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica”. The Court’s general agreement with the findings of the Trial Chamber is expressed *ibid.*, pp. 134, 166, paras. 223, 296.

existence of a group (or part of a group) as such, and therefore would of itself not satisfy the *actus reus* of Article II (a). Those killings could only satisfy the *actus reus* of Article II (a) if they are part of a wider campaign aimed at the destruction of the group (or part of the group) as such, in which acts of the kind referred to in Article II (a)-(e) are committed on a sufficiently large scale as to pose a real threat to the existence of the group (or part of the group) as such.

4.79 Although definitions of genocide adopted by international criminal courts and in municipal law are not necessarily identical to the definition in the Genocide Convention,⁴⁷⁸ the position under the Genocide Convention is correctly encapsulated by a majority decision of a Pre-Trial Chamber of the International Criminal Court (“ICC”), which said in relation to the crime of genocide under the ICC Statute that:

... the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the protection offered by the penal norm defining the crime of genocide - as an *ultima ratio* mechanism to preserve the highest values of the international community - is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical.⁴⁷⁹

4.80 The majority of the Pre-Trial Chamber acknowledged that there was some controversy as to whether this is a requirement of the *actus reus*, as opposed to being a requirement solely of the *dolus specialis* of genocide.⁴⁸⁰ However, it is unnecessary to determine in the present case whether or not this statement of the Pre-Trial Chamber is a correct statement in relation to the crime of genocide under the Statute of the ICC or that of any other international criminal court or tribunal, or in relation to the crime of genocide under customary international law. Myanmar maintains that it is a correct statement of the position under Article II of the Genocide Convention.

4.81 In the *Bosnia Genocide* case, the Court said in relation to locations other than Srebrenica that:

⁴⁷⁸ See CMM, paras. 4.6-4.7, and paragraphs. 4.1-4.19 above.

⁴⁷⁹ International Criminal Court, ICC-02/05-01/09-3, *Sudan / Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber, 4 March 2009, para. 124, RM, Vol. II, Annex 15.

⁴⁸⁰ *Ibid.*, para. 125.

The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II (a) of the Convention, are fulfilled.⁴⁸¹

This wording indicates that the Court found that the *actus reus* of Article II (a) of the Convention was satisfied because there were “massive killings”.

- 4.82 In relation to Srebrenica, as has been noted,⁴⁸² the Court found that the *actus reus* of Article II (a) of the Convention was satisfied in circumstances where 7,000 out of a population of 40,000 were killed (about one fifth).⁴⁸³ However, this conclusion was based on the Court’s further finding that the acts in question would “inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica”.⁴⁸⁴
- 4.83 In the *Croatia Genocide* case, in relation to Croatia’s claim, the Court found that the *actus reus* of Article II (a) of the Convention was satisfied in circumstances where “a large number of killings were carried out ... in several localities” and “a large majority of the victims were members of the protected group”.⁴⁸⁵ In relation to Serbia’s counter-claim, the Court found that the *actus reus* of Article II (a) of the Convention was satisfied in circumstances where an unknown number of Serbs remaining in the areas of the Krajina protected by the United Nations had been killed.⁴⁸⁶
- 4.84 It is thus not possible for individual killings by individual perpetrators of themselves to satisfy the *actus reus* of Article II (a) of the Convention (other than in the most unusual and theoretical circumstances, in which a lone individual could deploy a weapon of mass destruction capable of endangering the existence of the group as such). As one commentator has observed extra-judicially:

[C]ategorizing the conduct of a lone individual as genocide would disconnect the crime of genocide from its historical roots as a crime against humanity. The requisite contextual element of all crimes against humanity is that they must occur as part of a

⁴⁸¹ *Bosnia Genocide* case, p. 154, para. 276.

⁴⁸² See paragraphs 4.74-4.76 above.

⁴⁸³ *Bosnia Genocide* case, pp. 162-163, paras. 290-291.

⁴⁸⁴ See paragraph 4.76 above.

⁴⁸⁵ *Croatia Genocide* case, p. 98, para. 295.

⁴⁸⁶ *Ibid.*, pp. 142-144, paras. 486-493.

systematic or widespread attack against any civilian population. Such a disconnection would not only be highly implausible in light of the historical development of the law, but also for reasons of coherency within the corpus of crimes under international law. Indeed, it would be an oddity to dispense with a context requirement for the crime of genocide, while at the same time emphasizing the special stigma that attaches to this crime.

The general exclusion of the lone perpetrator from the scope of the international crime of genocide is broadly in line with the Genocide Convention case law, and subsequent practice.⁴⁸⁷

- 4.85 Similarly, killings of members of a protected group by a number of different perpetrators will collectively not satisfy the *actus reus* of Article II (a) unless the killings collectively are on such a scale as to present a concrete threat to the existence of the targeted group (or part thereof).

c. Article II (b): “Causing serious bodily or mental harm”

- 4.86 The Gambia apparently agrees with Myanmar’s position that Article II (b) would not apply to “harm caused to civilians by a military attack, if the military attack was exclusively directed at military targets, and the harm to civilians was not caused deliberately”.⁴⁸⁸
- 4.87 The Counter-Memorial of Myanmar states that both parties agree that in order to fall within the scope of this provision, the serious bodily and mental harm must be such as to *contribute to* the physical or biological destruction of the group, in whole or in part.⁴⁸⁹ The Reply of The Gambia does not deny that this is agreed by both parties.
- 4.88 The Reply of The Gambia expresses no disagreement with the argument in the Counter-Memorial of Myanmar that the word “serious” in this provision imposes a threshold of severity.⁴⁹⁰

⁴⁸⁷ C. Kreß, “The International Court of Justice and the Elements of the Crime of Genocide”, *European Journal of International Law*, vol. 18 (2007), pp. 619–629, at p. 621, RM, Vol. II, Annex 38.

⁴⁸⁸ RG, para. 3.21, referring to CMM, para. 4.63.

⁴⁸⁹ CMM, para. 4.64.

⁴⁹⁰ CMM, paras. 4.65–4.66.

d. Article II (c): “Deliberately inflicting ... conditions of life”

4.89 Paragraph 4.68 of the Counter-Memorial of Myanmar states that the “conditions of life” must be inflicted on the *group*, and not merely on certain members of the group only. The Gambia states that it would be sufficient for the “conditions of life” to be inflicted on “part” of the group, in circumstances where the genocidal intent targets “part” of a protected group rather than the group as a whole.

4.90 As has been explained above, a “part” of protected group within the meaning of the chapeau to Article II of the Convention must be an *identifiable* part of the overall protected group.⁴⁹¹ A number of members of the protected group that do not together form such an identifiable part will not be a “part” of the group for purposes of Article II. Thus, for instance, “Bosnian Muslims of Srebrenica” may be part of the protected group of “Bosnian Muslims”, but isolated members of the protected group that do not form an identifiable part of it would not, even if the number is large.

4.91 Thus, in order to fall within Article II (c), the “conditions of life”:

- (1) if imposed with intent to destroy the protected group “in whole ..., as such”, must be imposed on the protected group as a whole as such, not merely on certain members of the protected group; and
- (2) if imposed with intent to destroy the protected group “in part ..., as such”, must be imposed on the identifiable part of the protected group as such, not merely on certain members of that identifiable part of the protected group.

4.92 Nothing in the Reply of The Gambia appears to disagree with this.

4.93 The Gambia does not address paragraphs 4.67, and 4.69 to 4.71 of the Counter-Memorial of Myanmar,⁴⁹² and The Gambia therefore does not appear to disagree with what is stated in them.

⁴⁹¹ See paragraphs 4.24-4.27 above. See also CMM, paras. 4.26-4.29.

⁴⁹² See RG, para. 3.22.

4.94 The Reply of The Gambia vaguely suggests that “all Rohingya in Internally Displaced Persons (‘IDP’) camps” could be a “part” of the “Rohingya” protected group.⁴⁹³ It is unnecessary to determine whether this is so, as it is not The Gambia’s case that genocide has been committed against “all Rohingya in Internally Displaced Persons (‘IDP’) camps”.

e. Article II (d): “Imposing measures intended to prevent births”

4.95 Paragraph 4.77 of the Counter-Memorial of Myanmar states that Article II (d), like Article II (c), requires that the measures be inflicted on the *group* as such (or on a part of the group as such), and not just on certain members of the group. The Gambia does not disagree with this as such, but states that there is “no *actus reus* requirement for any of these acts to be inflicted on *all* members of the group, which would be an impossible requirement to meet”.⁴⁹⁴

4.96 Myanmar does not contend that such measures must be imposed on every single member of the group. However, Myanmar maintains that the measures must be directed at the group as such (or part of the group as such), rather than certain members of the group only. In the *Croatia Genocide* case, the Court refers to the “systematic nature” of such measures.⁴⁹⁵ In that case, the Court found that Croatia had failed to prove that “acts of rape were carried out *on such a scale* that it can be said that they inflicted conditions of life [within the meaning of Article II (c)]”,⁴⁹⁶ and that Croatia had similarly not proved that rape and other sexual violence was committed in order to prevent births within the group, within the meaning of Article II (d).⁴⁹⁷

4.97 In that case, the Court furthermore indicated that acts falling within this paragraph of Article II have both a physical and a mental element. The physical element is that “the circumstances of the commission of [the] acts, and their consequences, are such that the capacity of members of the group to procreate is affected”.⁴⁹⁸ The mental element

⁴⁹³ See RG, para. 3.22 last sentence.

⁴⁹⁴ See RG, para. 3.24.

⁴⁹⁵ *Croatia Genocide* case, p. 72, para. 164.

⁴⁹⁶ *Ibid.*, p. 117, para. 397 (emphasis added).

⁴⁹⁷ *Ibid.*, p. 117, paras. 397, 399 and 400.

⁴⁹⁸ *Ibid.*, p. 72, para. 166.

is that the measures must have been imposed “in order to” (that is, for the purpose of) preventing births *within the group*.⁴⁹⁹

4.98 Thus, in the *Bosnia Genocide* case, the Court found that the commission of acts within Article II (d) had not been proved because the evidence did not establish that victims of sexual violence had refused subsequently to procreate or had been unable to find a husband, or that there had been a decline in births within the protected group.⁵⁰⁰

4.99 Paragraph 4.77 of the Counter-Memorial of Myanmar also states that Article II (d) will not apply if the acts or measures in question do not result in a lowering of the birth rate to such an extent that the population of the protected group will decline at a rate that threatens the very existence of the group. The Gambia disputes this requirement.⁵⁰¹

4.100 However, this requirement necessarily follows from the very nature of genocide itself, which involves the destruction of a human group, as such. If a measure has the effect of reducing the rate by which a group grows, but still leaves the group with a positive rate of growth, then the measure is inherently incapable of leading to the destruction of the group, as such.

4.101 In the *Croatia Genocide* case, the Court said that acts of rape did not fall within Article II (c) of the Convention because they were not “on such a scale as to have amounted also to inflicting conditions of life on the group that were capable of bringing about its physical destruction in whole or in part”.⁵⁰² The Court furthermore implied that a similar requirement applies under Article II (d). It would be illogical for the *actus reus* of the crime of destroying a group to be satisfied by an act that is inherently incapable of leading to the destruction of the group.

4.102 The Counter-Memorial of Myanmar refers to the Secretariat comments of 1947 on the draft Convention on the Crime of Genocide, which refer to “measures aimed at the extinction of a group of human beings by systematic restrictions on births without

⁴⁹⁹ *Croatia Genocide* case, p. 117, paras. 397, 399, 400.

⁵⁰⁰ *Bosnia Genocide* case, p. 191, paras. 358-360.

⁵⁰¹ RG, paras. 3.23 and 3.25.

⁵⁰² *Bosnia Genocide* case, p. 110, para. 364.

which the group cannot survive”.⁵⁰³ The Gambia argues that this comment applied only to “biological genocide”.⁵⁰⁴ However, the established jurisprudence of the Court confirms that the scope of the Genocide Convention is limited to the physical or biological destruction of a group, and that it does not extend, for instance, to “cultural genocide”.⁵⁰⁵ If The Gambia claims that a measure that does not lead to a decline in the population of a group would constitute a form of genocide other than physical or biological genocide, then The Gambia is impermissibly seeking to expand the scope of the Convention. The Secretariat comments of 1947 confirm that a measure will not fall within Article II (*d*) of the Convention unless it is “aimed at the extinction of a group of human beings by systematic restrictions on births without which the group cannot survive”. Measures that allow a positive population growth to continue cannot be aimed at the “extinction” of that population, and cannot fall within Article II (*d*).

C. State responsibility

1. Responsibility for acts under Article III

4.103 Chapter 3 of the Reply of The Gambia does not reply to or express any disagreement with paragraphs 4.79 to 4.83 of the Counter-Memorial of Myanmar.

2. Duty to prevent genocide

4.104 Chapter 3 of the Reply of The Gambia does not reply to or express any disagreement with paragraphs 4.84 to 4.86 of the Counter-Memorial of Myanmar.

3. Duty to punish genocide

4.105 Chapter 3 of the Reply of The Gambia does not reply to or express any disagreement with paragraphs 4.87 to 4.90 of the Counter-Memorial of Myanmar.

⁵⁰³ CMM, para. 4.78.

⁵⁰⁴ RG, para. 3.25.

⁵⁰⁵ *Croatia Genocide* case, p. 63, para. 136.

4. Duty to enact legislation

- 4.106 Chapter 3 of the Reply of The Gambia does not reply to or express any disagreement with paragraphs 4.91 to 4.117 of the Counter-Memorial of Myanmar.
- 4.107 Chapter 9 of the Reply of The Gambia suggests that Article V of the Convention requires all Contracting Parties to enact domestic legislation that specifically criminalises genocide, and that States cannot rely instead on the general provisions of their criminal law prohibiting murder, assault, rape, forced sterilization or the abduction of children, and so forth.⁵⁰⁶
- 4.108 That argument of The Gambia is untenable for the reasons given in the Counter-Memorial of Myanmar.⁵⁰⁷ If correct, it would mean that many Contracting Parties to the Genocide Convention are today in continuing violation of Article V of the Convention, and that many other Contracting Parties were in continuing violation for decades after they became parties to the Convention, until they eventually enacted domestic legislation criminalizing genocide.⁵⁰⁸

⁵⁰⁶ RG, para. 9.103.

⁵⁰⁷ CMM, paras. 4.91-4.117.

⁵⁰⁸ CMM, especially paras. 4.104-4.109.

CHAPTER 5

QUESTIONS OF PROOF

A. Burden of proof

1. General

- 5.1 The Court applies the general principle that the party which asserts a fact has the duty to establish the existence of that fact (the principle of *onus probandi incumbit actori*). Both parties are agreed on this.⁵⁰⁹
- 5.2 Paragraph 4.4 of the Reply of The Gambia makes a passing reference to the principles that:
- (1) a State that is not in a position to provide direct proof of certain facts “should be allowed a more liberal recourse to inferences of fact and circumstantial evidence”⁵¹⁰ (as to which see paragraphs 5.3 to 5.14 below);
 - (2) in certain circumstances, the burden of proof will vary depending on the type of facts which it is necessary to establish⁵¹¹ (as to which see paragraphs 5.15 to 5.19 below); and
 - (3) the party not bearing the burden of proof has a duty to co-operate “in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it”⁵¹² (as to which see paragraph 5.20 below).

⁵⁰⁹ CMM, paras. 5.1-5.5; RG, para. 4.4 first sentence.

⁵¹⁰ RG, para. 4.4 second sentence; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment of 31 January 2024 (“**ICSFT and CERD case**”), para. 169 second sentence, citing *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949 (“**Corfu Channel case**”), p. 18.

⁵¹¹ RG, para. 4.4 second sentence; *ICSFT and CERD case*, para. 169 third sentence, citing *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010 (II) (“**Diallo case**”), pp. 660-661, paras. 55-56.

⁵¹² RG, para. 4.4 third sentence; *ICSFT and CERD case*, para. 169 first sentence, citing *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I) (“**Pulp Mills case**”), p. 71, para. 163.

However, The Gambia provides no elaboration of the relevant effect that it says that these principles have in the present case. The Gambia does not show that these principles are of any materiality in this case.

2. Party unable to provide direct proof

- 5.3 The effect of the principle referred to in paragraph 5.2(1) above is as follows. Where it should reasonably be possible for the party bearing the burden of proof to provide direct evidence of a claimed fact, but that party fails to do so, the Court will give little or no weight to inferences of fact and circumstantial evidence relied on by that party as proof of that fact. On the other hand, where the party bearing the burden of proof is not reasonably able to provide direct evidence of the claimed fact, the Court will be more willing to allow that party to rely on inferences of fact and circumstantial evidence in order to prove it.
- 5.4 This principle does not lead to any shifting of the burden of proof, or to any lowering of the standard of proof. The party bearing the burden of proof still has to prove, to the requisite standard of proof, the facts from which it asks the Court to draw the inferences. Furthermore, in a case involving claimed breaches of the Genocide Convention, the inference that the Court is asked to draw from the circumstances must be the only reasonable inference available on the evidence.⁵¹³
- 5.5 This principle is an aspect of the “best evidence rule”.⁵¹⁴ Where inferences of fact and circumstantial evidence are the best evidence that a party bearing the burden of proof can reasonably be expected to provide, the Court may attach evidential weight to such evidence. However, the Court will not do so if the party bearing the burden of proof could reasonably have been expected to provide better evidence.
- 5.6 This principle thus concerns the evidential weight to be given to evidence, not the burden of proof or the standard of proof.
- 5.7 The Gambia suggests that the Court should allow a more liberal recourse to inferences of fact and circumstantial evidence where the party bearing the burden of proof lacks

⁵¹³ See CMM, paras. 5.11 to 5.18, and this Rejoinder, paragraphs 5.21 to 5.40 below.

⁵¹⁴ See paragraph 5.88 below.

“access to the territory at issue in a case”,⁵¹⁵ referring to the *ICSFT and CERD* case.⁵¹⁶ However, that case does not support this suggestion.

- 5.8 The Court said in that case only that it has *sometimes* “‘allowed . . . a more liberal recourse to inferences of fact and circumstantial evidence’ when a State lacks effective control over the territory where evidence is located”.⁵¹⁷ It is to be noted that the Court spoke of cases where a State lacks effective control over the territory *where evidence is located*, and not of cases where a State lacks effective control over the territory *where the alleged events occurred*. Furthermore, the Court cited only two previous cases where this had ever happened.⁵¹⁸
- 5.9 Both of these two previous cases are in fact simple applications of the “best evidence rule”.⁵¹⁹
- 5.10 The first of these two previous cases was the *Corfu Channel* case.⁵²⁰ In that case, the Court said that where an applicant State is *unable* to furnish direct proof of facts occurring on the territory of another State, due to that other State’s exclusive control over its own territory, the former State “should be allowed a more liberal recourse to inferences of fact and circumstantial evidence”.⁵²¹
- 5.11 The second of these two previous cases was *Armed Activities on the Territory of the Congo*.⁵²² In that case, the Court allowed the applicant State to have a more liberal recourse to inferences of fact and circumstantial evidence in relation to proving facts, in circumstances where that State was unable “to produce evidence with greater

⁵¹⁵ RG, para. 4.4 second sentence.

⁵¹⁶ RG, para. 4.4 second sentence, referring to *ICSFT and CERD* case, para. 169. In fact it is in para. 80 of that judgment that the Court “recalls that it has sometimes ‘allowed . . . a more liberal recourse to inferences of fact and circumstantial evidence’ when a State lacks effective control over the territory where evidence is located”.

⁵¹⁷ See previous footnote.

⁵¹⁸ *ICSFT and CERD* case, para. 169, referring to *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)* (“*Armed Activities on the Territory of the Congo (Reparations)*”), p. 67, para. 157, and *Corfu Channel* case, p. 18.

⁵¹⁹ See paragraph 5.88 below.

⁵²⁰ See above, paragraph 5.8 last sentence.

⁵²¹ *Corfu Channel* case, p. 18.

⁵²² See above, paragraph 5.8 last sentence.

probative value”.⁵²³ This inability was due to the fact that it had lost effective control over the part of its own territory “where the crucial evidence is located” due to belligerent occupation by another State.⁵²⁴

- 5.12 In the *ICSFT and CERD* case itself, the Court also allowed Ukraine a more liberal recourse to inferences of fact and circumstantial evidence in relation to claimed facts occurring in Crimea, in circumstances where Ukraine was “*not in a position to provide further evidence* owing to its lack of access to Crimea”.⁵²⁵
- 5.13 In all of these cases, a State was allowed a more liberal recourse to inferences of fact and circumstantial evidence because that State was *unable to produce better or more direct evidence*. These cases do not establish any general principle that a State will be allowed a more liberal recourse to inferences of fact and circumstantial evidence, merely because the alleged facts that that State seeks to prove occurred in the territory of another State. On the contrary, these cases confirm that the question will always be whether the State bearing the burden of proof could reasonably be expected to produce better or more direct evidence than the evidence that it has produced.
- 5.14 Even where a State is allowed a more liberal recourse to inferences of fact and circumstantial evidence in relation to the proof of certain facts, this does not mean that this will be allowed in relation to the proof of *all* facts in the case. Nor does it mean that the inferences of fact and circumstantial evidence relied on by that State will necessarily be sufficient to discharge its burden of proof. In the *ICSFT and CERD* case, despite allowing Ukraine a more liberal recourse to inferences of fact and circumstantial evidence, the Court was still not convinced that Ukraine had proved the facts that it alleged.⁵²⁶ Similarly, in *Armed Activities on the Territory of the Congo*, the Court said that it was “aware that detailed proof of specific events that have occurred in a devastating war, in remote areas, and almost two decades ago, is often not available”, but the Court nonetheless considered that “notwithstanding the difficult

⁵²³ *Armed Activities on the Territory of the Congo (Reparations)*, p. 58, para. 157.

⁵²⁴ *Ibid.*

⁵²⁵ *ICSFT and CERD* case, para. 217 (emphasis added).

⁵²⁶ *Ibid.*

situation in which the DRC found itself, more evidence relating to loss of life could be expected to have been collected”.⁵²⁷

3. Variation of the burden of proof

- 5.15 As to the principle referred to in paragraph 5.2(2) above, the case law of the Court indicates that the burden of proof will vary only “in certain circumstances”.⁵²⁸ The only case cited in the *ICSFT and CERD* case in which there was any variation of the normal burden of proof is the *Diallo* case.⁵²⁹ That case concerned a very specific question, namely whether a public authority of the respondent State had afforded certain procedural guarantees to a particular individual. The Court said that a public authority is generally able to produce documentary evidence of the actions that were carried out, but that it nonetheless cannot be inferred in every case where a Respondent is unable to prove the performance of a procedural obligation that it has disregarded it. The Court concluded that, when establishing facts of this kind, neither party is alone in bearing the burden of proof.⁵³⁰
- 5.16 Contrary to what The Gambia may be suggesting,⁵³¹ where one party to a case alleges that certain facts occurred on the territory of the other party to the case, the burden of proof does not shift to the latter to disprove the occurrence of those facts. In the *Bosnia Genocide* case and the *Croatia Genocide* case, the Court did not consider that there were any circumstances that required that the normal burden of proof should be varied. In the *Croatia Genocide* case, the Court said expressly that “neither the subject-matter nor the nature of the dispute makes it appropriate to contemplate a reversal of the burden of proof”, and that “It is not for Serbia to prove a negative fact, for example the absence of facts constituting the *actus reus* of genocide within the meaning of Article II of the Convention”.⁵³²

⁵²⁷ *Armed Activities on the Territory of the Congo (Reparations)*, p. 59, para. 159.

⁵²⁸ *ICSFT and CERD* case, para. 169 first sentence, citing *Pulp Mills* case, p. 71, para. 163.

⁵²⁹ See paragraph 5.2(2) above.

⁵³⁰ *Diallo* case, pp. 660-661, paras. 55-56.

⁵³¹ RG, para. 4.4 second sentence.

⁵³² *Croatia Genocide* case, pp. 73-74, para. 174.

- 5.17 Similarly, in the *Corfu Channel* case and the *Military and Paramilitary Activities* case, the Court affirmed that:

... it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.⁵³³

- 5.18 Again, in the *Pulp Mills* case, the Court applied the general principle of *onus probandi incumbit actori*, and expressly rejected an argument that the precautionary approach in a treaty operated as a reversal of the burden of proof in relation to facts alleged by Argentina to have occurred in the territory of Uruguay.⁵³⁴
- 5.19 The Gambia cites no other case in which the Court has departed from the general principle of *onus probandi incumbit actori*.

4. Duty of co-operation

- 5.20 As to the principle referred to in paragraph 5.2(3) above, The Gambia has not specifically alleged any breach by Myanmar of any claimed duty of co-operation. The duty of co-operation referred to by The Gambia does not require Myanmar to produce any evidence in this case at all, and any failure by Myanmar to produce evidence of any matter will not change the burden of proof or standard of proof.⁵³⁵ In particular, as the Court held in the *Croatia Genocide* case, the fact that the alleged facts occurred in the territory of the Respondent does require the Respondent to “provide explanations of the facts alleged by the Applicant”, nor shift the burden of proof.⁵³⁶ The Gambia itself expressly acknowledges that Myanmar is not under any “positive duty to disclose”.⁵³⁷

⁵³³ *Corfu Channel* case, p. 18, quoted with approval in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, I.C.J. Reports 1986, p. 84, para. 155.

⁵³⁴ *Pulp Mills* case, pp. 70-71, paras. 160-164.

⁵³⁵ See CMM, paras. 5.3-5.10.

⁵³⁶ *Croatia Genocide* case, pp. 73-74, paras. 174-175.

⁵³⁷ RG, para. 4.4 final sentence.

B. Standard of proof

5.21 The recent judgment of the Court of January 2024 in the *ICSFT and CERD* case reaffirms that:

... the standard of proof may vary from case to case, taking into account factors including the gravity of the allegation. In this regard, the Court has noted that “charges of exceptional gravity” such as the crime of genocide, require proof at “a high level of certainty” [citing *Bosnia Genocide* case, pp. 129-130, paras. 209-210]. In other cases not involving allegations of exceptional gravity, however, the Court has applied a less exacting standard of proof.⁵³⁸

This is a very recent reaffirmation by the Court of its already settled case law in this respect.⁵³⁹ In the present case, which concerns allegations of genocide, the much more exacting standard of proof applies.

5.22 As explained in the Counter-Memorial of Myanmar,⁵⁴⁰ this higher standard of proof is in effect the same as the “beyond reasonable doubt” standard of proof applied by international criminal courts and tribunals.

5.23 The Gambia disputes this. The Gambia argues that the Court is not a criminal court, and that there “is thus no basis for the assertion that the Court must apply the same standard of proof as if it were”.⁵⁴¹ However, Myanmar does not suggest that the Court should simply apply directly the standard of proof applied by international criminal courts. On the contrary, the Counter-Memorial of Myanmar expressly acknowledges that the Court must apply the relevant standard of proof that is established by its own case law to be the applicable standard of proof for cases of this kind before this Court. The Counter-Memorial sets out this relevant case law of the Court. Nevertheless, as the Counter-Memorial observes, the applicable standard of proof established by the case law of this Court happens to be, in effect, the same as the “beyond reasonable doubt” standard of proof applied by international criminal courts and tribunals.⁵⁴²

⁵³⁸ *ICSFT and CERD* case, para. 81.

⁵³⁹ See CMM, paras. 5.11-5.18.

⁵⁴⁰ CMM, paras. 1.50, 5.11-5.18 and 16.8.

⁵⁴¹ RG, paras. 4.1 and 4.5.

⁵⁴² CMM, paras. 1.50, 5.11-5.18 and 16.8.

- 5.24 The Gambia argues that in the *Bosnia Genocide* case and the *Croatia Genocide* case, the Court did not say that the standard of proof is “beyond reasonable doubt”, but that the Court instead used terms such as “clearly established”, “fully convinced”, and “only inference that could reasonably be drawn from the acts in question”.⁵⁴³ However, the meaning of these expressions, as used by the Court in this context, is indeed, in effect, the same as the “beyond reasonable doubt” standard of proof applied by international criminal courts and tribunals.
- 5.25 In the *Croatia Genocide* case, the Court made clear that it was applying the same standard of proof that was applied in the *Bosnia Genocide* case.⁵⁴⁴ The Court further indicated in the *Croatia Genocide* case that this was the same standard of proof that was applied in the *Corfu Channel* case, according to which “claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive”.⁵⁴⁵
- 5.26 In the *Corfu Channel* case, in respect of an allegation by the United Kingdom that a minefield had been laid with the connivance of Albania, the Court said that the evidence relied on by the United Kingdom “can be regarded only as allegations falling short of conclusive evidence”, and that “A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here”.⁵⁴⁶ In respect of a further allegation that Albania had knowledge of minelaying independently of any connivance by Albania, the Court said that “The proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt”.⁵⁴⁷ When the judgment is read as a whole, it is apparent that the expressions “conclusive evidence” and “no room for reasonable doubt” are intended to have the same meaning.
- 5.27 In the *Bosnia Genocide* case, the Court said that it must be “fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts

⁵⁴³ RG, para. 4.5.

⁵⁴⁴ *Croatia Genocide* case, p. 74, paras. 177-179.

⁵⁴⁵ *Ibid.*, p. 74, para. 178, referring to *Corfu Channel* case, p. 17.

⁵⁴⁶ *Corfu Channel* case, p. 17.

⁵⁴⁷ *Ibid.*, p. 18.

enumerated in Article III have been committed, have been clearly established”,⁵⁴⁸ and that such allegations need to be “established by fully conclusive evidence”.⁵⁴⁹ The Court again made clear that this was the same standard of proof that was applied in the *Corfu Channel* case.⁵⁵⁰

- 5.28 In the *Croatia Genocide* case, the Court said that this higher standard of proof applies not only when determining whether acts within Article III of the Genocide Convention have been committed, but also when determining whether such acts can be attributed to the Respondent.⁵⁵¹ In relation to the latter question, the Court found that acts of the Republika Srpska and the VRS could not be attributed to the Federal Republic of Yugoslavia (“FRY”) because it was “not established *beyond any doubt* ... whether the authorities of the FRY supplied ... their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way”.⁵⁵²
- 5.29 It is clearly apparent from this case law that the expressions “fully convinced that ... acts ... have been clearly established” and “established by fully conclusive evidence” have the same meaning as the expressions “leave no room for reasonable doubt” and “established beyond any doubt”.
- 5.30 Indeed, in the *Croatia Genocide* case, the Court expressly said that the standard of proof for establishing the existence of the *dolus specialis* of genocide is “in substance identical” with “the criterion applied by the ICTY Trial Chamber in the Judgment in the *Tolimir* case”,⁵⁵³ which is to say, the beyond reasonable doubt standard applied by international criminal courts and tribunals.⁵⁵⁴

⁵⁴⁸ *Bosnia Genocide* case, p. 129, para. 209.

⁵⁴⁹ *Ibid.*, p. 175, para. 319.

⁵⁵⁰ *Ibid.*, p. 129, para. 209.

⁵⁵¹ *Croatia Genocide* case, p. 129, para. 209.

⁵⁵² *Ibid.*, p. 218, para. 422 (emphasis added).

⁵⁵³ *Ibid.*, p. 67, para. 148.

⁵⁵⁴ See CMM, paras 5.17 and 6.42, and this Rejoinder, paras. 4.7-4.8 and 4.36-4.38 above.

5.31 Thus, the standard of proof applied in the settled jurisprudence of the Court in cases applying the Genocide Convention is, in effect, identical to the “beyond reasonable doubt” standard applied by international criminal courts and tribunals.

5.32 As the then President of the Court said to the Sixth Committee of the UN General Assembly in 2007 (after the judgment had been given in the *Bosnia Genocide* case but before the judgment had been given in the *Croatia Genocide* case):

When dealing with genocide claims in the recent *Bosnia and Herzegovina v. Serbia and Montenegro* case, the Parties wanted to know whether the criminal standard of proof was applicable. The Applicant argued that the matter before the Court was not one of criminal law and that the appropriate standard was therefore the balance of probabilities, inasmuch as what was alleged was breach of treaty obligations. The Respondent, on the other hand, contended that a charge of such exceptional gravity against a State required “a proper degree of certainty” and the standard should leave no room for reasonable doubt.

In the circumstances of this case, the Court did find it necessary to specify a standard of proof to be met. ...

There have been some curious comments by observers as to this being a “higher” or “lower” standard than “beyond reasonable doubt”. It is simply a comparable standard, but employing terminology more appropriate to a civil, international law case.⁵⁵⁵

5.33 The settled jurisprudence of the Court is thus clear as to the standard of proof. The judgment in the *Croatia Genocide* case was given only in 2015, less than a decade ago (as at the date of this Rejoinder), and applies a standard of proof already established in the *Bosnia Genocide* case less than a decade before then. It has been reaffirmed very recently in the *ICSFT and CERD* case. It is unthinkable that the Court would in the present case depart from its own settled jurisprudence, established in two cases involving alleged violations of the Genocide Convention by two different European respondent States,⁵⁵⁶ and very recently affirmed in another case between

⁵⁵⁵ Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, to the Sixth Committee of the General Assembly, 2 November 2007, RM, Vol. IV, Annex 113.

⁵⁵⁶ In both the *Bosnia Genocide* case and the *Croatia Genocide* case, the Court adjudicated claims made against the Federal Republic of Yugoslavia/Serbia and Montenegro/Serbia. In the latter case, the Court also adjudicated a counter-claim made under the Convention against Croatia.

two European States, and now apply a different standard of proof in a case involving a Respondent in Asia.

- 5.34 The Gambia argues that this high standard of proof does not apply to the proof of each and every fact that the applicant is required to prove in order to establish each of the alleged breaches of the Genocide Convention.⁵⁵⁷ The Gambia contends that “In fact, the standard of proof is applicable to each *element* that must be proven to establish a violation of the Convention under Article III, not to each and every *fact*.”⁵⁵⁸
- 5.35 However, the paragraphs of the *Bosnia Genocide* case and *Croatia Genocide* case cited by The Gambia in support of its position do not say this.⁵⁵⁹
- 5.36 In order to find that an element of a violation of the Convention has been established, the Court must necessarily find that the relevant facts constituting that element have been established. The Court obviously cannot find that the element has been established in accordance with the very high standard of proof unless it first finds that the facts constituting that element have been established in accordance with that standard of proof.
- 5.37 The “beyond reasonable doubt” standard of proof applied by international criminal courts and tribunals works in exactly the same way.⁵⁶⁰ The Appeals Chamber of the ICTR and ICTY have both expressed the position as follows:

Only after the analysis of all the relevant evidence, can the Trial Chamber determine whether the evidence upon which the Prosecution relies should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies. At this fact-finding stage, the standard of proof beyond a reasonable doubt is applied to establish the facts forming the elements of the crime or the form of responsibility alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction.

At the final stage, the Trial Chamber has to decide whether all of the constitutive elements of the crime and the form of responsibility alleged against the accused have been proven.

⁵⁵⁷ RG, para. 4.6, disputing CMM, para. 5.14.

⁵⁵⁸ RG, para. 4.6 (emphasis in original).

⁵⁵⁹ RG, para. 4.6 cites *Bosnia Genocide* case, pp. 129-130, para. 209 and *Croatia Genocide* case, p. 74, para. 178.

⁵⁶⁰ *Bosnia Genocide* case, p. 130, para. 210 last sentence.

Even if some of the material facts pleaded in the indictment are not established beyond reasonable doubt, a Chamber might enter a conviction provided that having applied the law to those material facts it accepted beyond reasonable doubt, all the elements of the crime charged and of the mode of responsibility are established by those facts.⁵⁶¹

- 5.38 This quote indicates that not every material fact *pleaded in the indictment* needs to be proved beyond a reasonable doubt, but that it is indeed necessary to prove beyond reasonable doubt sufficient material facts to establish each of the elements of the crime charged, and each of the elements of the mode of responsibility.
- 5.39 The position is the same at the International Criminal Court.⁵⁶²
- 5.40 The *Bosnia Genocide* case and *Croatia Genocide* case establish that the very high standard of proof applies to each and every element of genocide within the meaning of the Convention. The commission of the *actus reus* of acts falling within Article II (a) to (e) and III of the Convention must be proved in accordance with that standard of proof,⁵⁶³ as must the existence of the specific *mens rea* (*dolus generalis*) of the relevant paragraph of Article II. The existence of the *mens rea* (*dolus specialis*) for genocide in the chapeau to Article II must then also be proved in accordance with that standard of proof,⁵⁶⁴ as must the attribution of the acts in question to the

⁵⁶¹ International Criminal Tribunal for Rwanda, *Ntagerura et al.*, ICTR-99-46-A, Judgement, Appeals Chamber, 7 July 2006 (“*Ntagerura Appeal Judgment*”), para. 174, RM, Vol. II, Annex 13, quoted in International Criminal Tribunal for the former Yugoslavia, *Halilović*, IT-01-48-A, Judgement, Appeals Chamber, 16 October 2007, para. 125, RM, Vol. II, Annex 14. See also *Ntagerura Appeal Judgment*, para. 175 (“each fact on which an accused’s conviction is based must be proved beyond a reasonable doubt”); International Criminal Tribunal for the former Yugoslavia, *Dragomir Milošević*, IT-98-29/1-A, Judgement, Appeals Chamber, 12 November 2009, para. 20, RM, Vol. II, Annex 16 (“a reasonable trier of fact must have reached the conclusion that all the facts which are material to the elements of the crime have been proven beyond reasonable doubt by the Prosecution”).

⁵⁶² International Criminal Court, ICC-01/04-01/07-3436, *Katanga*, Judgment pursuant to Article 74 of the Statute, Trial Chamber, 7 March 2014, para. 69, RM, Vol. II, Annex 23: “the standard of proof ‘beyond reasonable doubt’ must be applied in establishing an element of crime or the mode of liability held against the accused, *as well as in establishing the existence of facts indispensable for entering a conviction*” (emphasis added). See also International Criminal Court, ICC-02/04-01/15-2022-Red, *Ongwen*, Judgment of the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”, Appeals Chamber, 15 December 2022, para. 321, RM, Vol. II, Annex 25: “.. the Appeals Chamber recalls that it has previously held that the ‘beyond reasonable doubt’ standard is to be applied to the facts that are indispensable for entering a conviction, namely, those constituting the elements of the crimes or modes of liability charged” (footnote omitted).

⁵⁶³ *Bosnia Genocide* case, p. 129, para. 209 first two sentences; *Croatia Genocide* case, p. 74, para. 178 first sentence.

⁵⁶⁴ See CMM, paras 5.17 and 6.42, and this Rejoinder, paragraphs 4.7-4.8, 4.36-4.38 and 5.30 above.

Respondent.⁵⁶⁵ The same standard of proof also applies to claims of breaches of the duty to prevent genocide, as well as to claims of breaches of the duty to punish genocide.⁵⁶⁶ The facts establishing all of these elements must accordingly also be established in accordance with the very high standard of proof.

C. Methods of proof

1. General

5.41 The Counter-Memorial of Myanmar makes the obvious point that it will require a high standard of evidence to discharge the high standard of proof that applies in cases alleging violations of the Genocide Convention.⁵⁶⁷ The Gambia expresses disagreement with this statement, claiming that “the same methods of proof and criteria for assessing the weight of the evidence apply in all cases”.⁵⁶⁸

5.42 However, in cases where the higher *standard* of proof applies, it must be self-evident that a higher *standard* of evidence will be required in order to meet that higher standard of proof. Evidence that would be sufficient to meet the standard of proof that applies in the generality of cases may not be sufficient to meet the very high standard of proof that applies in cases such as the present. This is the inevitable effect of the established case law of the Court in respect of the burden of proof.

2. Witness statements

5.43 The recent *ICSFT and CERD* case confirms that:

- (1) “witness statements which are collected many years after the relevant events, especially when not supported by corroborating documentation, must be treated with caution”;⁵⁶⁹

⁵⁶⁵ *Bosnia Genocide* case, p. 129, para. 209 last sentence; *Croatia Genocide* case, p. 74, para. 178 last sentence.

⁵⁶⁶ *Bosnia Genocide* case, p. 130, para. 210 last sentence.

⁵⁶⁷ CMM, para. 5.22.

⁵⁶⁸ RG, para. 4.7.

⁵⁶⁹ *ICSFT and CERD* case, paras. 177 and 250. See also *Armed Activities on the Territory of the Congo (Reparations)*, p. 54, para. 147.

- (2) “any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness . . . cannot take the place of evidence”;⁵⁷⁰
- (3) “In determining the probative value of evidence provided by a party, the Court also treats with caution statements by witnesses who are not disinterested in the outcome of the case, especially when not supported by corroborating documentation”;⁵⁷¹ and
- (4) witness statements that lack specificity with respect to particular allegations are of limited value in relation to such allegations.⁵⁷²

5.44 The Gambia appears to suggest that “victims [who] are testifying solely about facts within their personal knowledge directly related to the core issue in this case” must be treated as inherently unbiased and impartial, and that their evidence must be considered as “highly probative”.⁵⁷³ However, The Gambia cites no authority for that proposition. In fact, the reliability and probative value of witness statements must be evaluated on a witness-by-witness basis, having regard to all relevant matters.

5.45 The degree of interest that a witness has in the outcome of the proceedings must inherently be a relevant matter when determining the weight to be given to that witness’s evidence.⁵⁷⁴ It is unrealistic to suggest, as The Gambia apparently does, that anyone who is not a government official of one or other of the parties must be unbiased and impartial.⁵⁷⁵ It would similarly be unrealistic to suggest, for instance, that every Bengali Muslim from northern Rakhine State is completely unbiased and impartial in relation to the issues to be decided by the Court in this case. Thus, for instance, in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the Court noted that 11 affidavits annexed to a pleading of one of the parties “appear to have been sworn specifically for the purposes of this case and are signed by

⁵⁷⁰ *ICSFT and CERD* case, para. 177.

⁵⁷¹ *Ibid.*, paras. 177 and 363.

⁵⁷² *Ibid.*, para. 250.

⁵⁷³ RG, para. 4.13.

⁵⁷⁴ See CMM, para 5.36.

⁵⁷⁵ See CMM, para 5.36.

fishermen who may be considered as particularly interested in the outcome of these proceedings, factors that have a bearing on the weight and probative value of that evidence”.⁵⁷⁶

- 5.46 Contrary to what The Gambia contends,⁵⁷⁷ the Court *did* indicate in the *Croatia Genocide* case that an unsigned statement of a witness should be accorded no weight unless the statement is confirmed in a subsequent signed statement or through oral testimony. It is true that the Court said in that case that “the absence of signatures of the persons who made the statements or took them does not in principle exclude these documents”.⁵⁷⁸ However, the Court thereby indicated merely that because the Statute and Rules of Court do not “lay down any specific requirements concerning the admissibility of statements”,⁵⁷⁹ unsigned witness statements would not be excluded from evidence altogether. However, the Court did not thereby suggest that any weight could be given to such evidence.
- 5.47 On the contrary, the Court immediately went on to say that it “has to ensure that documents, which purport to contain the statements of individuals who are not called to give oral testimony, faithfully record the evidence actually given by those individuals”.⁵⁸⁰ The Court then found that it could not attach evidential weight to “records of interviews ... of ... individuals which are not signed by those persons and contain no indication that those individuals were aware of the content”,⁵⁸¹ or to “statements which are neither signed nor confirmed”,⁵⁸² or to “an unsigned police record of an interview”.⁵⁸³
- 5.48 Furthermore, contrary to what The Gambia contends, the Court did not decide in the *Croatia Genocide* case that it is sufficient if a witness statement is signed by the

⁵⁷⁶ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, p. 349, para. 219.

⁵⁷⁷ See RG, para 4.14.

⁵⁷⁸ *Croatia Genocide* case, pp. 77-78, para. 196.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid.*, pp. 78, 89, 91, 104, 105, 106, 110, 111, paras. 198, 248, 256, 328, 333, 338, 343, 363, 370.

⁵⁸² *Ibid.*, p. 78, para. 198.

⁵⁸³ *Ibid.*, p. 85, para. 229. See also at pp. 78, 106, paras. 198, 338.

“organization responsible for taking that testimony”.⁵⁸⁴ On the contrary, in the *Croatia Genocide* case, the Court refused to give evidential weight to statements taken by the *police* that were not signed by the person giving the statement.⁵⁸⁵ There is no reason why the Court should nonetheless give weight to unsigned statements taken by other bodies, and in particular, unsigned statements taken by NGOs.

3. Reports from official bodies and NGOs

- 5.49 Paragraphs 5.40 to 5.61 of the Counter-Memorial of Myanmar set out the principles concerning the weight to be given to reports and documents of UN and other official bodies, and of NGOs. Contrary to what The Gambia claims, Myanmar is not arguing for “an inversion of the Court’s practice”.⁵⁸⁶ The principles set out in the Counter-Memorial of Myanmar, and in the earlier case law of the Court cited therein, are in fact confirmed by the recent judgment of the Court in the *ICSFT and CERD* case.
- 5.50 The *ICSFT and CERD* case reiterates that the probative value of reports from official or independent bodies will be considered on a case-by-case basis in accordance with, among other things, “(1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts)”.⁵⁸⁷ The Gambia does not dispute this.⁵⁸⁸ Furthermore, this approach has again been reaffirmed by the Court even more recently in *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, in which the Court said:

As far as the methods of proof are concerned, the Court recalls that, in its contentious jurisdiction, it has taken evidence contained in United Nations documents into account “to the extent that they are of probative value and are corroborated, if necessary, by other credible sources” (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v.*

⁵⁸⁴ See RG, para. 4.15.

⁵⁸⁵ *Croatia Genocide* case, pp. 78, 85, 106, paras. 198, 229, 338.

⁵⁸⁶ RG, para. 4.9.

⁵⁸⁷ *ICSFT and CERD* case, paras. 175-176. See CMM, para. 5.40, citing *Bosnia Genocide* case, p. 135, para. 227; *Croatia Genocide* case, p. 76, paras. 190-191.

⁵⁸⁸ RG, para. 4.10 first sentence.

Uganda), *Judgment*, *I.C.J. Reports 2005*, p. 239, para. 205). The Court assesses the probative value of reports from official or independent bodies according to criteria that include

“(1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts)” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007 (I)*, p. 135, para. 227; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Judgment of 31 January 2024*, para. 175).

When considering the evidentiary value of such reports, the Court has given weight to the care taken in preparing a report, the comprehensiveness of its sources and the independence of those responsible for preparing it (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007 (I)*, p. 137, para. 230). The Court will apply these criteria in its assessment of the probative value of the reports proffered in this case.⁵⁸⁹

- 5.51 It is thus established that even reports of UN bodies will be taken into account only “to the extent that they are of probative value and are corroborated, if necessary, by other credible sources”.
- 5.52 The *ICSFT and CERD* case adds that the Court must take into account, as affecting the weight to be given to such a report, the fact that the body on whose observations the report is based lacked access to the territory in which the events in question occurred.⁵⁹⁰
- 5.53 Contrary to what The Gambia contends, the *ICSFT and CERD* case does not demonstrate that the Court “has placed significant reliance on such reports before turning to other evidence, including witness statements”, or that the Court “has consistently relied on independent and authoritative fact-finding reports in

⁵⁸⁹ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, para. 76.

⁵⁹⁰ *ICSFT and CERD* case, para. 215.

circumstances in which the Court may not be able to engage in independent investigation or fact-finding on its own”.⁵⁹¹

5.54 On the contrary, in the *ICSFT and CERD* case, although the applicant produced various reports and documents of UN and other official bodies, and of NGOs, the reliance placed on them by the Court in reaching its decision was very limited.

5.55 In that case, the Court had to decide upon five claimed violations by Russia of the International Convention for the Suppression of the Financing of Terrorism (“**ICSFT**”). In respect of four of those claimed violations, the judgment of the Court contains no references to any reports or documents of UN or other official bodies, or of NGOs.⁵⁹² In relation to one claimed violation,⁵⁹³ the Court relied on a report of the Financial Action Task Force as proof of a single specific fact, namely that “Russia generally answers requests for mutual legal assistance ‘within one to two months’”.⁵⁹⁴

5.56 The Court then also had to decide upon nine claimed violations by Russia of the International Convention on the Elimination of All Forms of Racial Discrimination (“**CERD**”).⁵⁹⁵ In respect of two of those claimed violations, the judgment of the Court contains no references to any reports or documents of UN or other official bodies, or of NGOs.⁵⁹⁶ In relation to the remaining seven claimed violations, the reliance placed by the Court on such documents was as follows:

- (1) In respect of the first claimed violation,⁵⁹⁷ Ukraine relied on various reports by intergovernmental organisations and NGOs.⁵⁹⁸ The Court said that it “takes note” of these reports,⁵⁹⁹ but found that they did not establish Ukraine’s claims

⁵⁹¹ RG, para. 4.9.

⁵⁹² These four claimed violations are dealt with in the judgment in the *ICSFT and CERD* case at paras. 86-98, 112-120, 121-131, and 132-146 respectively.

⁵⁹³ This claimed violation is dealt with in the judgment in the *ICSFT and CERD* case at paras. 99-111.

⁵⁹⁴ *ICSFT and CERD* case, para. 101.

⁵⁹⁵ In the table of contents of the judgment in the *ICSFT and CERD* case, these nine claimed violations are numbered 1, 2, 3, 4, 5, 6, 7, 8(a), and 8(b) respectively (see paragraphs 202-269 of the judgment).

⁵⁹⁶ These two claimed violations are dealt with in the judgment in the *ICSFT and CERD* case at paras 276-288, and 364-368, respectively.

⁵⁹⁷ This claimed violation is dealt with in the judgment in the *ICSFT and CERD* case at paras. 202-221.

⁵⁹⁸ *ICSFT and CERD* case, paras. 205 and 206.

⁵⁹⁹ *Ibid.*, para. 211.

in certain respects.⁶⁰⁰ The Court also took into consideration, as reducing the evidential weight of some of this material, the lack of access of the relevant body to the territory where the events occurred.⁶⁰¹ The Court found that the claimed violation was not established.⁶⁰²

- (2) In respect of the second claimed violation,⁶⁰³ Ukraine relied on various reports by intergovernmental organisations and NGOs.⁶⁰⁴ The Court attributed “considerable weight to reports of several UN organs and monitoring bodies” when making the finding of fact that “law enforcement measures ... produced a disparate adverse effect on the rights of persons of Crimean Tatar origin”.⁶⁰⁵ However, the Court nonetheless ultimately found that Ukraine had not proved that the law enforcement measures discriminated against persons of Crimean Tatar origin based on their ethnic origin,⁶⁰⁶ noting that “the reports relied on by Ukraine are of limited value in confirming that the relevant measures are of a racially discriminatory character”.⁶⁰⁷
- (3) In respect of the third claimed violation,⁶⁰⁸ the Court considered a UN General Assembly resolution, OHCHR reports and observations of CERD, and a document of the High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe (OSCE).⁶⁰⁹ Nevertheless, the Court found that the claimed violation was not established,⁶¹⁰ stating that Ukraine had “not provided convincing evidence”.⁶¹¹

⁶⁰⁰ *Ibid.*, para. 214.

⁶⁰¹ *ICSFT and CERD* case, para. 215.

⁶⁰² *Ibid.*, para. 221.

⁶⁰³ This claimed violation is dealt with in the judgment in the *ICSFT and CERD* case at paras. 222-251.

⁶⁰⁴ *ICSFT and CERD* case, paras. 227 and 231.

⁶⁰⁵ *Ibid.*, para. 238.

⁶⁰⁶ *Ibid.*, para. 244.

⁶⁰⁷ *Ibid.*, para. 250.

⁶⁰⁸ This claimed violation is dealt with in the judgment in the *ICSFT and CERD* case at paras. 252-275.

⁶⁰⁹ *ICSFT and CERD* case, paras. 255, 265, 268 and 269.

⁶¹⁰ *Ibid.*, para. 275.

⁶¹¹ *Ibid.*, para. 272.

- (4) In respect of the fifth claimed violation,⁶¹² the Court considered several decisions of the European Court of Human Rights and an opinion of the Venice Commission,⁶¹³ as well as reports by intergovernmental and non-governmental organisations.⁶¹⁴ Nevertheless, the Court found that the claimed violation was not established,⁶¹⁵ stating that Ukraine had not “sufficiently substantiated” its claim.⁶¹⁶
- (5) In respect of the sixth claimed violation,⁶¹⁷ Ukraine referred to reports of international and non-governmental organisations.⁶¹⁸ The Court found that while these reports “lend some support to Ukraine’s allegation”,⁶¹⁹ and while some of them “suggest the existence of a link between the measures taken ... and the ethnic origin of ... those concerned”,⁶²⁰ the statements made in the reports were “vague and not corroborated by further evidence with respect to the existence of racial discrimination”.⁶²¹ The Court found that the claimed violation was not established.⁶²²
- (6) In respect of the seventh claimed violation,⁶²³ the Court considered observations of the CERD Committee,⁶²⁴ but found that that body did “not take a position as to whether the respective reports are accurate and does not rely on first-hand evidence”.⁶²⁵ The Court found that the claimed violation was not established.⁶²⁶

⁶¹² This claimed violation is dealt with in the judgment in the *ICSFT and CERD* case at paras. 289-306.

⁶¹³ *ICSFT and CERD* case, paras. 301 and 305.

⁶¹⁴ *Ibid.*, para. 303.

⁶¹⁵ *Ibid.*, para. 306.

⁶¹⁶ *Ibid.*, para. 305.

⁶¹⁷ This claimed violation is dealt with in the judgment in the *ICSFT and CERD* case at paras. 307-323.

⁶¹⁸ *ICSFT and CERD* case, para. 309.

⁶¹⁹ *Ibid.*, para. 320.

⁶²⁰ *Ibid.*, para. 321.

⁶²¹ *Ibid.*, para. 321.

⁶²² *Ibid.*, para. 323.

⁶²³ This claimed violation is dealt with in the judgment in the *ICSFT and CERD* case at paras. 324-337.

⁶²⁴ *ICSFT and CERD* case, para. 333.

⁶²⁵ *Ibid.*, para. 334.

⁶²⁶ *Ibid.*, para. 337.

(7) In respect of the eighth claimed violation,⁶²⁷ the Court considered an OHCHR report,⁶²⁸ which was accepted as evidence of the single specific fact that “There was ... an 80 per cent decline in the number of students receiving an education in the Ukrainian language during the first year after 2014 and a further decline of 50 per cent by the following year”.⁶²⁹ Although the Court ultimately found that the Russian Federation had not demonstrated that it complied with its duty to protect the rights of ethnic Ukrainians, the Court said that it was unable to conclude, on the basis of the evidence presented, that parents had been subjected to harassment or manipulative conduct.⁶³⁰

5.57 It must be noted that the *ICSFT and CERD* case was not one where the very high standard of proof applied. The Court said in that case that “the Applicant’s claims, while undoubtedly serious, are not of the same gravity as those relating to the crime of genocide and do not require the application of a heightened standard of proof”.⁶³¹ Nevertheless, even though a lower standard of proof was required than that required in the present case, only one of the thirteen claimed violations in the *ICSFT and CERD* case was found to have been established, notwithstanding Ukraine’s reliance on numerous documents from UN organs and other intergovernmental organisations and NGOs. In relation to the single violation that the Court found to have been established, the OHCHR report relied on by Ukraine was found to establish a single statistical fact.⁶³² In a case such as the present, which is subject to a much higher standard of proof, the Court will inevitably be more exacting in assessing the evidential value of such reports and documents.

5.58 The *ICSFT and CERD* case therefore does not support The Gambia’s contention that the Court “regularly” attributes “considerable authority” or “considerable weight” to such reports, or that the Court “as it deems appropriate, gives significant weight to

⁶²⁷ This claimed violation is dealt with in the judgment in the *ICSFT and CERD* case at paras. 358-363.

⁶²⁸ *ICSFT and CERD* case, para. 358.

⁶²⁹ *Ibid.*, para. 359.

⁶³⁰ *Ibid.*, para. 363.

⁶³¹ *Ibid.*, para. 82.

⁶³² See paragraph 5.56(7) above.

their findings of fact and conclusions”,⁶³³ or that the Court “has placed significant reliance on such reports”, or that the Court “has consistently relied on independent and authoritative fact-finding reports”.⁶³⁴ On the contrary, the *ICSFT and CERD* case demonstrates that the Court will be cautious when deciding whether reliance can be placed on such documents, and if so, how much reliance, and in relation to which specific facts. In *Armed Activities on the Territory of the Congo*, the Court for instance refused to rely on reports of the International Crisis Group, Human Rights Watch, and the Secretary-General of the United Nations, articles in the Integrated Regional Information Networks bulletin and *Jeune Afrique*, and a statement by a deserter, on the ground that these items were “uncorroborated, based on second-hand reports, or not in fact saying what they are alleged to say by the DRC, or even in some cases partisan”.⁶³⁵

- 5.59 In fact, The Gambia struggles to find any examples to cite in support of its claims about the weight that the Court gives to such documents. The Gambia cites only three “examples”, none of which in fact supports The Gambia’s claim.
- 5.60 First, The Gambia refers to the *ICSFT and CERD* case.⁶³⁶ For the reasons above, this case in fact contradicts The Gambia’s claims.
- 5.61 Secondly, The Gambia refers to the evidential value given by the Court in the *Bosnia Genocide* case to a report of the United Nations Secretary-General, *The fall of Srebrenica*.⁶³⁷ This has already been dealt with at length by Myanmar in its Counter-Memorial.⁶³⁸ This report was of assistance to the Court in that case only in relation to certain specific matters in which the United Nations itself was involved at the material time, and which were recorded in contemporaneous documents held in the United Nation’s archives.

⁶³³ RG, para. 4.12 final sentence.

⁶³⁴ RG, para. 4.9.

⁶³⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 225, para. 159.

⁶³⁶ RG, para. 4.11 second sentence and para. 4.12 footnote 183, referring to *ICSFT and CERD* case, paras. 215 and 238.

⁶³⁷ RG, para. 4.10, and para. 4.12 footnote 183.

⁶³⁸ See CMM, paras. 6.22-6.31.

5.62 Thirdly, The Gambia refers to a statement of the Court in the *Croatia Genocide* case that it “must give evidential weight” to a report of a special rapporteur of the Commission on Human Rights.⁶³⁹ This, too, has already been dealt with in the Counter-Memorial of Myanmar.⁶⁴⁰ The Court referred to that report of the special rapporteur in only three paragraphs of its judgment, in one of which it attached “some” weight to a passage in it,⁶⁴¹ and in two others of which it referred to the report as corroborating findings of fact that had been made in a judgment of the ICTY.

5.63 In fact, in the *Bosnia Genocide* case and the *Croatia Genocide* case, reports and documents of UN bodies and other official bodies and NGOs were not sufficient to prove genocide. All of the allegations of genocide made in both cases were ultimately found by the Court *not* to be proved, apart from the allegation in the *Bosnia Genocide* case of the commission of genocide in Srebrenica. When making its findings of genocide in Srebrenica and of State responsibility for that genocide in Srebrenica, the Court placed virtually no reliance on reports and documents of UN bodies and other official bodies and NGOs.

(1) In the *Croatia Genocide* case, the Court dismissed entirely both the claim of Croatia and the counter-claim of Serbia.

(2) In the *Bosnia Genocide* case, the position was as follows.

(a) The Court dismissed the claim of Bosnia and Herzegovina, in so far as it alleged that Serbia had committed genocide, conspired to commit genocide, incited the commission of genocide, or been complicit in the commission of genocide.⁶⁴²

(b) The Court also found that, save for events at Srebrenica, genocide had not been proved to have been committed at all.⁶⁴³ In its findings of fact relating to events in Srebrenica,⁶⁴⁴ the Court did not place reliance on

⁶³⁹ RG, para. 4.11 first sentence.

⁶⁴⁰ CMM, para. 5.41.

⁶⁴¹ *Croatia Genocide* case, p. 141, para. 484.

⁶⁴² *Bosnia Genocide* case, pp. 237-238, para. 471 (*dispositif*).

⁶⁴³ *Ibid.*, p. 194, para. 370.

⁶⁴⁴ *Ibid.*, pp. 155-166, paras. 278-297.

reports and other documents of UN and other official bodies or NGOs, other than the report of the Secretary-General, *The fall of Srebrenica*.⁶⁴⁵ This report of the Secretary-General was relied on only as evidence of certain specific matters in which the United Nations itself was involved at the material time.⁶⁴⁶

- (c) In relation to the question of the Respondent's effective control over, participation in, involvement in, or influence over, the events in and around Srebrenica, the Court considered a report of the Netherlands Institute for War Documentation and a report of the United States Central Intelligence Agency,⁶⁴⁷ but the Court ultimately concluded that "the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility".⁶⁴⁸
- (d) Ultimately, the Court found that the Respondent had violated its obligation to prevent the Srebrenica genocide.⁶⁴⁹ In making this finding, the Court did not refer to any reports or other documents of UN or other official bodies or NGOs, other than *The fall of Srebrenica*, which was taken into account as evidence of the sole fact that the European Union negotiator had made certain representations to the President of the Respondent during a particular visit on a particular date.⁶⁵⁰
- (e) The Court also found that the Respondent failed to comply with its obligation to punish genocide.⁶⁵¹ In reaching this finding, the Court did not refer to any reports or other documents of UN or other official bodies or NGOs.

⁶⁴⁵ *Bosnia Genocide* case, p. 224, para. 436.

⁶⁴⁶ CMM, paras. 6.22-6.31.

⁶⁴⁷ *Bosnia Genocide* case, pp. 212-214, paras. 410-412.

⁶⁴⁸ *Ibid.*, p. 215, para. 415.

⁶⁴⁹ *Ibid.*, p. 226, para. 438.

⁶⁵⁰ *Ibid.*, p. 223, para. 436.

⁶⁵¹ *Ibid.*, p. 229, para. 450.

- 5.64 The Gambia argues that it would “impose an unnecessary burden on the Court” if the Court had to look, not at reports and documents of UN bodies and other official bodies and NGOs, but rather at the actual evidence on which such reports are based.⁶⁵² This is an astonishing argument. It is difficult to see how this position could be reconciled with the rule of law, the independence of the judiciary, or with international standards of justice.
- 5.65 This argument is akin to an argument that it would “impose an unnecessary burden” on the municipal law courts of a State to have to hear witnesses and look at primary documentary evidence in very large criminal or civil cases, and that the courts should instead base their judgments on reports prepared by third parties, in which the third parties express their conclusions based on evidence that the court does not see.
- 5.66 In fact, this argument of The Gambia is even more extreme than this, since, as explained in the Counter-Memorial of Myanmar, some of the reports on which The Gambia seeks to rely may not even be secondary sources of material, but may contain tertiary or quaternary, or even more remote references to the original source material.⁶⁵³
- 5.67 The Gambia appears to dispute that such third-party reports should be considered as hearsay.⁶⁵⁴ However, a report that describes what claimed eyewitnesses have said to the author of the report is, by definition, a hearsay account by the author of the report of the substance of what the claimed witness is said to have said. Similarly, a report which describes what the author of the report has been told by A, about what A has been told by claimed eyewitnesses, is by definition double hearsay. There is simply no other way of describing it.
- 5.68 Furthermore, to the extent that such a report expresses the conclusions of the author in relation to the evidence, the report is, by definition, an expression of opinion, not evidence of facts. Again, there is simply no other way of describing it.

⁶⁵² RG, para. 4.12.

⁶⁵³ See CMM, paras. 5.45-5.51 and 7.135.

⁶⁵⁴ RG, para. 4.12 fourth and fifth sentences.

- 5.69 The settled case law of the Court is clear. Little or no weight will be given to hearsay evidence,⁶⁵⁵ and expressions of opinion are not evidence at all.⁶⁵⁶
- 5.70 This is true in the case of a report of a fact-finding mission or commission of inquiry established by a UN body, as much as it is in relation to any other report of any UN or other official body or NGO. Again, parallels can be drawn with municipal legal systems. In many municipal legal systems, the legislature or the executive can establish independent bodies such as commissions of enquiry or royal commissions, which have the power to make findings of fact and recommendations to the legislature and executive. However, in the event that the matters dealt with in the reports of such bodies become the subject-matter of civil or criminal litigation before the courts, the findings of those bodies are not binding on the courts, and indeed, are not even taken as the starting point by the courts.⁶⁵⁷ An independent judicial body must make its own original findings of fact, based on its own examination of the original evidence.

⁶⁵⁵ See CMM, paras. 5.33-5.34, 5.39, 5.52-5.54 and 5.65.

⁶⁵⁶ See CMM, paras. 5.43-5.44, 5.52 and 5.57, and this Rejoinder, paragraph 5.43(2) above.

⁶⁵⁷ **Canada**, Supreme Court of Canada, *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)* [1997] 3 S.C.R. 440, para. 34, RM, Vol. II, Annex 30: "A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. ... There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter." **India**, Supreme Court of India, *Sham Kant v. State of Maharashtra*, AIR 1992 SC 1897, para. 28, RM, Vol. II, Annex 28: "The findings of the Commission of Inquiry ... is not binding on this Court when the Court has arrived to its own conclusion on the independent assessment of the persuasive evidence ...". **Ireland**, Supreme Court of Ireland, *Goodman International and Lawrence Goodman v. The Honourable Mr. Justice Liam Hamilton, Ireland and the Attorney General* [1992] 2 IR 542, RM, Vol. II, Annex 29: "A finding by this Tribunal, either of the truth or of the falsity of any particular allegation which may be the subject matter of existing or potential litigation, forms no part of the material which a court which has to decide that litigation could rely upon. It cannot either be used as a weapon of attack or defence by a litigant who in relation to the same matter is disputing with another party rights arising from some allegation of breach of contract or illegal conduct or malpractice." **Australia**, High Court of Australia, *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, para. 23, RM, Vol. II, Annex 31: "The appointment of a commissioner to inquire into and report upon the commission of a crime creates no prerogative criminal court; his report can neither commit anyone nor involve those consequences which a curial finding of guilt entails. The only direct consequence of his reported conclusion that a particular person has committed a crime is that the mind of the executive is informed of his conclusion. The legal consequences are no different from those which would follow were some private person to choose to inquire of his own motion into the circumstances of a crime and then to inform the executive of his conclusions." **Germany**, Basic Law, Article 44(4), RM, Vol. V, Annex 175: "The courts shall be free to evaluate and rule upon the facts that were the subject of the investigation [of a committee of inquiry established by the Bundestag (the lower house of the German parliament)]." **New Zealand**, Court of Appeal, *In re the Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96, at p. 109, RM, Vol. II, Annex 27: "A Commission of Inquiry is certainly not a Court of law. ... Nor is a Commission of Inquiry to be likened to an administrative tribunal entrusted with the duty of deciding questions between parties. There is nothing approaching a *lis*, a Commission [of

5.71 This has been recognised by a Pre-Trial Chamber of the International Criminal Court, which stated that:

Heavy reliance upon anonymous hearsay, as is often the basis of information contained in reports of nongovernmental organizations (“NGO reports”) and press articles, is problematic for the following reasons. Proving allegations solely through anonymous hearsay puts the Defence in a difficult position because it is not able to investigate and challenge the trustworthiness of the source(s) of the information, thereby unduly limiting the right of the Defence under article 61(6)(b) of the Statute to challenge the Prosecutor’s evidence, a right to which the Appeals Chamber attached “considerable significance”. Further, it is highly problematic when the Chamber itself does not know the source of the information and is deprived of vital information about the source of the evidence. In such cases, the Chamber is unable to assess the trustworthiness of the source, making it all but impossible to determine what probative value to attribute to the information. ...

In light of the above considerations, the Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a) of the Statute. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.⁶⁵⁸

5.72 A commentator has observed, with respect to the practice of the International Criminal Court, as follows:

[T]here seems to be a consensus among international criminal tribunals, such as the ICC, that caution must be exercised in assessing NGO/IO reports [that is, reports of NGOs and international organisations]. Such reports, used as evidence, most often stand at odds with an accused’s right to confront the evidence presented against him or her, which is an essential element of a fair trial. The evidential value of such reports should be assessed with extreme caution due to the absence of any opportunity for the participants in these proceedings to know the

Inquiry] has no general power of adjudication, it determines nobody’s rights, its report is binding on no one”.

⁶⁵⁸ International Criminal Court, ICC-02/11-01/11-432, *Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, Pre-Trial Chamber, 3 June 2013, paras. 29 and 35, RM, Vol. II, Annex 22.

source of the information, the identity of which may be vital for the truth. Moreover, as the ICC jurisprudence has shown, caution must also be exercised and demonstrated by the judges with respect to reliance on NGO/IO reports for corroborative purposes. ...

In addition, the potential use of anonymous hearsay at the pre-trial and trial stages at the ICC may be distinguished. If anonymous hearsay evidence may at times, be used, as an “introduction to the historical context of a conflict situation,” or to corroborate other evidence at the pre-trial stage, this cannot be true at the trial stage, where the evidentiary threshold is much higher. At the trial phase, anonymous hearsay evidence should be excluded altogether, or given extremely little to no weight by the Chamber in the determination of guilt or innocence.⁶⁵⁹

- 5.73 The Gambia suggests that if it is not possible to rely on such reports in a case alleging violations of the Genocide Convention, it would in practice be impossible for genocide to be proved.⁶⁶⁰ The Gambia says that an inability to rely on such reports would “require the Court, in genocide cases or any others involving human rights abuses committed against masses of people, to entertain and evaluate the credibility of dozens, if not hundreds, of witnesses and to hold oral hearings lasting months”.⁶⁶¹ However, that is not a valid justification for The Gambia’s unprincipled position.
- 5.74 First, apart from anything else, The Gambia’s contention that the Court, in order to decide such a case in a way that is just, would have to hear the oral testimony of “dozens, if not hundreds, of witnesses and to hold oral hearings lasting months”,⁶⁶² is a mere assertion.
- 5.75 For instance, as one commentator points out, in relation to the *Bosnia Genocide* case: “Serbia and Montenegro had indicated that it would call hundreds of witnesses in the merits phase of the *Bosnian Genocide* case. In the end, Serbia and Montenegro called only seven witnesses and witness-experts”.⁶⁶³

⁶⁵⁹ G-J.A. Knoop and S. Pedroso, “The Evidentiary Value of NGO and IO Reports in International Criminal Proceedings”, in G.Z. Capaldo (ed.), *The Global Community: Yearbook of International Law and Jurisprudence 2022* (Oxford University Press, 2023), pp. 143-154, at p. 154, RM, Vol. II, Annex 47.

⁶⁶⁰ RG, para. 4.12.

⁶⁶¹ RG, para. 4.12.

⁶⁶² RG, para. 4.12.

⁶⁶³ K. Mačák, “Article 43”, in A. Zimmermann and C. Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd edn., 2019), p. 1274, margin no. 137, footnote 558, RM, Vol. II, Annex 44.

- 5.76 It is unclear at this stage whether either party will want to call any witnesses to give oral testimony in this case, or if so, how many witnesses.
- 5.77 Secondly, the history of the Court demonstrates that the Court is capable of dealing with complex cases involving numerous contested issues. In the *Barcelona Traction* case, which was decided by the Court in an era before modern technology, the Court was called upon to consider pleadings which, together with annexes, amounted to some 66,776 pages.⁶⁶⁴ In more recent times, the Court has also heard and determined some very large and complex cases.
- 5.78 The number of cases before the Court involving alleged “genocide ... or ... human rights abuses committed against masses of people” has to date been small. It is inevitable that cases before this Court will vary in size and complexity. Even if a small proportion of cases before the Court may be much larger and more complex than the average case, this does not mean that it would be unrealistic or unworkable to deal with those few larger cases in accordance with international standards of justice.
- 5.79 Thirdly, if it were ever to prove necessary, there are means by which the Court could seek to lessen the burdens on the Court in a very large case without compromising on standards of justice. As one commentator observes:

The personal testimony of a large number of witnesses and experts in Court may cause considerable inconvenience, burden, and expense upon the other party whose agent, counsel, and advocates must be present in the courtroom and may put considerable strain on the Court’s resources. Faced with the prospect of a party calling hundreds of witnesses (which did not materialize), the Court in 2001 carried out a detailed study of the practical issues involved in hearing a large number of witnesses. In such a situation, the way forward seems to be to make better use of Article 63, para. 2 of the Rules of Court which allows the Court, or the President if the Court is not sitting, to take the necessary steps for the examination of witnesses (but not experts) other than before the Court itself. The Court could delegate one or more of its members, nominate a commission of inquiry in the sense of Article 50, or entrust the parties to take the testimony.⁶⁶⁵

⁶⁶⁴ M. Bedjaoui, “The ‘Manufacture’ of Judgments at the International Court of Justice”, *Pace Yearbook of International Law*, vol. 3 (1991), pp. 29–61, at pp. 36–37, RM, Vol. II, Annex 36.

⁶⁶⁵ Mačák, *op. cit.*, p. 1274, margin no. 137, RM, Vol. II, Annex 44.

- 5.80 In fact, however, the Court has so far not found it necessary to adopt such procedures, even in the largest and most complex cases before it.⁶⁶⁶
- 5.81 Finally, it must ultimately be the duty of the Court to do whatever is necessary to ensure that cases are decided justly. It would be wholly unprincipled to suggest that the principal judicial organ of the United Nations should observe lower standards of justice than other international courts and tribunals, merely to avoid any “unnecessary burden”. It would be even more unprincipled to suggest that the principal judicial organ of the United Nations should become a body that simply endorses findings and conclusions found in reports and documents of UN bodies and other official bodies and NGOs.
- 5.82 If the Court were to cut corners and to compromise on its standards of justice, that may make it possible for the Court to deal with larger numbers of such cases, and may make it more attractive for applicants to bring such cases. However, it is not possible seriously to entertain a suggestion that the Court should compromise on its standards of justice in order to attract a larger number of cases in which standards of justice will be compromised. Nor is it possible to entertain a suggestion that the Court should hear and determine cases in a way that is unjust, simply because it would “impose an unnecessary burden” on the Court to hear the case in a way that is just.
- 5.83 Contrary to what The Gambia contends, Myanmar does not argue that reports and other documents of UN and other official bodies and of NGOs should be *inadmissible* as evidence in proceedings before the Court.⁶⁶⁷ The issue is not one of *admissibility* of evidence, but of the evidential weight to be given to such documents. The case law of the Court is clear that the question of evidential weight falls to be determined on a case-by-case basis. It may also need to be determined on a fact-by-fact basis, since a single document may have greater evidential weight in relation to one fact than it will have in relation to another. The established case law of the Court is that virtually no weight can be given to hearsay, and that no weight can be given at all to mere

⁶⁶⁶ Bedjaoui, *op. cit.*, pp. 36–37, RM, Vol. II, Annex 36.

⁶⁶⁷ RG, para. 4.12.

opinions.⁶⁶⁸ Such evidence cannot be sufficient to meet the very high standard of proof that applies in cases like the present case.

- 5.84 The Gambia identifies no prior case before this Court in which the Court has made a finding of a violation of international law, and in which the findings of the material facts that constitute that violation have been established primarily on the basis of reports and other documents of UN or other official bodies or of NGOs. The Gambia certainly identifies no such case in which the very high standard of proof applicable to allegations of genocide had to be met.

4. Evidence prepared for purposes of the case

- 5.85 The *ICSFT and CERD* case confirms that the Court “will treat with caution evidentiary materials specially prepared for th[e] case and also materials emanating from a single source”.⁶⁶⁹

5. Media articles and books

- 5.86 The *ICSFT and CERD* case confirms that “certain materials, such as press articles and extracts from publications, are regarded ‘not as evidence capable of proving facts ...’”.⁶⁷⁰ The Court said that such materials may, in some circumstances, “contribute ... to corroborating the existence of a fact”.⁶⁷¹

6. Expert reports

- 5.87 In the *ICSFT and CERD* case, both parties relied on expert reports. These expert reports are referred to in paragraphs of the judgment setting out the procedural history and the arguments of the parties,⁶⁷² but not in the paragraphs giving the reasoning of

⁶⁶⁸ See CMM, paras. 5.31-5.34.

⁶⁶⁹ *ICSFT and CERD* case, para. 175. See also CMM, para. 5.62. In addition to the cases there cited, see also *Bosnia Genocide* case, p. 130, para. 213; *Armed Activities on the Territory of the Congo (Reparations)*, pp. 55, 97, 125, paras. 121, 254, 358; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, p. 301, para. 66.

⁶⁷⁰ *ICSFT and CERD* case, para. 178.

⁶⁷¹ *ICSFT and CERD* case, para. 178. See also CMM, paras. 5.63-5.68. In addition to the cases there cited, see also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, p. 300, para. 65: “while press articles and documentary evidence of a similar secondary nature are not capable of proving facts, they can corroborate, in some circumstances, the existence of facts established by other evidence”.

⁶⁷² *ICSFT and CERD* case, paras. 20, 255, 261 and 292.

the Court. It thus appears that the Court placed no reliance on the expert reports in its decision.⁶⁷³

7. The “best evidence rule”

5.88 General principles of international law include the principles that:

- (1) to establish the claims in its memorial, a claimant is required to produce the highest evidence which the nature of its claim admits;
- (2) where evidence of a better quality should be available and its non-production is not satisfactorily explained, this will weigh against the allegations of that party;
- (3) the amount of evidence that may be available will depend on the circumstances of the case;
- (4) a government cannot rely on its own lack of power to procure evidence as an excuse for the non-production of available evidence when such power could be easily obtained;
- (5) in cases where it is obvious that everything has been done to collect stronger evidence and where all efforts to do so have failed, a court can be more easily satisfied that it is not possible to produce evidence of a better quality than in cases where no such efforts seem to have been made.⁶⁷⁴

⁶⁷³ See also CMM, paras. 5.69 and 5.70.

⁶⁷⁴ B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge University Press, 2006 reprint of the 1953 original), pp. 320-322, Vol. II, Annex 33.

PART THREE

CHAPTER 6

UN FACT-FINDING MISSION REPORTS

A. Introduction

- 6.1 Chapter 6 of the Counter-Memorial of Myanmar deals with the reasons why no evidential weight can be given to the reports of the United Nations International Fact-finding Mission on Myanmar (the “**FFM**”),⁶⁷⁵ which form the evidential centre-piece of The Gambia’s case.⁶⁷⁶ The Gambia replies thereto in paragraphs 4.17 to 4.34 of its Reply.
- 6.2 The present Chapter of this Rejoinder will demonstrate that nothing in the Reply of The Gambia changes the conclusion that no evidential weight can be given to these reports.
- 6.3 The Gambia does not dispute that the FFM reports are the evidential centre-piece of its case. As in the case of its Memorial, the Reply of The Gambia contains extensive referencing to the FFM reports. For instance, in Chapter 7 of the Reply, dealing with events during the 2016 and 2017 counter-terrorism operations, of the 298 footnotes that contain references to material relied on by The Gambia as evidence,⁶⁷⁷ 115

⁶⁷⁵ UN GA, Human Rights Council, Report of the independent international fact-finding mission on Myanmar, UN Doc. A/HRC/39/64, 12 September 2018 (the “**2018 FFM Report**”), MG, Vol. II, Annex 39, CMM, Vol. VI, Annex 238; UN GA, Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2, 17 September 2018 (the “**2018 FFM Detailed Findings**”), MG, Vol. II, Annex 40, CMM, Vol. VI, Annex 239, RG, Vol. II, Annex 1; UN GA, Human Rights Council, Report of the independent international fact-finding mission on Myanmar, UN Doc. A/HRC/42/50, 8 August 2019 (the “**2019 FFM Report**”), MG, Vol. III, Annex 47, CMM, Vol. VI, Annex 214; UN GA, Human Rights Council, Detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/42/CRP.5, 16 September 2019 (the “**2019 FFM Detailed Findings**”), MG, Vol. III, Annex 49, CMM, Vol. VI, Annex 246, RG, Vol. II, Annex 3.

⁶⁷⁶ CMM, paras. 6.1 to 6.4.

⁶⁷⁷ Chapter 7 of the Reply of The Gambia contains 372 footnotes, of which 74 (footnotes 542-544, 549-551, 555, 560, 563, 565-568, 571, 572, 578, 582, 583, 587, 596-598, 602, 608-612, 617, 620, 621, 641, 648, 649, 652, 653, 662, 666-669, 686, 687, 691, 699, 701, 702, 705, 706, 728-731, 749, 750, 796-798, 800, 815, 816, 831, 833, 834, 846, 850, 871-874, 877, 897, 901) contain no references to material relied on as evidence.

contain references to FFM reports.⁶⁷⁸ The Reply argues that other material relied on by The Gambia should be given evidential weight because that material “corroborates” the FFM reports,⁶⁷⁹ thereby confirming The Gambia’s primary reliance on the FFM reports.

6.4 A striking feature of this case is that the Reply of The Gambia continues to rely on the FFM reports as the evidential core of its claim, even though The Gambia has now received a considerable body of material from the Independent Investigative Mechanism for Myanmar (the “IIMM”).⁶⁸⁰ The Reply of The Gambia places minimal reliance on the material provided by the IIMM, notwithstanding that the IIMM (unlike the FFM) was specifically set up by the United Nations Human Rights Council to collect witness statements and other materials for use in connection with judicial proceedings. Furthermore, the IIMM itself has indicated that the FFM reports are *not* suitable to be used in connection with judicial proceedings. The Gambia nonetheless continues to cling on to the FFM reports as its primary evidence in the case. It is apparent that The Gambia does so because the IIMM material does not support its claim of genocide.

6.5 Myanmar makes clear at the outset that it does *not* recognise the IIMM, and has repeatedly and consistently rejected it at the Human Rights Council, the General Assembly and the Security Council. Nor has Myanmar ever recognised the FFM. For instance, in the Third Committee of the General Assembly on 22 October 2019, Myanmar stated as follows:

[L]et me make it clear that Myanmar’s participation in this interactive dialogue does not, in any way, be interpreted as recognizing the International Independent Fact-finding Mission (FFM) on Myanmar, its mandate or any of its reports. ...

Just now, we have heard the chair of the FFM. As expected, we heard one sided views, unsubstantiated allegations, misleading information based on secondary sources, and narratives.

⁶⁷⁸ RG, footnotes 569, 573, 574, 579, 580, 584, 588, 595, 613, 614, 624, 627, 630, 631, 650, 651, 654-658, 660, 661, 663, 670-676, 681-683, 694-698, 721, 722, 732, 735-746, 751, 752, 754, 760, 769, 778, 785, 799, 807, 809-814, 817-819, 822, 825, 830, 832, 837-840, 844, 845, 847, 848, 851, 855, 857-860, 862, 868, 870, 875, 883, 884, 885, 887, 888, 892, 894, 898-900, 904, 905, 909, 910, 912, 913.

⁶⁷⁹ RG, paras. 4.37 first sentence, 4.44 last sentence, 4.47 last sentence, 4.55 first sentence, 4.65 last sentence, and 4.78 last sentence. See also RG, para. 6.2 (arguing that new evidence should be accepted because it corroborates the FFM reports).

⁶⁸⁰ See Sub-Section H.2 of Chapter 7 below.

Obviously, he completely ignored contradicting evidence and facts including the devastated situation experienced by innocent Hindu minority as well as the other ethnic nationalities in Rakhine State. The whole work of the FFM validated our rejection of the Mechanism. ...

In the same vein, I would like to reiterate our rejection of the establishment of the Independent Investigative Mechanism (IIM) on Myanmar. This mechanism is yet another form of unprecedented discriminatory scrutinization on a member country. It was set up beyond the mandate of the UN General Assembly and the Human Rights Council. Therefore, we do not recognize nor will we cooperate with this mechanism. ...

The FFM issued one report in August 2018 and three reports in 2019. The reports mostly contained the narratives of the alleged victims of the displacement without hard evidence. The FFM in its reports portrayed the Myanmar security forces as perpetrators of mass atrocity crimes while deliberately ignoring or discounting the provocative and premeditated armed attacks of ARSA terrorists on various security posts in October 2016 and August 2017 which were the undeniable causes of the present humanitarian situation. Most importantly, the FFM never condemned the well-documented atrocity crimes committed by ARSA that resulted in the death of security personnel and hundreds of innocent people in Rakhine, including a hundred Hindu villagers, in August 2017.⁶⁸¹

⁶⁸¹ Statement by Ambassador Hau Do Suan, Permanent Representative of the Republic of the Union of Myanmar to the United Nations in response to the Presentation made by Mr. Marzuki Darusman, Chair of the former Independent International Fact-finding Mission on Myanmar, Agenda Item 70-c, Promotion and protection of human rights: Human rights situation and reports of special rapporteurs and representatives at the Third Committee of the 74th Session of the United Nations General Assembly (New York, 22 October 2019), RM, Vol. IV, Annex 125*bis*. See also the following. Statement by H.E. Mr. Kyaw Moe Tun, Permanent Representative of Myanmar at the consideration of the draft resolution on “the Situation of Human Rights of Rohingya Muslims and other minorities in Myanmar” at the 39th Session of the Human Rights Council, Geneva, 27 September 2018, RM, Vol. IV, Annex 117: “The Government of Myanmar has rejected the establishment of the FFM since the beginning ... The establishment, composition and mandate of the FFM also raised serious concerns that it would lack impartiality and hinder the Government’s own efforts to find long-term solutions to the situation in Rakhine State. As expected, the FFM’s report is found to be unbalanced and put the whole blame on one side. ... Therefore, my delegation categorically rejects the draft resolution L.22 [establishing the IIMM]”. UN SC, 8477th meeting, Thursday, 28 February 2019, S/PV.8477 (Mr Suan (Myanmar)), p. 19, RM, Vol. IV, Annex 123 p. 19: “While we are engaging constructively with the United Nations in our efforts to resolve the multitude of challenges we are facing as a nascent democracy, some groups and countries in the United Nations system continue to exploit various United Nations mechanisms to exert discriminatory and illegitimate political pressures on Myanmar with malicious intent. One vivid example, among many others, is the establishment of the Independent Investigative Mechanism on Myanmar by the Human Rights Council. That action is yet another step in a series of unprecedented discriminatory examinations of a member State. We strongly objected to the establishment of the Mechanism. The reasons are simple. The Mechanism was set up beyond the Council’s mandate. It represents selectivity and a discriminatory and double-standard practice on the part of the United Nations human rights body. In addition, its terms of reference are very intrusive to a sovereign country’s domestic jurisdiction. The Mechanism will only serve the political purposes of those who wish to exploit the Human Rights Council for their political agenda. Such intrusive measures, without the consent of the country concerned, will only further polarize different communities and exacerbate tensions.” See also, for instance, paragraph 12.46 below.

Other Member States of the United Nations have also opposed the establishment of the IIMM.⁶⁸² It must be emphasised that Myanmar is under no legal obligation to co-operate with either the FFM or the IIMM and that Myanmar has not done so. These bodies thus could not and have not considered Myanmar's position or any of the evidence submitted by Myanmar in the present proceedings, with the consequence that work product of these bodies is incomplete and one-sided. In adversarial proceedings before this Court, which is required to consider the evidence and arguments presented by Myanmar, evidential weight cannot be given to conclusions expressed by another body in a process in which Myanmar was not required to participate, and did not participate.

- 6.6 Myanmar makes absolutely clear that nothing in its pleadings in this case implies any acceptance or recognition of the FFM or the IIMM, or their mandates, or any of their work. Myanmar itself therefore does *not* rely on material of the FFM or the IIMM as evidence of any of the substantive facts of this case, does not accept that any FFM or IIMM materials are reliable evidence, and does not accept that IIMM materials can be relied on by the Court to establish the material facts of this case. Myanmar refers to the FFM and the IIMM in its pleadings only out of necessity. It is forced to do so

⁶⁸² **China:** speech given by the Chinese delegation at the 39th session of the Human Rights Council, "The Human Rights Situation of Rohingya Muslims and Other Minorities in Myanmar", Draft resolution (A/HRC/39/L.22), Speech before taking action (Afternoon, 27 September, 2018), RM, Vol. IV, Annex 118: "It is obvious that the draft resolution does not respect the opinions of Myanmar, as a country concerned, and unilaterally Pressure includes very controversial content such as 'ethnic cleansing', 'genocide', submission to the International Criminal Court, and the establishment of a new investigation mechanism. We hope that the draft resolution will delete controversial content and be fair and objective. ... China has always upheld a fair and objective stance in international affairs and actively worked to promote peace and talks. We call on all parties to seriously consider the correct way to resolve the Rakhine State issue, adhere to dialogue and cooperation, abandon confrontation and pressure, provide constructive assistance to Myanmar and Bangladesh, and play a positive role in resolving the Rakhine State issue." **Philippines:** 37th Session of the Human Rights Council, Item 4, Decision, Explanation of vote before the vote on the situation of human rights of Rohingya Muslims and other minorities in Myanmar (A/HRC/39/L.22), 27 September 2018, RM, Vol. IV, Annex 119: "The Philippines has been consistent in our view that sustained constructive dialogue, cooperation and engagement with the country concerned is the most effective way to address our aims and objectives. We do not see much value in imposing measures that polarize parties and engender mistrust with the concerned State and among parties on the ground. We maintain this view in considering this resolution." **Belarus:** 42nd session of the UN Human Rights Council, Item 4 of the agenda Dialogue with an international mission after establishing the facts in Myanmar, Speech of the representative Republic of Belarus, September 17, 2019, RM, Vol. IV, Annex 125: "[T]he international community, including HRC, can play a constructive role in the search for the most sustainable solution that would lead to peace, stability and development in Rakhine State. However, we are convinced that exerting discriminatory political pressure on Myanmar, including through the fact-finding or investigative mechanisms established in the Council, will not help solve the problems. In this regard, it seems to us more expedient to involve regional (ASEAN) and bilateral cooperation mechanisms with Myanmar, focused on dialogue and involvement."

because the FFM and IIMM are referred to by The Gambia, and because The Gambia relies on materials of the FFM and IIMM as purported evidence in support of its case. Myanmar merely refers to the IIMM material in order to explain why evidential weight cannot be given to it, to demonstrate the inconsistencies between the IIMM material and The Gambia's case, and to demonstrate that the IIMM material shows the unreliability of other material relied on by The Gambia. Myanmar also refers to the IIMM materials to point out the illogicality of The Gambia's primary reliance on the FFM reports as the evidential centre-piece of the case, rather than the IIMM materials.

6.7 Furthermore, and in any event, the reports of the FFM are not material of a kind that can be given evidential weight in this case. **Section B** of this Chapter, which addresses The Gambia's reply to Chapter 6 of the Counter-Memorial of Myanmar, demonstrates that The Gambia has no substantive response to the arguments of Myanmar in this respect.

6.8 To the extent that the FFM reports express opinions or conclusions, this is obviously not *evidence*. The Court cannot find a fact to be established, merely because a body such as the FFM was of the view that that fact is true. As has been noted in a publication of the Geneva Academy of International Humanitarian Law and Human Rights:

[w]hile fact-finding may involve many bodies and take many forms, one thing is clear and undisputed: fact-finding itself is not able or tasked to make authoritative or binding judicial declarations. Its findings cannot therefore be compared to those made by courts or tribunals. (This point is made in many fact-finding reports.) FFM's do not, and cannot be expected to apply the same degree of scrutiny or standard of certainty ...⁶⁸³

6.9 The members of the FFM also did not have expertise in forensic investigations, or in the collection of evidence for use in judicial proceedings, and there is nothing to suggest that its staff had such expertise.⁶⁸⁴

⁶⁸³ S. Wilkinson, "Standards of Proof in International Humanitarian Law and Human Rights Fact-Finding and Inquiry Missions", Geneva Academy of International Humanitarian Law and Human Rights, pp. 11-12, RM, Vol. V, Annex 172.

⁶⁸⁴ See CMM, para. 6.39.

6.10 The Gambia appears to suggest that descriptions in FFM reports of what interviewees told the FFM should be treated as “first-hand” accounts.⁶⁸⁵ Such an argument fundamentally misunderstands the nature of The Gambia’s own evidence upon which it relies. No witness statements taken by the FFM are in evidence before the Court. It cannot be inferred from the FFM reports that any witness statements were even taken by the FFM, or that any interviewees signed documents confirming the truth of what they had said.⁶⁸⁶ In particular, there is no suggestion in the “methodology” section of the FFM reports that the FFM took signed witness statements,⁶⁸⁷ and it is clearly to be expected that this would have been mentioned in this section of the FFM reports if signed witness statements had been taken. The clear inference is that, as a matter of policy, statements were *not* taken. The Gambia has produced only the FFM *reports*. The FFM *reports* contain merely second-hand or hearsay descriptions by the FFM of what interviewees are said to have said in the interviews. They are prototypical examples of secondary sources of information. Furthermore, because no witness statements or interview records taken by the FFM are in evidence before the Court, it is very often impossible to know whether the interviewees themselves gave first-hand accounts or hearsay statements. If an FFM report makes a statement of fact, and then cites what the FFM was told by an interviewee as the evidence in support of that fact, it is simply impossible to know without seeing an original witness statement whether the FFM report accurately reflects what the interviewee said, or whether the interviewee was giving a first-hand or a hearsay (or a double- or triple-hearsay) account of that fact. Furthermore, it appears that most or all interviewees were interviewed by *staff* of the FFM, rather than by the three members of the FFM themselves, thereby adding another level of hearsay.⁶⁸⁸

⁶⁸⁵ RG, para. 4.31 last sentence: “The witness accounts in the Mission’s [FFM’s] reports are not hearsay; they are facts within the direct knowledge of those witnesses”. See also *ibid.*, para. 7.112, read with para. 7.111.

⁶⁸⁶ See CMM, paras. 5.24-5.39.

⁶⁸⁷ See, in particular, 2018 FFM Detailed Findings, paras. 8-29 MG, Vol. II, Annex 40).

⁶⁸⁸ See CMM, para. 6.40. See also 2018 FFM Detailed Findings, para. 23, MG, Vol. II, Annex 40: “Mission members visited the refugee camps in Cox’s Bazar (Bangladesh) at the start of the mandate, shortly after the arrival of vast numbers of Rohingya refugees, and once again near the end of the mandate in July 2018 to take stock of the situation prior to the finalization of their report to the Human Rights Council. The *Mission secretariat* undertook numerous additional field-missions between September 2017 and July 2018, of several weeks at a time, primarily *to interview victims and witnesses*.” (Emphasis added.)

- 6.11 Furthermore, although the FFM purported to take into account whether or not it found interviewees to be credible,⁶⁸⁹ there is nothing to suggest that the FFM ever disregarded the contents of even a single interview on the ground that the interviewee was found not to be credible. There is also no indication of how the FFM assessed the credibility and reliability of particular interviewees, other than that the FFM applied an even lower standard of proof in relation to allegations of sexual crimes.⁶⁹⁰ In any event, in this case, it is for the Court to make its own determination of whether witnesses are credible, and of what weight should be given to different items of evidence and to the accounts given by different witnesses. The Court does not delegate such a decision to a body such as the FFM.
- 6.12 Ultimately, whatever the form in which the FFM may have kept records of the interviews it conducted, these records are not available in these proceedings. On 8 May 2024, and again on 7 August 2024, counsel for Myanmar requested the Head of the IIMM to provide the underlying documents on which the FFM reports are based.⁶⁹¹ On 30 August 2024, the Head of the IIMM responded that “The Mechanism does not have consent to share with Myanmar the records of any interviews conducted by the Independent International Fact-Finding Mission on Myanmar”.⁶⁹²
- 6.13 Given that the United Nations, at very considerable expense, at the time of a liquidity crisis, has established the IIMM with the express mandate of collecting and producing material for use in connection with judicial proceedings, it seems inexplicable that The Gambia has not sought to base its case on materials provided by the IIMM, but instead continues to rely primarily, and heavily, on the FFM reports, which were never designed, or intended, to be used as evidence in judicial proceedings.
- (1) The IIMM has since 2020 been providing material to both The Gambia and Myanmar. The IIMM has assured counsel for Myanmar that the same material has been provided to both parties.⁶⁹³

⁶⁸⁹ RG, para. 4.25.

⁶⁹⁰ CMM, paras. 6.45-6.46.

⁶⁹¹ Letter from counsel for Myanmar to the Head of the IIMM, 7 August 2024, RM, Vol. III, Annex 76.

⁶⁹² Letter from the Head of the IIMM to counsel for Myanmar, 30 August 2024, RM, Vol. IV, Annex 150.

⁶⁹³ Letter from the Head of the IIMM to counsel for Myanmar, 17 May 2024, RM, Vol. IV, Annex 147.

- (2) By the end of January 2024, The Gambia had received from the IIMM 35 witness statements and a large number of other documents, images and video-clips.⁶⁹⁴ This was provided with ample time remaining for The Gambia to use all of this material in its Reply, if it had wanted to do so.
- (3) Despite this, The Gambia's Reply relies on only 12 of these 35 witness statements and 6 reports from amongst the other documents that it had received from the IIMM.
- (4) By a letter dated 3 May 2024, the Agent of The Gambia applied to the Court for an extension of time for the filing of The Gambia's Reply, which was then due on 16 May 2024, on the ground that The Gambia had received new material from the IIMM on 2 and 3 May 2024, and on the ground that The Gambia expected to receive further material from the IIMM over the following two weeks.⁶⁹⁵ The material received by The Gambia from the IIMM in May 2024 included six additional signed witness statements and four analytical reports. Despite the fact that The Gambia's request for an extension of the time-limit for the filing of its Reply was denied, all four of the analytical reports received in May 2024 were annexed by The Gambia its Reply,⁶⁹⁶ demonstrating that The Gambia had sufficient time to review, analyse and incorporate this material and to incorporate it into its Reply prior to its filing.
- (5) Overall, the pleadings of The Gambia thus rely on only 12 of the 41 witness statements it had received from the IIMM by the time that its Reply was filed in May 2024,⁶⁹⁷ and on only six other documents and one video⁶⁹⁸ out of the many thousands of documents and images, and hundreds of videos, received from the IIMM.

⁶⁹⁴ *Ibid.*, and sharing pack list document, RM, Vol. IV, Annex 148.

⁶⁹⁵ Letter from the Agent of The Gambia to the Registrar, 3 May 2024, RM, Vol. V, Annex 211.

⁶⁹⁶ These are the annexes at RG, Vol. II, Annexes 7, 8, 9 and 10. The four analytical reports received in May 2024 are numbers 7, 8, 12 and 13 in the list at IIMM, "IIMM Sharing Packs Provided to The Gambia", received by Myanmar on 21 May 2024, RG, Vol. IV, Annex 148. Item 11 in this list is a duplicate of item 5 in the list (received by The Gambia in December 2023) together with underlying material, and this annex was included in the Reply of the Gambia at RG, Vol. II, Annex 5.

⁶⁹⁷ RG, Vol. IV, Annexes 48-51 and 53-60.

⁶⁹⁸ These are the documents at RG, Vol. II, Annexes 4, 5, 7-10, and the video at MG, Vol. V, Annex 136.

(6) As will be seen below, even this small amount of IIMM material is relied on by The Gambia for only very limited purposes.⁶⁹⁹

(7) In its request for an extension of the time-limit for the filing of its Reply, the Agent of The Gambia said that if the extension of the time-limit was not granted, The Gambia “would be forced, after review of these materials, to submit a separate request to the Court to include them in the record”.⁷⁰⁰ In fact, no such request has since been submitted by The Gambia to the Court. No such application was made by The Gambia even after it received a further signed witness statement from the IIMM in August 2024, bringing the total number of witness statements received from the IIMM to 42.

6.14 It is apparent from this that The Gambia has consciously chosen to place very limited reliance on the IIMM material (notwithstanding that the IIMM material is specifically intended for use in connection with judicial proceedings), and has chosen to rely instead to the greatest extent possible on the FFM reports (notwithstanding that the FFM reports are *not* intended for use as evidence in judicial proceedings).

6.15 Myanmar does not recognise the IIMM or the FFM. Myanmar furthermore maintains that no significant weight can be given to the IIMM material for reasons given below,⁷⁰¹ and that the IIMM material is incapable of proving The Gambia’s claims. Nevertheless, The Gambia cannot deny that the witness statements provided by the IIMM are at least intended to be better evidence than the FFM reports. By continuing to make the FFM reports the evidential centre-piece of its case, rather than relying on materials of the IIMM, The Gambia therefore fails to observe the principle that a claimant is required to produce the highest evidence which the nature of its claim admits.⁷⁰² It is evident that the reason why The Gambia nonetheless continues to cling

⁶⁹⁹ See Sub-Section H.2 of Chapter 7 below.

⁷⁰⁰ Letter from the Agent of The Gambia to the Registrar dated 3 May 2024, RM, Vol. V, Annex 211.

⁷⁰¹ See Sub-Section H.2 of Chapter 7 below.

⁷⁰² See paragraph 5.88 above, and B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge University Press, 2006 reprint of the 1953 original), p. 320, RM, Vol. II, Annex 33, citing United States Domestic Commission, Spanish Claims (Act of 1836), Final Report (1838) 5 *Int. Arb.*, p. 4542, at p. 4544: “Each claimant was required to produce the highest evidence, which the nature of his claim admitted, to establish the allegations of his memorial”.

on to the FFM reports as its primary evidence in the case is that the IIMM material does not support its claim of genocide.

B. Response to The Gambia's arguments

6.16 Nothing in paragraphs 4.17 to 4.34 of the Reply of The Gambia provides any effective response to what is stated in Chapter 6 of the Counter-Memorial of Myanmar, and in paragraphs 6.1 to 6.23 above.

6.17 Essentially, The Gambia asks the Court to delegate its fact-finding function to the FFM. The Gambia asks the Court to find that facts have been established merely on the basis that the FFM has already found those facts to be established.⁷⁰³ However, quite apart from the fact that the FFM purported to make findings of fact on a significantly lower “reasonable grounds” standard of proof rather than the very high standard of proof applicable in this case,⁷⁰⁴ it would be an abnegation by the Court of its of judicial function if it were simply to adopt findings of fact made by another body, particularly where the Court is unable even to see the primary material on which that other body based its findings.

6.18 The Gambia appears to suggest that the FFM reports should be considered to be reliable evidence because the FFM interviewed a large number of witnesses.⁷⁰⁵ That is not so. The FFM reports contain merely brief second-hand descriptions by the FFM of what it says interviewees said in interviews. The records of those interviews are not available. In contrast, the IIMM has produced formal signed witness statements of those it has interviewed. Thus, the more witnesses that were interviewed by the FFM, the more glaring it appears that the FFM reports are based on descriptions of interviews for which no interview records are available, and the more glaring it appears that the FFM reports are merely second hand descriptions of what interviewees are said to have said to the FFM, and that The Gambia has placed little reliance on the signed witness statements that *are* available.

⁷⁰³ See RG, paras. 4.17-4.34.

⁷⁰⁴ CMM, paras. 6.42-6.47.

⁷⁰⁵ RG, para. 4.26.

- 6.19 This is all the more significant in the present case, given that various persons interviewed by the IIMM have acknowledged that they were previously interviewed by other organisations, and have admitted or claimed that statements that they previously made to those other organisations are incorrect.⁷⁰⁶ Some of these previous statements that have now been admitted to be incorrect may have been made to the FFM. The parties and the Court cannot know to what extent this is the case. Some of those interviewed by the IIMM were unable to recall the details of other organisations that had interviewed them previously. Where those interviewed by the IIMM have been able to identify the organisations that interviewed them previously, the names of those organisations have been redacted from their witness statements by the IIMM. Where the IIMM has prior statements given by those persons to other organisations, the IIMM has not provided these to Myanmar or The Gambia, and has not even disclosed the identity of the organisations.⁷⁰⁷
- 6.20 Furthermore, the interviews conducted by the FFM appear to have been cursory. The FFM claims that it conducted 875 “in-depth interviews with victims and eye-witnesses”⁷⁰⁸ and a further 250 consultations with “other stakeholders”.⁷⁰⁹ The interviews appear to have been conducted by staff of the FFM (not the three members of the FFM themselves⁷¹⁰) during several short periods within the 10-month period from September 2017 to July 2018.⁷¹¹ Given the very small size of the FFM’s staff,⁷¹² it is apparent that interviews of 875 people in that very short space of time can hardly have been “in-depth”, and that the process can hardly have been careful and detailed.

⁷⁰⁶ See paragraphs 7.17-7.33 below.

⁷⁰⁷ On 30 August 2024, the Head of the IIMM said to counsel for Myanmar that where the IIMM has been able to collect a prior statement given by a witness to a third party, the IIMM does not have consent to share that prior statement with the parties to this case: see letter from the Head of the IIMM to counsel for Myanmar, 30 August 2024, RM, Vol. IV, Annex 150.

⁷⁰⁸ 2018 FFM Detailed Findings, para. 19.

⁷⁰⁹ 2018 FFM Detailed Findings, para. 23.

⁷¹⁰ See CMM, para. 6.40, and this Rejoinder, paragraph 6.10 last sentence above.

⁷¹¹ 2018 FFM Detailed Findings, para. 23: “Mission members visited the refugee camps in Cox’s Bazar (Bangladesh) at the start of the mandate, shortly after the arrival of vast numbers of Rohingya refugees, and once again near the end of the mandate in July 2018 to take stock of the situation prior to the finalization of their report to the Human Rights Council. *The Mission secretariat undertook numerous additional field-missions between September 2017 and July 2018, of several weeks at a time, primarily to interview victims and witnesses.*” (Emphasis added.)

⁷¹² See CMM, para. 6.39.

Moreover, contrary to what The Gambia seems to try to suggest,⁷¹³ the means by which the witnesses interviewed by the FFM were selected is opaque.⁷¹⁴

- 6.21 The Gambia also claims that the FFM “held over 250 consultations with other stakeholders, including intergovernmental and non-governmental organizations, researchers, and diplomats”.⁷¹⁵ However, as in the case of the witness interviews, the underlying notes of these consultations are not available.
- 6.22 The Gambia accepts that the FFM did not have adversarial or public proceedings.⁷¹⁶ The FFM reports were therefore *not* “the product of a careful court or court-like process”.⁷¹⁷ The FFM reports can be contrasted, for instance, with the report of the Porter Commission that was considered by the Court in *Armed Activities on the Territory of the Congo*.⁷¹⁸ The Court said that the Porter Commission gathered evidence “obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature”.⁷¹⁹ The Court said that the report of the Porter Commission would be given “appropriate consideration” because of this, and because there had been no challenge to the credibility of the report since its publication, which had been accepted by both parties.⁷²⁰ None of these observations apply to the FFM reports. There is nothing to suggest that those interviewed by the FFM were subjected to cross-examination by skilled cross-examiners. The FFM reports were not accepted by both parties when published.⁷²¹ More fundamentally, the FFM’s procedures were not adversarial because Myanmar did not participate in them. Myanmar was under no legal obligation

⁷¹³ See RG, para. 4.26 third sentence.

⁷¹⁴ CMM, paras.6.58-6.67. See also this Rejoinder, paragraphs 7.19 and 7.33-7.34 below.

⁷¹⁵ See RG, para. 4.27.

⁷¹⁶ See RG, para. 4.30.

⁷¹⁷ See paragraph 5.50 above, and the case law of the Court there cited.

⁷¹⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168.

⁷¹⁹ *Ibid.*, p. 201, para. 61.

⁷²⁰ *Ibid.*

⁷²¹ See paragraph 6.5 above. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022, pp. 503-504, paras. 67, 69.

to co-operate with the FFM, and it did not do so.⁷²² The result is that the FFM reports are a one-sided account based primarily on interviews with people in camps in Bangladesh who, out of fear of or loyalty to ARSA, were generally unwilling to speak about ARSA's role in events or to give accounts that are inconsistent with ARSA's version of events.⁷²³ In proceedings before this Court, in which Myanmar is a party, evidential weight cannot be given to the results of a process in which Myanmar was not required to participate, and did not participate. The Court certainly cannot take the results of such a process as the evidential centre-piece of the case, as The Gambia has done.

- 6.23 Reports such as the FFM reports might well be considered by the Court in provisional measures proceedings, where the standard of proof is low.⁷²⁴ However, that does not mean that such reports are evidence capable of proving facts at the merits stage of proceedings, especially in cases involving the very high standard of proof that applies in cases alleging genocide. It is noted that *Armed Activities on the Territory of the Congo* was not a case involving the very high standard of proof that applies in the present case. The Court did not in that case consider the question whether even the report of the Porter Commission would have been capable of proving facts in accordance with that very high standard of proof.
- 6.24 The Gambia states that the mandate of the FFM “lasted two years and six months, after which the IIMM took over the work, which continues to this very day”,⁷²⁵ thereby necessarily accepting that the work of the FFM could not be adequately completed within the period of its mandate.
- 6.25 The Gambia contends that Myanmar misrepresents the FFM when it asserts that the FFM “targeted interviewees to corroborate specific incidents or patterns”.⁷²⁶ That is not accepted. Myanmar simply quoted the FFM's own words. Contrary to what The

⁷²² 2018 FFM Detailed Findings, para. 3, MG, Vol. II, Annex 40; 2019 FFM Detailed Findings, para. 29, RM, Vol. IV, Annex 124 (additional to the extracts at MG, Vol. III, Annex 49 and CMM, Vol. VI, Annex 246).

⁷²³ See also paragraph 6.26 below.

⁷²⁴ See, for instance, the provisional measures order in this case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, pp. 12-13, 22, 26-27, paras. 27, 55, 72.

⁷²⁵ See RG, para. 4.30.

⁷²⁶ See RG, para. 4.32, referring to CMM, para. 6.62.

Gambia suggests, the FFM did *not* say that it “targeted interviewees who could speak about particular incidents in order to determine what they said corroborated other interviewees”.

- 6.26 The Gambia argues that it is a “groundless complaint” and “conjecture” for Myanmar to suggest “that ARSA could have influenced interviewees in the refugee camps”.⁷²⁷ That is not so. Solid grounds are given in paragraphs 3.108 to 3.145, and 6.64 to 6.67, of the Counter-Memorial of Myanmar,⁷²⁸ and elsewhere in this Rejoinder.⁷²⁹ The fact that the FFM says that it “paid specific attention to the protection of victims and witnesses”, even if that were true (and this cannot be assumed since details are not known), would not mean that witnesses would have no fear of reprisals from ARSA.⁷³⁰ The fact that the FFM says that it “concentrated on interviewing new arrivals to the camps” would not of itself mean that ARSA did not influence interviewees, especially if the FFM relied on others in the camps to identify interviewees,⁷³¹ since those others would also have reason to fear ARSA. Contrary to what The Gambia suggests,⁷³² the FFM did *not* say that interviewees feared no reprisals from anyone other than the authorities of Myanmar.
- 6.27 The Gambia claims that “the UN Human Rights Council and the General Assembly have repeatedly welcomed the reports of the [FFM] and called upon Myanmar to implement the recommendations contained therein”.⁷³³ However, statements by States and by political organs of the United Nations welcoming such reports are political statements,⁷³⁴ which do not somehow render the reports more reliable as evidence in judicial proceedings.

⁷²⁷ See RG, para. 4.33.

⁷²⁸ CMM, paras. 3.39, 3.44-3.45, 3.108-3.145, 6.63-6.67, 7.80, 8.55-8.62, 9.98, 13.40 and 16.16.

⁷²⁹ See paragraph 2.30 above, and Section D of Chapter 3 above.

⁷³⁰ See RG, para. 4.33.

⁷³¹ See CMM, paras. 6.61-6.63.

⁷³² See RG, para. 4.33 last sentence, referring to 2018 FFM Detailed Findings, paras. 27-29, MG, Vol. II, Annex 40.

⁷³³ See RG, para. 4.34.

⁷³⁴ See paragraph 7.115 below.

- 6.28 The Gambia says that Myanmar “did not allow the [FFM] access to the country and did not cooperate with it at all”.⁷³⁵ That is correct. This is because Myanmar did not recognise the FFM or its mandate.⁷³⁶ The fact that Myanmar did not co-operate with the FFM does not somehow render its reports more reliable as evidence in judicial proceedings. On the contrary, it provides further reason why they cannot be so used.⁷³⁷ Myanmar has cooperated with other United Nations entities and office-holders.⁷³⁸
- 6.29 The Gambia suggests that comments by Professor Bassiouni concerning the shortcomings of fact-finding missions are no longer valid because those comments were made in 2001.⁷³⁹ In fact, other commentators have made similar comments more recently. For instance, one commentator notes:

The strength of the mandate conferred upon these investigative mechanisms, for example, (as well as the adequacy of the resources they will receive), largely depends upon whether the mandate is truly intended to be carried out, or whether the fact-finding mechanisms has been established as a gag-measure in response to a crisis. ...

The best way to do this [give only the appearance of pursuing the values of truth and justice while at the same time not generating politically unwanted results] is to ensure that the mechanism is chronically understaffed and under-resourced. Most fact-finding missions have in fact very limited resources, sometimes none at all, and are supported by staff often on a part-time basis.⁷⁴⁰

- 6.30 A publication in 2022 by the Oxford Institute for Law, Ethics and Armed Conflict contains the results of an anonymised survey of over 103 staff members of relevant UN mandates, including fact-finding missions and commissions of enquiry. It states that “just 11.70% of respondents agreed that the recruitment yielded staff with the requisite expertise and skills”.⁷⁴¹ This publication also noted that “The *ad hoc* and

⁷³⁵ RG, para. 4.27.

⁷³⁶ See paragraphs 6.5-6.6 and 6.30 above.

⁷³⁷ See paragraphs 6.5-6.6 and 6.30 above.

⁷³⁸ See paragraph 12.50 below.

⁷³⁹ RG, para. 4.30, referring to CMM, para. 6.50.

⁷⁴⁰ F. D’Alessandra, “The Accountability Turn in Third Wave Human Rights Fact-Finding”, *Utrecht Journal of International and European Law*, vol. 33 (2017), pp. 59-76, at p. 68, RM, Vol. II, Annex 42.

⁷⁴¹ F. D’Alessandra *et al.*, “Anchoring Accountability for Mass Atrocities” (Oxford Institute for Law, Ethics and Armed Conflict, 2022), p. 41, RM, Vol. V, Annex 167.

urgent origins of UN mandates have, in the past, generated problems with the specifications of the mandate, the investigation's time frame, the stability of financing, and the adequacy of staffing".⁷⁴²

C. Conclusion

- 6.31 For the reasons given in Chapter 6 of the Counter-Memorial of Myanmar and in this Chapter of this Rejoinder, the FFM reports are not evidence capable of coming anywhere near the very high standard of proof that applies in cases involving the Genocide Convention. Regarding the IIMM, Myanmar makes clear at the outset that it does *not* recognise the IIMM, and has repeatedly and consistently rejected it at the Human Rights Council, the General Assembly and the Security Council. Myanmar does not accept that any FFM or IIMM materials are reliable evidence.

⁷⁴² *Ibid.*, p. 31.

CHAPTER 7

OTHER MATERIAL RELIED ON BY THE GAMBIA

A. Introduction

- 7.1 Chapter 7 of the Counter-Memorial of Myanmar deals with the quality and evidential weight of the material other than the reports of the Fact-finding Mission (“FFM”) that is relied on by The Gambia as evidence of alleged acts of genocide committed during the counter-terrorism operations of 2016 and 2017. That chapter of the Counter-Memorial demonstrates that in accordance with the general principles of proof established in the case law of the Court, no or little evidential weight can be given to any of this material. It is incapable of discharging the very high standard of proof that applies in the present case. Indeed, it would be incapable of discharging even the ordinary standard of proof applicable in the generality of cases before the Court.
- 7.2 The Gambia has now also annexed further such material to its Reply.
- 7.3 This Chapter of this Rejoinder responds to paragraphs 4.35 to 4.80 of the Reply of The Gambia, dealing with the evidential weight of the material annexed by The Gambia to both its Memorial and its Reply.
- 7.4 As in the case of Chapter 7 of the Counter-Memorial,⁷⁴³ it is not practicable for this Chapter of this Rejoinder to address the evidential deficiencies of every single individual item of material relied on by The Gambia. The present Chapter is therefore confined to the materials cited as evidence in Chapters 8 and 9 of The Gambia’s Memorial, and to the materials annexed to The Gambia’s Reply which are cited as evidence in Chapter 7 of the Reply.⁷⁴⁴ These are the documents relied on by The Gambia as its evidence of the acts alleged to have been committed during the counter-terrorism operations in 2016 and 2017 that are claimed to be acts of genocide.

⁷⁴³ CMM, para. 7.2.

⁷⁴⁴ This chapter of this Rejoinder does not expressly address any documents which The Gambia has not annexed to its Reply, but for which it has (contrary to Article 50 of the Rules of Court) merely included a URL in a footnote.

- 7.5 The points made in Chapter 7 of the Counter-Memorial and in this Chapter of this Rejoinder will apply as relevant also to other materials on which The Gambia relies as evidence in other chapters of its Memorial and Reply.⁷⁴⁵ The fact that a document relied on by The Gambia has not been expressly addressed in Chapter 7 of the Counter-Memorial or in this Chapter of this Rejoinder does not mean that it is accepted by Myanmar without challenge.⁷⁴⁶
- 7.6 As to the material annexed to the Memorial of The Gambia, this is dealt with in Sections B to G of this Chapter below. In relation to much of this material, the Reply of The Gambia provides either no response at all, or no material response, to the arguments in the Counter-Memorial of Myanmar as to why no or little evidential weight can be attached to it.
- 7.7 As to the additional material annexed to the Reply of The Gambia, this is dealt with in Section H of this Chapter below.
- 7.8 The additional material annexed to the Reply of The Gambia includes witness statements and reports prepared by the Independent Investigative Mechanism for Myanmar (the “IIMM”). At the outset, Myanmar recalls that it does not recognise the IIMM or its mandate or any of its work, does not rely on material of the FFM or the IIMM as evidence of any of the substantive facts of this case, does not accept that any FFM or IIMM materials are reliable evidence, and does not accept that IIMM materials can be relied on by the Court to establish the material facts of this case. Myanmar merely refers to the IIMM material in order to explain why evidential weight cannot be given to it, to demonstrate the inconsistencies between the IIMM material and The Gambia’s case, and to demonstrate that the IIMM material shows the unreliability of other evidence relied on by The Gambia.⁷⁴⁷ All references in this case to the IIMM, or to evidence emanating from the IIMM, are without prejudice to this fundamental position of Myanmar.
- 7.9 Nothing in the Reply of The Gambia affects the conclusions in Chapter 7 of the Counter-Memorial of Myanmar. The witness statements purportedly filed “under

⁷⁴⁵ See also CMM, para. 7.2 footnote 773.

⁷⁴⁶ See further paragraphs 7.128-7.140 below.

⁷⁴⁷ See paragraphs 6.5-6.6 above.

seal” by The Gambia should be excluded from the case file, and should not be considered by the Court. The anonymous witness statements annexed to The Gambia’s pleadings, and the descriptions given in reports of NGOs and other organisations of what unnamed persons are said to have said to those organisations, can be given no evidential weight for the overarching reasons given in paragraphs 7.10 to 7.43 below. Furthermore, the individual documents annexed to The Gambia’s pleadings can be given no evidential weight, or alternatively, no significant evidential weight, for the reasons given in Chapter 7 of the Counter-Memorial of Myanmar, and in paragraphs 7.64 to 7.165 below.

B. Witness statements and other witness accounts

1. Overarching observations

a. Witness statements are treated with caution

7.10 Paragraphs 5.24 to 5.39 of the Counter-Memorial of Myanmar, and paragraphs 5.43 to 5.48 above of this Rejoinder, set out the case law of the Court concerning the evidential weight that will be given to witness statements and affidavits. Paragraphs 7.5 to 7.131 of the Counter-Memorial of Myanmar set out the reasons why no evidential weight can be given to the witness statements and other witness accounts annexed to the Memorial of The Gambia,⁷⁴⁸ as well as the reasons why the witness statements of certain journalists⁷⁴⁹ do not establish the alleged facts in support of which they are cited as evidence.

7.11 These paragraphs of the Counter-Memorial are not unnecessarily repeated. The Reply of The Gambia provides no substantive response to many of the points made in them. The Reply of The Gambia instead provides perfunctory, generic statements. The Gambia states for instance that “witnesses testify to events that they observed or experienced first-hand”,⁷⁵⁰ when in fact, many statements contain hearsay, and in

⁷⁴⁸ CMM, paras. 7.11-7.131.

⁷⁴⁹ CMM, paras. 7.119-7.131, dealing with the witness statement of the journalist Christina Lamb, the witness statement of the journalists Alex Crawford and Neville Lazarus, and the witness statement of the journalist Jonathan Head.

⁷⁵⁰ RG, para. 4.37.

many statements it is unclear whether the information is first-hand or hearsay.⁷⁵¹ The Gambia states that “[m]any of the statements were taken relatively soon after the events”,⁷⁵² when in fact many were taken years after the events they describe.⁷⁵³ The Gambia states that “[n]one of the witnesses are officials or officers of The Gambia”,⁷⁵⁴ when in fact this in itself is no guarantee that the witnesses are impartial and reliable,⁷⁵⁵ and claimed eye-witnesses do have a personal interest in the outcome of the proceedings.⁷⁵⁶ The Gambia states that “[t]he vast majority of the statements were taken by independent actors or entities, including ... Legal Action Worldwide”,⁷⁵⁷ when in fact Legal Action Worldwide (“LAW”), Fortify Rights and other NGOs cannot be considered impartial and non-partisan,⁷⁵⁸ and when, in any event, the

⁷⁵¹ CMM, paras. 7.119 and 7.125, and this Rejoinder, paragraphs 7.27, 7.78, 7.103-7.105, 7.107, 7.112(2), 7.148, 8.85, 8.92, 8.109, 8.169, 9.30, 9.34, 9.57 and 9.176 below.

⁷⁵² RG, para. 4.37.

⁷⁵³ CMM, paras. 7.61, 7.71, 7.103, 7.120, 7.123, 7.128, 8.58, 8.62, 8.76, 9.261, and see this Rejoinder, paragraphs 7.65, 7.73, 7.74, 8.116, 8.127, 8.133, 9.53 and 9.72 below.

⁷⁵⁴ RG, para. 4.37.

⁷⁵⁵ See paragraph 5.45 above, and paragraphs 7.13, 8.81-8.82 and 8.91 below.

⁷⁵⁶ Many of the LAW witness statements relied on by The Gambia conclude with expressions of interest in the outcome of the proceedings, indicating that the witness is hoping that the Court will order that they be given citizenship of Myanmar, and be granted return of land/property, and so forth. See, for instance, Witness Statement No. 001, p. 4, MG, Vol. X, Annex 335 (“He [the witness] wants us to help and let the world know the situation- to help them get citizenship rights”); Legal Action Worldwide, “Collated Information from Victims/Witnesses” (“**Legal Action Worldwide, Collated Information**”), p. 30 (CK0243), MG, Vol. X, Annex 336 (“She hopes that one day she will get citizenship”); Legal Action Worldwide, Collated Information, p. 55 (CK0621), MG, Vol. X, Annex 336 (“She wants the property and homes lost returned and also their land returned to them”); Legal Action Worldwide Witness Statement No. 009, para. 56, MG, Vol. X, Annex 346 (“I expect that the ICJ will help us get our properties and our land back”); Legal Action Worldwide, Witness Statement No. 012, para. 25, MG, Vol. X, Annex 349 (“I wonder when we can get back our citizenship rights”); Legal Action Worldwide, Witness Statement No. 032, para. 47, MG, Vol. XI, Annex 370 (“I hope that we will win our case”); Fortify Rights, “Firsthand Testimonies from August-September ‘Clearance Operations’ in Myanmar”, 14 April 2020 (“**Fortify Rights Document**”), p. 40, #24, RG, Vol. III, Annex 43 (full version of MG, Vol. X, Annex 338) (“We want to make our land Rohingya land. It should be a liberated land for Rohingya people”); Legal Action Worldwide, Witness Statement No. 044, 2 May 2024, para. 57, RG, Vol. IV, Annex 69 (“I want citizenship to be granted to the Rohingya”). Similar expressions of an interest can be found in the IIMM witness statements. See, for instance, IIMM, Witness Statement No. IIMM0027992990, p. 43, RG, Vol. IV, Annex 51 (“We want our land and properties back”); IIMM, Witness Statement No. IIMM0027992301, p. 50, para. 222, RG, Vol. IV, Annex 57 (“I hope that all the information that I gave in this interview will eventually lead to court ... We also hope that we get our land and our property back when we go back. And we want the proper identification as Rohingyas”). Those giving these witness statements clearly have a personal interest in the outcome of the proceedings.

⁷⁵⁷ RG, para. 4.37.

⁷⁵⁸ CMM, paras. 7.64, 7.80, 7.95, 7.163, 7.204; and this Rejoinder, paragraphs 7.68, 7.73, 7.76, 7.77, 7.80 and 7.93 below. In relation to LAW, the witness statements provided by that organisations state in terms that LAW “is conducting an investigation and gathering evidence *in support to* the case of genocide of the Rohingya” (emphasis added): see, for example Witness statement 007, para. 1, MG, Vol. X, Annex 344;

impartiality of an organisation taking a statement from a witness provides no guarantee that what the witness states is correct.⁷⁵⁹ The Gambia states that “many of the testimonies were taken before The Gambia’s Application was filed”,⁷⁶⁰ when in fact many were taken only after these proceedings were commenced, and were produced specifically for purposes of these proceedings.⁷⁶¹

- 7.12 The Gambia claims that the Court has “made clear that witness statements attesting to personal knowledge regarding facts are not inappropriate even if prepared for use in litigation”.⁷⁶² However, in support of that claim, The Gambia quotes a passage from a judgment of the Court out of context.⁷⁶³ In the paragraph of the judgment in which the quoted passage appears, the Court in fact affirms that “witness statements produced in the form of affidavits should be treated with caution”, that “[i]n assessing such affidavits the Court must take into account a number of factors”, and that “[a]ffidavits sworn later ... for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred”.⁷⁶⁴ Although the Court said that it “will not find it inappropriate *as such* to receive affidavits produced for the purposes of a litigation if they attest to personal knowledge of facts by a particular individual”,⁷⁶⁵ the Court did not say that it would necessarily *attach any evidential weight* at all to such affidavits. There is clearly a distinction between the question whether evidence will be *received* (that is to say, whether the evidence is *admissible*), and the question whether any *evidential weight* will be given to it.

Witness statement 008, para. 1, MG, Vol. X, Annex 345; Witness statement 010, para. 1, MG, Vol. X, Annex 347; Witness statement 011, para. 1, MG, Vol. X, Annex 348.

⁷⁵⁹ See paragraphs 8.81-8.82 and 8.91 below. See also CMM, paras. 3.108–3.119, in relation to the false narrative given by witnesses to the Reuters news agency about events Kha Maung Seik.

⁷⁶⁰ RG, para. 4.38.

⁷⁶¹ CMM, paras. 7.57, 7.70, 7.103, 7.120, 7.123, 7.128.

⁷⁶² RG, para. 4.38.

⁷⁶³ *Ibid.*, quoting *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 731, para. 244.

⁷⁶⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 731, para. 244.

⁷⁶⁵ *Ibid.* (emphasis added).

- 7.13 The Court made clear in that case that “[i]n assessing such affidavits the Court must take into account a number of factors”.⁷⁶⁶ In that particular case, the Court found that certain parts of the sworn statements of fishermen could not be treated as evidence because their contents were “of the nature of a personal opinion rather than the knowledge of a fact”.⁷⁶⁷ In another case, the Court found that affidavits of fishermen produced by the respondent as evidence in a maritime dispute did not prove the facts that they were intended to prove, given that they appeared to have been sworn specifically for the purposes of the case, given that the fishermen were particularly interested in the outcome of the proceedings, and given that the information in the affidavits was insufficiently specific.⁷⁶⁸
- 7.14 The witness statements annexed to the Memorial of The Gambia have the evidential defects identified in paragraphs 7.5 to 7.131 of the Counter-Memorial of Myanmar. In the circumstances, no evidential weight can be given to these witness statements. The Gambia must be taken to concede that it has no response to those points to which it has failed to provide any substantive response.
- 7.15 In particular, no evidential weight can be given to the anonymous witness statements annexed to The Gambia’s pleadings. For even greater reasons, no evidential weight can be given to descriptions in reports of NGOs and other organisations of what unnamed persons are said to have said to those organisations. As demonstrated in paragraphs 7.16 to 7.43 below, the information contained in such documents is not capable of being checked. It is untested and untestable. The same information found in different documents may in fact emanate from a single source. Claimed eye-witnesses are known to have given contradictory information in different statements, for various reasons, and an untestable statement by an anonymous person cannot be treated as reliable. Furthermore, witnesses in camps in Bangladesh are known to be influenced by ARSA. The Gambia has not exercised due care in the presentation of

⁷⁶⁶ *Ibid.*

⁷⁶⁷ *Ibid.*, p. 732, para. 245, quoting *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 42, para. 68: “The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence.”

⁷⁶⁸ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, pp. 349-350, paras. 219-220.

its evidence. The claim that evidence “corroborates” the FFM reports does not make it any more reliable.

b. Information likely emanates from same sources

- 7.16 The vast majority of the witness statements and witness accounts on which The Gambia relies are anonymous. In almost all cases, the identities of the anonymous witnesses are not even known to The Gambia itself. The identities of the persons in camps in Bangladesh who were interviewed by the FFM are also unknown to both parties in this case. So are the identities of the persons in camps in Bangladesh who were interviewed by NGOs and other organisations, whose accounts formed the basis of the reports of those organisations annexed to the pleadings of The Gambia.
- 7.17 Because of this, it is impossible to determine whether two or more claimed eye-witness accounts are in fact given by the same person. Two or more anonymous witness statements provided by different organisations (or indeed, even by the same organisation) may in fact be from the same person. Similarly, where a report of a UN body or an NGO contains a description of what an unnamed person is said to have said to the authors of the report, the person in question may in fact be the same person whose account is also described anonymously in another report of another organisation (or even of the same organisation), and/or may be the same person who has given one or more of the anonymous witness statements on which The Gambia relies. Without knowing the identities of all of the claimed eye-witnesses, it is simply impossible to know to what extent information in various different documents relied on by The Gambia in fact emanates from a single individual. Whenever The Gambia cites two or more anonymous sources as evidence of a claimed fact, or claims that two or more items of anonymous evidence corroborate each other, The Gambia often can not in fact provide any guarantee that they are not citing information that emanates from a single person. Where information in two or more documents comes from the same person, the documents obviously cannot be said to corroborate each other.
- 7.18 It is clear from the witness statements provided by the IIMM that many people have in fact been interviewed multiple times by different organisations. Some 42 witness statements have been provided to the parties by the IIMM, of which 30 have been annexed to a pleading of either The Gambia or Myanmar. These witness statements

show that the interviewers from the IIMM routinely asked all interviewees if they had previously been interviewed or spoken to about the events that led to their departure from Myanmar. Many said that they had been interviewed before,⁷⁶⁹ one as many as 15 to 20 times during his stay in the camps in Bangladesh.⁷⁷⁰ The interviewees were almost invariably unable to name the organisations to which they had previously spoken. One of the witnesses had heard of the FFM, but was unsure if anyone he had spoken to was connected with the FFM.⁷⁷¹

- 7.19 Given the large number of people living in the camps in Bangladesh, it seems unlikely that so many would have been interviewed multiple times by different organisations if the organisations in question were genuinely selecting the interviewees randomly. The fact that so many witnesses were interviewed multiple times suggests that

⁷⁶⁹ For instance, IIMM, Witness Statement No. IIMM0019922097, p. 5, para. 10, RG, Vol. IV, Annex 49: “Many people, foreigners, came to visit me in the past at least ten times to ask questions about what happened in my village and why we came here to Bangladesh. They came sometimes with cameras and recorded me. I can’t really say if these were always the same people or different ones, because all foreigners look all the same to me”. IIMM, Witness Statement No. IIMM0019629206, p. 6, para. 16, RG, Vol. IV, Annex 50: “The interviewers asked me if I was interviewed by any other organizations before this interview, I told them that previously I was interviewed by [REDACTED]. There were many journalists and NGOs who conducted interviews immediately after the influx. ... There were so many people approaching us and asking questions that I can’t remember them all.” IIMM, Witness Statement No. IIMM0027992990, p. 4, para. 10, RG, Vol. IV, Annex 51: “I have previously been interviewed by multiple organizations. I don’t recall the names and details of all organizations. I only recall that I was interviewed by a foreigner ...”. IIMM, Witness Statement No. IIMM0019629265, p. 5, para. 10, RG, Vol. IV, Annex 53: “I was asked if I had given any previous statements. I confirmed that I have given statements on three other occasions. I do not remember all of the names of the people I spoke to or the names of the organizations that they represented.” IIMM, Witness Statement No. IIMM0027971404, p. 5, para. 15, RG, Vol. IV, Annex 55: “After I arrived in Bangladesh, some people from different organisations came and spoke to me. They asked me about what had happened in Myanmar. I don’t remember the names of the people I spoke to.” IIMM, Witness Statement No. IIMM0027999848, p. 4, para. 10, RG, Vol. IV, Annex 59: “I have been interviewed many times in the first year after arriving in Bangladesh. I do remember many foreigners coming over at my place, taking photos and interviewing me. I do not remember any names or organizations ...” IIMM, Witness Statement No. IIMM0027997604, p. 4, para. 10, RG, Vol. IV, Annex 60: “I have given one interview in the past about what I experienced in Myanmar. About four or five years ago, two people came to my house in the camp, in Bangladesh, and were seeking to take statements from Rohingya ... I [do not] recall which organisation they were from.”

⁷⁷⁰ IIMM, Witness Statement No. IMM0027993001, p. 8, para. 21, RG, Vol. IV, Annex 56: “in 2017, right after we arrived in Bangladesh, there were a lot of people who interviewed us. I was interviewed many times, maybe more than 15 or 20 times. There were a lot of people asking questions and we just answered. I do not remember the name of any organisation or person who interviewed me. No one gave me their name or a card.” The person identified as CK0526 (see paragraphs 7.22(3) and 7.29(3) above) said that she was interviewed by LAW “five to eight times” after her initial contact with them: Legal Action Worldwide, Witness statement No. 039, p. 3, para. 5, RG, Vol. IV, Annex 62.

⁷⁷¹ IIMM, Witness Statement No. IIMM0027971404, p. 5, para. 23, RG, Vol. IV, Annex 55: “The interviewers asked me if I had heard of the U.N. Fact Finding Mission. I have heard of that name. I was asked if I had spoken to FFM. I am not sure if I had spoken to FFM or not, but I have heard the name”.

different organisations, who were looking for eyewitnesses in the camps in Bangladesh, were somehow being directed to the same people for interview.

7.20 It is therefore likely that various witness statements, reports and other documents of the FFM, NGOs and other organisations relied on by The Gambia are in fact wholly or partially based on information given by the same people.

7.21 Because of the pervasive anonymity of claimed eye-witnesses in this case, it is simply impossible to know to what extent this is the case, or precisely which items of information in different documents emanate from the same person.

7.22 There are however three specific instances where it is known that two identifiable statements have been given by the same person.

(1) Annex 51 to the Reply of The Gambia is a witness statement provided by the IIMM of a person identified only as P1299.⁷⁷² The Reply of The Gambia claims that this witness statement is an item of “additional testimony”⁷⁷³ that “corroborates”⁷⁷⁴ the claims made by The Gambia about soldiers shooting civilians in Min Gyi.⁷⁷⁵ One of the items of evidence annexed to the Memorial of The Gambia which is specifically said to be “corroborated” by this new witness statement is LAW Witness statement No. 10, found at Annex 347 to The Gambia’s Memorial.⁷⁷⁶ However, six weeks after filing its Reply, The Gambia notified the Registrar that P1299 is in fact the *same person* who gave LAW Witness statement No. 10.⁷⁷⁷

(2) Annex 54 to the Reply of The Gambia is a witness statement provided by the IIMM of a person identified only as P1244.⁷⁷⁸ The Reply of The Gambia claims

⁷⁷² IIMM, Witness Statement No. IIMM0027992990, RG, Vol. IV, Annex 51.

⁷⁷³ RG, para. 7.58.

⁷⁷⁴ RG, para. 7.59 first sentence.

⁷⁷⁵ RG, paras. 7.60-7.61, footnotes 709-710 and accompanying text.

⁷⁷⁶ See RG, footnote 708 and accompanying text, quoting Legal Action Worldwide, Witness statement No. 010, MG, Vol. X, Annex 347.

⁷⁷⁷ See letter from the Agent of The Gambia to the Registrar, 1 July 2024, RM, Vol. V, Annex 215: “The Gambia has determined that Reply Annex 51 and Memorial Annex 347 are statements from the same witness from Min Gyi (Tula Toli) taken by the IIMM and LAW, respectively, on different dates”.

⁷⁷⁸ IIMM, Witness Statement No. IIMM0019915116, RG, Vol. IV, Annex 54.

that this witness statement is one item of evidence that “confirms” the finding of the FFM about the killing of men and boys in Maung Nu.⁷⁷⁹ Another of the items of evidence said by The Gambia to confirm the findings of the FFM in this respect is LAW Witness statement No. 005 found at Annex 342 to The Gambia’s Memorial.⁷⁸⁰ However, The Gambia also notified the Registrar, six weeks after filing its Reply, that P1244 is in fact the same person who gave LAW Witness statement No. 005.⁷⁸¹

- (3) Annex 62 to the Reply of The Gambia is a witness statement provided by LAW.⁷⁸² The person giving this witness statement confirms in it⁷⁸³ that she is the same person whose account is summarised in the Legal Action Worldwide, Collated Information document under the pseudonym CK0526.⁷⁸⁴

7.23 In these three instances, it is only known that two different statements are from the same person because information to that effect fortuitously happens to have been made available. There are bound to be many similar examples that are unknown and, due to the pervasive anonymity, unknowable. The Court must of course “treat with caution evidentiary materials ... emanating from a single source”.⁷⁸⁵ It must similarly treat with caution evidentiary materials that *may* emanate from a single source.

c. Witnesses contradict themselves

7.24 As noted above, many people who gave witness statements to the IIMM indicated that they had previously been interviewed by other organisations. Where the IIMM interviewers were in possession of previous statements given by those witnesses to other organisations, they were able to confront witnesses with inconsistencies between

⁷⁷⁹ See RG, para. 7.105 first sentence and para. 7.109.

⁷⁸⁰ See RG, para. 7.108, referring to Legal Action Worldwide, Witness statement No. 005, para. 31, MG, Vol. X, Annex 342.

⁷⁸¹ See letter from the Agent of The Gambia to the Registrar, 1 July 2024, RM, Vol. V, Annex 215: “... Reply Annex 54 and Memorial Annex 342 are statements from the same witness from Maung Nu, taken separately by the IIMM and LAW, respectively, on different dates”.

⁷⁸² Legal Action Worldwide, Witness statement No. 039, RG, Vol. IV, Annex 62.

⁷⁸³ *Ibid.*, p. 3, para. 5.

⁷⁸⁴ Legal Action Worldwide, Collated Information, pp. 2-5 (CK0526), MG, Vol. X, Annex 336.

⁷⁸⁵ CMM, para. 5.62.

the accounts given in their earlier statements to other organisations and their current version of events. When so confronted, witnesses accepted that their previous accounts contained errors, inaccuracies or untruths.

- 7.25 In some instances, the interviewee was unable to explain the reasons for giving false information in the earlier statement.⁷⁸⁶
- 7.26 In other instances, IIMM witnesses attributed the incorrect information in the earlier statement to the poor quality of the interviewing process, for instance, the lack of time for the interview,⁷⁸⁷ matters not being dealt with chronologically,⁷⁸⁸ the interview taking place at a time of trauma due to an incident in the camp,⁷⁸⁹ the interview taking place when the witness was not in a good mental state;⁷⁹⁰ the failure of the interviewer to ask any follow-up questions or to attempt to clarify what was said;⁷⁹¹ the chaotic

⁷⁸⁶ For instance, IIMM witness P1492 acknowledges that what he said in a previous *signed statement* given to another organisation was incorrect. When he was told by the IIMM interviewer that his previous signed statement said that “I helped him but he died”, he said this is incorrect and that he was only informed of the killing later. When the IIMM interviewer pointed out to him that he had changed his story and was now claiming to have observed events from a different person’s house located elsewhere, he was unable to explain his inconsistent accounts. In his account to the IIMM, the principal matter that he describes concerning Maung Nu is the killing of Zahid Hussein, which he claims to have personally witnessed. When the IIMM interviewer pointed out to him that this incident was not mentioned by him in his previous signed statement, he responds, “I think it was not in my mind when I spoke to the previous interviewers”. When it was pointed out to him that he was giving the IIMM a different account to that given in his previous signed statement in relation to the location from which he could hear the sound of women screaming, he could provide no explanation for this. See IIMM, Witness Statement No. IIMM0027995869, pp. 8, 9, 10, 11, 12, paras. 42, 53, 65, 76, 81, 85, RM, Vol. IV, Annex 138.

⁷⁸⁷ IIMM, Witness Statement No. IIMM0028059653, p. 33, para. 195, RM, Vol. IV, Annex 139: “The interviewers informed me that they wanted to clarify some aspects of my account, noting that there were some differences in the information I provided in this interview and the record of my meeting in [REDACTED]. ... When I did have the meeting, it only went for about an hour, and we did not go through things slowly and in detail like we are doing in this interview. Also, I was not really listing things chronologically like we have done in this interview”. IIMM, Witness Statement No. IIMM0019922097, p. 12, para. 48, RG, Vol. IV, Annex 49: “I want to say that the interview at that time was not as detailed as this one. Nothing was asked in detail, only general questions were asked without further explanations.”

⁷⁸⁸ IIMM, Witness Statement No. IIMM0028059653, p. 33, para. 195, RM, Vol. IV, Annex 139: “Also, I was not really listing things chronologically like we have done in this interview”.

⁷⁸⁹ *Ibid.*: “I explained that the first time I tried to go to that meeting, there was a bad bus accident and 21 people died”.

⁷⁹⁰ IIMM, Witness Statement No. IIMM0027999848, p. 4, para. 10, RG, Vol. IV, Annex 59: “At the time, I had just reached Bangladesh and I was not in a good mental state”. IIMM, Witness Statement No. IIMM0019922097, p. 12, para. 48, RG, Vol. IV, Annex 49: “I don’t know why this [previous testimony] was written, it may be that at that time I was under stress for what happened ... Again, at the time of that interview I was under much stress and these records were just written without further details”.

⁷⁹¹ IIMM, Witness Statement No. IIMM0027995869, p. 9, para. 50, RM, Vol. IV, Annex 138: “[T]he interviewers ... did not ask follow-up questions to my answers”. IIMM, Witness Statement No. IIMM0027992867, p. 23, para. 105, RM, Vol. IV, Annex 136: “I was not asked questions in the same way and did not review what was recorded”.

situation at the time of the interview;⁷⁹² or the failure of the earlier interviewer to read back to them what had been recorded.⁷⁹³

- 7.27 Some witnesses also explained that the inconsistency in the earlier account was due to the fact that the earlier account included information received from others that was not within the witness's own direct knowledge (that is, hearsay).⁷⁹⁴
- 7.28 Another witness simply admitted to the IIMM that what he had said in his earlier statement was a complete fabrication. When speaking to the IIMM interviewer, he said "I told [previous interviewer] that I saw Kabir's wife being raped, but this is not true". He added that "at the time of the [earlier] interview, I was heavily traumatised and exaggerated events I saw", that "I did not know what I was saying", that "I did not see her get raped", that "I was not told by anyone to say that Kabir's wife was raped", and that "I said it with my own will because I wanted the world to know about all the atrocities that had been committed against us".⁷⁹⁵ The witness furthermore added that "I personally did not witness any incidents of rape ... nor did I learn of any such incidents ... after the attack".⁷⁹⁶

⁷⁹² IIMM, Witness Statement No. IIMM0027971404, p. 16, para. 107, RG, Vol. IV, Annex 55: "The interview I did with that organisation was not very detailed. We were in such a chaotic situation at the time of that interview. They did not ask for dates and specific events like what we are doing now."

⁷⁹³ IIMM, Witness Statement No. IIMM0027995869, p. 9, para. 50, RM, Vol. IV, Annex 138: "They did read a document back to me, but there was no time for me to provide any clarifications."

⁷⁹⁴ IIMM witness P2499 states that: "I have been interviewed many times in the first year after arriving in Bangladesh... [O]n the occasion of another one of these interviews... there were so many people from Chut Pyin altogether... After I came to Bangladesh I found many of my villagers, and we shared what we had experienced. When I was being interviewed before, I always talked about these experiences and everything that had happened to us. However, in this interview I am limiting my account to my story and to the things I saw myself": see IIMM, Witness Statement No. IIMM0027999848, pp. 4-5, paras. 10, 12, RG, Vol. IV, Annex 59.

Likewise, IIMM witness P1495 said that he did not recall whether he was told in his previous interview "about making distinctions as to what happened to others and what happened to myself", that after reaching Bangladesh those from his village were "talking to each other and putting the pieces together of what had happened in our village", and that at his previous interview he "was trying my best to make sure to talk about everything I knew about from family, from friends, from everyone in the community": see IIMM, Witness Statement No. IIMM0027992867, p. 23, paras. 105-106, RM, Vol. IV, Annex 136.

See also IIMM, Witness Statement No. IIMM0027995869, p. 12, paras. 81 and 85, RM, Vol. IV, Annex 138 (in which IIMM witness P1492 admits that although his previous signed witness statements testified to shootings, stabbings and hangings, he had not in fact seen these incidents); IIMM, Witness Statement No. IIMM0019922097, p. 12, para. 48, RG, Vol. IV, Annex 49 ("I don't know why this [previous testimony] was written, ... maybe I was simply referring to others").

⁷⁹⁵ IIMM, Witness Statement No. IIMM0027997604, pp. 23-24, para. 108, RG, Vol. IV, Annex 60.

⁷⁹⁶ *Ibid.*

7.29 As has been noted above,⁷⁹⁷ there are three instances where, fortuitously, it has been possible to identify that two specific anonymous statements annexed to The Gambia’s pleadings have been given by the same person. It is remarkable that in *every one* of these three instances, there have been fundamental inconsistencies between the two statements of the same person.

- (1) As to P1299,⁷⁹⁸ in his earlier statement to LAW, he said that he had never seen members of ARSA and was not aware of any attacks by ARSA near his village (Min Gyi).⁷⁹⁹ In his later statement to the IIMM, he said that there was a series of attacks on outposts in and around his village tract by a “Muslims group” who “told the villagers not to speak with moghs [ethnic Rakhines] or else they would be in trouble”. He added that “it is not possible for me to speak about this, these people are still around in the camps here now”.⁸⁰⁰ In context, the words “Muslims group” were clearly a reference to ARSA, demonstrating that he had not spoken truthfully in his initial account to LAW, and that he was still unwilling to speak about ARSA.⁸⁰¹
- (2) As to P1244,⁸⁰² in his earlier statement to LAW, he denied any knowledge of the presence of ARSA in Maung Nu.⁸⁰³ In his later statement to the IIMM, he in fact accepts and describes fighting taking place at the security posts in Maung Nu, demonstrating that he also had not spoken truthfully in his initial account to LAW.⁸⁰⁴
- (3) As to CK0526,⁸⁰⁵ there are fundamental inconsistencies in the two accounts given by this person, who says that her husband was killed in Thin Baw Kway

⁷⁹⁷ See paragraphs 7.22-7.23 above.

⁷⁹⁸ See paragraph 7.22(1) above.

⁷⁹⁹ Legal Action Worldwide, Witness statement No. 010, p. 4, para. 12, MG, Vol. X, Annex 347.

⁸⁰⁰ IIMM, Witness Statement No. IIMM0027992990, p. 42, para. 194, RG, Vol. IV, Annex 51.

⁸⁰¹ See also paragraphs 8.75-8.80 below.

⁸⁰² See paragraph 7.22(2) above.

⁸⁰³ Legal Action Worldwide, Witness statement No. 005, para. 36, MG, Vol. X, Annex 342: “In our area ARSA don’t exist. I never saw them or heard about them in our place”.

⁸⁰⁴ See paragraphs 8.157-8.160 below.

⁸⁰⁵ See paragraph 7.22(3) above.

(also known as Ku Lon), some 6 kilometres from Chut Pyin, and that she was raped in the same incident. For instance:

- (a) In her earlier statement, she says that her husband did not understand anything the soldiers said because the soldiers spoke in Burmese, and her husband and her spoke no Burmese.⁸⁰⁶ In her later statement she says that “My husband was educated, and he could speak Burmese”.⁸⁰⁷
- (b) In her earlier statement, she says that “she had never seen the military” and “had not even seen the police”.⁸⁰⁸ In her later statement she says that she would “see the military from a distance going into the mosque one or two times a week”,⁸⁰⁹ and “I had seen the military a lot in the daylight”.⁸¹⁰
- (c) In her earlier statement, she says that the soldiers found her husband and her in bed, and dragged her husband out of the house into the compound.⁸¹¹ In her later statement, she says that her husband was already outside of the house when the soldiers arrived.⁸¹² When this particular inconsistency was brought to her attention by the LAW interviewers, she claimed that LAW *could* be responsible for the previously recorded “misunderstanding”, but appears also to leave open the possibility that she simply provided previous LAW interviewers with a different account.⁸¹³
- (d) In her earlier statement, she says that she was raped by one of the soldiers.⁸¹⁴ In her later statement, she says that she was raped by all three soldiers.⁸¹⁵

⁸⁰⁶ *Ibid.*, p. 3.

⁸⁰⁷ Legal Action Worldwide, Witness statement No. 039, para. 15, RG, Vol. IV, Annex 62.

⁸⁰⁸ Legal Action Worldwide, Collated Information, p. 3 (CK0526), MG, Vol. X, Annex 336.

⁸⁰⁹ Legal Action Worldwide, Witness statement No. 039, para. 24, RG, Vol. IV, Annex 62.

⁸¹⁰ *Ibid.*, para. 51.

⁸¹¹ Legal Action Worldwide, Collated Information, p. 3 (CK0526), MG, Vol. X, Annex 336.

⁸¹² Legal Action Worldwide, Witness statement No. 039, para. 44, RG, Vol. IV, Annex 62.

⁸¹³ *Ibid.*

⁸¹⁴ Legal Action Worldwide, Collated Information, p. 3 (CK0526), MG, Vol. X, Annex 336.

⁸¹⁵ Legal Action Worldwide, Witness statement No. 039, paras. 50-58, RG, Vol. IV, Annex 62.

- (e) In her earlier statement, she says that immediately after the incident, she and her children “stayed in the home till morning and then fled to the forest with the first light”,⁸¹⁶ and then walked to Bangladesh.⁸¹⁷ In her later statement, she says that after the incident she remained “living at my neighbour” for two nights and three days,⁸¹⁸ and that her description in her earlier statement of going to the forest “may have been a misunderstanding”.⁸¹⁹

7.30 It would be an extraordinary coincidence if these were the only people who gave contradictory accounts in different statements. The reality is that it must be highly probable that in many other unknowable instances, similar inconsistencies would be found.

7.31 The examples above show that NGOs and other organisations who interviewed people living in the camps in Bangladesh conducted only cursory (or even “chaotic”) interviews, and did not record information carefully.⁸²⁰ There is nothing to indicate that the FFM was any better in this respect than other organisations.⁸²¹

7.32 The examples above also show that some information provided by claimed eye-witnesses is inaccurate because the witnesses themselves simply gave information that they later acknowledged to be incorrect, hearsay, or even complete fabrication.

d. Witnesses are influenced by ARSA

7.33 The influence of ARSA on those living in camps in Bangladesh has been dealt with in the Counter-Memorial of Myanmar,⁸²² and elsewhere in this Rejoinder.⁸²³ IIMM witness P1299 was the Deputy Chairman (“Tawankan”) of Min Gyi. If even a person

⁸¹⁶ Legal Action Worldwide, Collated Information, p. 3 (CK0526), MG, Vol. X, Annex 336.

⁸¹⁷ *Ibid.*, p. 4.

⁸¹⁸ Legal Action Worldwide, Witness statement No. 039, paras. 62 and 64, RG, Vol. IV, Annex 62.

⁸¹⁹ *Ibid.*, para. 64.

⁸²⁰ See paragraph 7.26 above.

⁸²¹ See paragraph 6.20 above.

⁸²² CMM, paras. 3.108-3.145. As to the fear engendered by ARSA generally, see also CMM, paras. 3.24, 3.43-3.45, 6.65-6.67, 7.211, 13.40, 13.101, 16.16.

⁸²³ See Section D of Chapter 3 above.

in such a position of authority is afraid to speak about ARSA,⁸²⁴ it must be concluded that the generality of Bengalis living in the camps in Bangladesh have similar fears.

- 7.34 It has been noted that different organisations appear somehow to have been directed to the same people in the camps in Bangladesh for interview.⁸²⁵ Where organisations relied on intermediaries in the camps to find people to be interviewed, it is an obvious possibility that these intermediaries produced the same people for interview to different organisations. Given what is known about the influence of ARSA in the camps, it is reasonable to presume that no one would have been put forward for interview if they were likely to make statements contrary to the narrative of ARSA.

e. Information can not be checked or tested

- 7.35 Without knowing the identities of all of the claimed eye-witnesses, and without having sight of all statements made by each of these persons, it is not possible to carry out even the most routine and basic checks upon the accuracy, credibility and reliability of the accounts placed before the court. In particular, it is not possible to check which anonymous statements were made by the same person, and whether there are any inconsistencies between different statements made by the same person.
- 7.36 Often, it will not even be possible to know that there are inconsistencies between two witness statements without first knowing that they are given by the same person. For instance, witness statement A might state that witness A viewed events from a particular location, and witness statement B may state that witness B viewed the same events from a different location. The two witness statements would not be inconsistent if they were given by two different witnesses. However, if it is known that witness A and witness B are in fact the same person, it is immediately apparent that they are inherently contradictory.
- 7.37 Even in the case of IIMM witnesses who are known to have given previous statements to other organisations,⁸²⁶ it has not been possible for Myanmar (or The Gambia) to obtain the previous statements. IIMM witnesses often could not remember the names

⁸²⁴ See paragraph 7.29(1) above.

⁸²⁵ See paragraph 7.19 above.

⁸²⁶ See paragraph 7.18 above.

of the organisations that they previously spoke to. In those cases where they could remember, the IIMM has not disclosed the details of the organisation to Myanmar. The IIMM has furthermore informed counsel for Myanmar that where the IIMM is in possession of previous statements given by witnesses to other organisations, it does not have consent to share these previous statements with Myanmar.⁸²⁷

- 7.38 LAW has also not provided screening notes of the persons giving the LAW witness statements. One of the LAW witnesses speaks of meeting with LAW on five to eight previous occasions.⁸²⁸ Records of all of these previous interviews have not been made available by LAW. LAW has also not indicated which of the persons giving witness statements previously gave accounts to LAW that were included in its “Collated Information” document.⁸²⁹

f. The Gambia has not exercised due care

- 7.39 Even in the few instances where it has been possible for The Gambia to know that two items of evidence emanate from the same person, The Gambia has not appreciated this fact. In the two instances mentioned in paragraph 7.22(1) and (2) above, The Gambia only noticed six weeks after it had filed its Reply that different annexes of its pleadings in fact emanated from the same person. It is not clear that The Gambia, even now, has appreciated that this is the case in the instance mentioned paragraph 7.22(3) above. There are furthermore at least two other instances where The Gambia appears to have failed to notice that two anonymous witness statements that bear different

⁸²⁷ Letter from the Head of the IIMM to counsel for Myanmar, 30 August 2024, p. 2, RM, Vol. IV, Annex 150.

⁸²⁸ Legal Action Worldwide, Witness statement No. 039, para. 5 last sentence, RG, Vol. IV, Annex 62: “I have visited LAW around five to eight times since [giving the summary testimony that was included in the LAW Collated Information document under the pseudonym CK0526]”.

⁸²⁹ Legal Action Worldwide, Collated Information, MG, Vol. X, Annex 336.

pseudonyms, and therefore superficially appear to be given by different persons, are in fact duplicates.

- (1) Annex 46 to the Reply of The Gambia, a witness statement provided by LAW,⁸³⁰ is in fact a duplicate of the witness statement already included as Annex 348 to the Memorial of The Gambia.⁸³¹
- (2) Annex 336 to the Memorial of The Gambia contains two statements from the same person provided under different pseudonyms.⁸³² The content of each is identical save for the addition in one of the statements of two sentences at the beginning and one at the end.

7.40 It is apparent that The Gambia has simply accepted anonymous documents from third parties, and has then unquestioningly and uncritically annexed those to its pleadings. There is no suggestion that The Gambia has undertaken any investigations of its own at all. There is no suggestion that The Gambia has taken any steps to seek to check the accuracy, credibility and reliability of the information contained in the material received from third parties. There is no suggestion that The Gambia has even sought to persuade the third parties providing the material to disclose the identities of the sources of information, or to provide any further background information about those sources, to assist the parties to these proceedings to check the information. Indeed, even in the few cases where The Gambia does know the identities of persons giving witness statements, it has withheld these from Myanmar and has purported to provide them only to the Court “under seal”.⁸³³

7.41 As the Applicant in a contentious case before the Court, The Gambia has a duty to the Court and to the Respondent to present its claim and its evidence with due care. This must especially be so, in a case involving grave allegations against the Respondent, in which an exceptionally high standard of proof applies. This must be all the more especially so, in a case where the Applicant invokes a right to act in the common

⁸³⁰ Legal Action Worldwide, Witness Statement No. 036, RG, Vol. IV, Annex 46.

⁸³¹ Legal Action Worldwide, Witness Statement No. 011, MG, Vol. X, Annex 348.

⁸³² Legal Action Worldwide, Collated Information, pp. 57-59 (CK0301), and pp. 100-102 (TS0200), MG, Vol. X, Annex 336.

⁸³³ See CMM, paras. 7.11-7.47, and this Rejoinder, paragraphs 7.44-7.63 below.

interest of all States Parties to the Genocide Convention. The Gambia has not acted with the requisite due care.

g. Witness statements do not “corroborate” FFM reports

7.42 As has been noted, the reports of the Fact-finding Mission (“**FFM**”) are the evidential centre-piece of The Gambia’s case. The Gambia claims that the other evidence on which it relies should be given weight because it “corroborates” the FFM reports.⁸³⁴ However, for the reasons given in Chapter 6 of the Counter-Memorial, and in Chapter 6 above of this Rejoinder, no meaningful evidential weight can be given to the FFM reports. The fact that two unreliable pieces of evidence are consistent with each other does not somehow make both of them reliable. The Gambia’s position appears to be that all items of evidence that are consistent with its case should be considered reliable on the ground that they corroborate each other,⁸³⁵ and that all evidence that is inconsistent with its case should be considered unreliable on the ground that it is inconsistent with the evidence on which The Gambia relies. Such a position is obviously untenable.

7.43 Furthermore, even if another item of evidence is consistent with some aspect or other of one of the FFM reports, that does not mean that the other evidence corroborates the FFM reports as a whole, or that the FFM reports corroborate the other evidence as a whole. For two items of evidence to corroborate each other, it is necessary to demonstrate that the two items of evidence are independent of each other, and that each gives details of a specific objectively identifiable fact that are consistent with the details given in the other. However, The Gambia does not seek to enumerate specific objectively identifiable facts which it claims are evidenced in this way by two or more independent items of evidence, and does not seek to show how the details of the facts as given in the two independent sources of evidence are consistent. Instead, The Gambia’s pleadings contain mainly high level and generalised statements of fact, which are said to be “evidenced” by high level and generalised statements in the FFM

⁸³⁴ CMM, paras. 1.52, 6.1-6.4, 16.13, and this Rejoinder, paragraph 6.3 above.

⁸³⁵ See for example RG, para. 6.4 footnote 474 arguing that two items of evidence corroborate a media report.

reports. Details given in individual witness statements do not “corroborate” such high level and generalised statements.

2. Witness statements purportedly “filed under seal”

- 7.44 When submitting its Memorial, The Gambia said in a covering letter to the Registrar dated 23 October 2020⁸³⁶ that Annexes 335, 338-358, 360-370, and 372 to the Memorial had been redacted, and that “for the purposes of full disclosure”, two unredacted copies were provided to the Court “under seal and separately from the Memorial and the Annexes ... so that the Court will have all of the identifying information that has been redacted”. The letter further indicated that Annex 178 to the Memorial was redacted, and that this document was also being provided to the Court “under seal in unredacted form”.⁸³⁷
- 7.45 In a letter to the Registrar dated 20 March 2023,⁸³⁸ Myanmar requested the Court to call upon The Gambia to provide unredacted copies of these annexes, and certain information pertaining to them.⁸³⁹
- 7.46 In a letter to the Registrar dated 30 March 2023,⁸⁴⁰ The Gambia objected to the disclosure to Myanmar of the identities of the persons concerned.⁸⁴¹
- 7.47 By a letter dated 6 April 2023,⁸⁴² the Registrar of the Court communicated the Court’s decision on Myanmar’s request, according to which “the Parties are free to address questions relating to the evidentiary value of materials adduced in the case file during the written and oral pleadings on the merits”, and that the “evidentiary questions in a case are properly to be addressed during the further stages of the merits phase”.
- 7.48 In accordance with that decision, Myanmar argues, at paragraphs 7.11 to 7.47 of its Counter-Memorial, that Annexes 335, 338-358, 360-370 and 372 to the Memorial of

⁸³⁶ Letter from the Agent of The Gambia to the Registrar, 23 October 2020, RM, Vol. V, Annex 207.

⁸³⁷ See further CMM, para. 7.6.

⁸³⁸ Letter from the Agent of Myanmar to the Registrar, 20 March 2023, RM, Vol. V, Annex 208.

⁸³⁹ See CMM, para. 7.7.

⁸⁴⁰ Letter from the Agent of The Gambia to the Registrar, 30 March 2023, RM, Vol. V, Annex 209.

⁸⁴¹ See CMM, para. 7.7.

⁸⁴² Letter from the Registrar to the Agent of Myanmar, 6 April 2023, RM, Vol. V, Annex 210.

The Gambia should be excluded from the case file, and should not be considered by the Court.⁸⁴³ Myanmar argues in the alternative that, at the very least, the unredacted versions of the documents, which have not been communicated to Myanmar, should be excluded from the case file and not considered by the Court, with the consequence that these annexes would be treated as anonymous documents.⁸⁴⁴ The contents of those paragraphs of the Counter-Memorial are not unnecessarily repeated here.

7.49 Despite this, when submitting its Reply, The Gambia has again unapologetically repeated the same practice. The covering letter of the Agent of The Gambia dated 23 May 2024⁸⁴⁵ states that Annexes 44-47, 61-62, 64-66 and 68-69 of the Reply of The Gambia have been redacted, and that The Gambia was providing to the Court, “separately from the Reply and the Annexes”, unredacted copies of those witness annexes. That letter further states that the unredacted versions were provided “under seal ... for the Court’s *in camera* review only”, should be kept confidential, and are provided “so that the Court will have all of the identifying information that has been redacted from the Annexes”.⁸⁴⁶ This means that the unredacted versions of these annexes, which are said by the Agent of The Gambia to “form part of the evidentiary basis for the claims made in the Reply”,⁸⁴⁷ are intended to be seen by The Gambia and by the Court, but not by Myanmar. In effect, The Gambia asks the Court to consider, as part of the evidentiary basis of its case, material that is not included in or annexed to any of the pleadings.

7.50 The letter of the Agent of The Gambia dated 23 May 2024 also states that The Gambia will, “for the purposes of full disclosure to the Court”, request the IIMM to submit to the Court, “for its *in camera* review only”, unredacted versions of witness statements taken by the IIMM that are contained in redacted form in Volume IV of the Reply.

⁸⁴³ CMM, paras. 7.11-7.47, especially para. 7.46.

⁸⁴⁴ See especially CMM, para. 7.47.

⁸⁴⁵ Letter from the Agent of The Gambia to the Registrar, 23 May 2024, RM, Vol. V, Annex 212.

⁸⁴⁶ *Ibid.*

⁸⁴⁷ *Ibid.*

7.51 As set out in a letter to the Registrar dated 24 June 2024,⁸⁴⁸ Myanmar objects to this conduct on the part of The Gambia. Myanmar’s position is as follows:

- (1) Both the redacted and the unredacted versions of the redacted annexes to the Reply should be excluded from the case file, and should not be considered by the Court, for the reasons given in paragraphs 7.11 to 7.47 of the Counter-Memorial of Myanmar.
- (2) If documents are sent to the Court directly by the IIMM for the purposes indicated in the letter of the Agent of The Gambia dated 23 May 2024, the Registry should return the materials to the IIMM on the ground that there is no provision in the Statute or the Rules of Court which would permit the documents to be received by the Court. There is no provision in the Statute or the Rules of Court under which evidence in a case could be filed with the Court by a third party, in order for it to be seen by the Court but not by both parties. That would be fundamentally inconsistent with the essence of a judicial process. There is in any event no provision in the Statute or the Rules of Court under which a body such as the IIMM could file documents in a case. The IIMM is not a “public international organization” within the meaning of Article 69, paragraph 4, of the Rules of Court, and therefore would not be able to furnish the documents in question under Article 69, paragraph 2. If any such documents are not returned to the IIMM, again for the reasons given in paragraphs 7.11 to 7.47 of the Counter-Memorial of Myanmar, both the redacted and the unredacted versions of the annexes in question should be excluded from the case file, and should not be considered by the Court.

7.52 In a letter dated 24 June 2024,⁸⁴⁹ the Registrar acknowledged that the letter of the Agent of Myanmar dated 24 June 2024 had been received, and stated that it had been communicated to The Gambia. To date, no response has been received.

7.53 Myanmar maintains the position set out in paragraphs 7.11 to 7.47 of the Counter-Memorial of Myanmar, and its letter dated 24 June 2024.

⁸⁴⁸ Letter from the Agent of Myanmar to the Registrar, 24 June 2024, RM, Vol. V, Annex 213.

⁸⁴⁹ Letter from the Registrar to the Agent of Myanmar, 24 June 2024, RM, Vol. V, Annex 214.

- 7.54 There is nothing in the Statute, Rules of Court or Practice Directions that would permit The Gambia to act in the way that it has. It is not for a party to invent new procedures not provided for in the Statute, Rules of Court or Practice Directions.
- 7.55 As noted in the Counter-Memorial of Myanmar, even in international criminal courts and tribunals, where provisions for witness protection are expressly found in their Statutes and Rules, such witness protection measures must be *ordered* by a judge or chamber, on the *application* of a party. The party applying for protective measures for witnesses needs to persuade the judge or chamber that protective measures are required for witnesses. If that party does so, it is then for the judge or chamber to determine exactly what protective measures are appropriate. Such measures are ordered in relation to individual witnesses on a case-by-case basis: blanket orders applying to all witnesses in the case are not made.⁸⁵⁰ Moreover, a mere subjective fear of a witness will generally not suffice for protective measures to be granted: rather, an objectively identifiable risk to the witness must be established by the party requesting protective measures.⁸⁵¹
- 7.56 Furthermore, it is very rare before international criminal tribunals for the identity of a witness called by one party to be withheld from the other party. For instance, in the case of the ICTY, in its entire history this only ever occurred in one case, and attracted heavy criticism.⁸⁵² Generally, at most, disclosure of the identity of a witness will be delayed, such that the court or tribunal and the other party will be provided with the identity of the witness, say, 30 days prior to the commencement of the trial, or 30 days prior to the giving of testimony by the witness.
- 7.57 This approach reflects a balancing of any specific need for witness protection with the rights of the other party to a fair trial,⁸⁵³ and “the balance dictates clearly in favour of

⁸⁵⁰ CMM, paras. 7.28-7.31.

⁸⁵¹ CMM, paras. 7.29-7.32.

⁸⁵² CMM, para. 7.26.

⁸⁵³ CMM, paras. 7.28-7.30.

an accused's right to the identity of witnesses which the Prosecution intends to rely upon".⁸⁵⁴

- 7.58 In the present case, the Court has made no findings at all that witnesses are at any risk from the authorities of Myanmar. Nonetheless, The Gambia has purported to determine unilaterally that the vast majority of the witnesses should remain anonymous, and that their identities should be completely withheld from Myanmar. This practice should be deprecated as disrespecting the authority of the Court, as failing to comply with the provisions of the Statute, Rules of Court and Practice Directions, and as violating the procedural rights of the other party.
- 7.59 Of additional concern is the evidential basis on which The Gambia has purported to determine that protective measures are merited. The Gambia brazenly claims that it has provided such a basis by reference to a statement in one paragraph of an FFM report⁸⁵⁵ and a letter from the Head of the IIMM.⁸⁵⁶ This entirely misses the point that even in courts and tribunals whose statutes and rules of court expressly provide for witness protection measures, it is for a judge or chamber to decide if and what witness protection measures are required, in respect of a specific witness. It is entirely a matter of speculation whether the "evidential basis" now retrospectively invoked by The Gambia would have persuaded the Court that the measures that have been unilaterally imposed by The Gambia are necessary, even assuming that it is open to this Court to order such measures at all. The single paragraph of the single FFM report cited by The Gambia speaks only of the FFM's "initial protection assessment" and gives no details of the information on which that assessment was based.⁸⁵⁷ The letter from the Head of the IIMM states only that "some witnesses" have requested the IIMM to convey to the Court concerns about their safety and security (without specifying what those concerns are), and that "some witnesses" have expressed the view that they would be

⁸⁵⁴ International Criminal Tribunal for the former Yugoslavia, *Karadžić*, IT-95-5/18-T, Decision on Accused's Motion for Modification of Protective Measures: Witnesses KDZ490 and KDZ492, Trial Chamber, 25 March 2010, para. 10, RM, Vol. II, Annex 18. In that case, the Trial Chamber was "satisfied that delayed disclosure of the Witnesses' identities to the Accused until 21 and 30 days prior to their respective testimonies remains justified in this particular case": *ibid.*, para. 16.

⁸⁵⁵ 2018 FFM Detailed Findings, para. 26, MG, Vol. II, Annex 40, cited in RG, para. 4.42.

⁸⁵⁶ Letter from the Head of the IIMM to the Agent of The Gambia, 8 December 2023, RG, Vol. II, Annex 6, cited in RG, para. 4.42.

⁸⁵⁷ 2018 FFM Detailed Findings, para. 26, MG, Vol. II, Annex 40.

at risk if their identities became known to the Myanmar Government or military.⁸⁵⁸ The clear implication is that not all persons spoken to by the IIMM expressed such concerns. There is no suggestion in the wording of the letter that the IIMM itself is of the view that the concerns are justified. No further details are provided that would enable the Court itself to consider whether any such concerns have any objective basis. Accordingly, The Gambia's "evidential basis" provides no justification for a conclusion that every person who spoke to the FFM or IIMM must be granted complete anonymity on a blanket basis.

- 7.60 The Gambia claims that what it has done is consistent with Article 50, paragraph 2, of the Rules of Court.⁸⁵⁹ That is not so. That provision states:

If only parts of a document are relevant, only such extracts as are necessary for the purpose of the pleading in question need be annexed. A copy of the whole document shall be deposited in the Registry, unless it has been published and is readily available.

The purpose of depositing a copy of the whole document in the Registry is self-evidently so that it can be consulted by the other party if it wishes to do so. For this reason, there is no need to deposit a copy of the whole document if it is readily available. Depositing documents in the Registry "under seal", with instructions that they not be made available to the other party, is not conduct falling within this provision. Furthermore, if this provision of the Rules of Court did apply, it would mean that only the information in the redacted versions is to be treated as "relevant" for the case. Article 50, paragraph 1, of the Rules of Court states clearly that "any relevant documents adduced in support of the contentions contained in the pleading" "shall be annexed to the original of every pleading". Thus, any additional information in the documents deposited with the Registry under Article 50, paragraph 2, would not be part of the case file, and could not be considered as evidence in the proceedings. The result would be that only the redacted versions annexed to The Gambia's pleadings would be part of the case file, and these would therefore fall to be treated as *anonymous* witness statements, to which no evidential weight could be attached.

⁸⁵⁸ Letter from the Head of the IIMM to the Agent of The Gambia, 8 December 2023, third paragraph, RG, Vol. II, Annex 6.

⁸⁵⁹ See RG, para. 4.40.

- 7.61 The Gambia also brazenly claims that “There are no procedural rights of Myanmar that are infringed”,⁸⁶⁰ and that the fundamental principles of equality of the parties and *audi alteram partem* are not implicated.⁸⁶¹ That is obviously not correct, for the reasons already stated in the Counter-Memorial in this respect.
- 7.62 The Gambia states that Myanmar’s rights are unaffected because “The Gambia does not rely upon the redacted portions of the statements”.⁸⁶² If that is so, then the result must be that The Gambia relies solely on the redacted documents annexed to the Memorial and the Reply of The Gambia, such that the redacted witness statements are anonymous witness statements to which no weight should be attached.⁸⁶³
- 7.63 Contrary to what The Gambia contends,⁸⁶⁴ in its letter to the Court dated 30 March 2023 The Gambia did not answer all of the arguments in Myanmar’s letter to the Court dated 20 March 2023, and certainly did not answer all of the arguments in paragraphs 7.11 to 7.47 of the Counter-Memorial of Myanmar.

3. “Collated information” provided by Legal Action Worldwide

- 7.64 Paragraphs 7.48 to 7.65 of the Counter-Memorial of Myanmar set out the evidential shortcomings of Annex 336 to the Memorial of The Gambia, entitled “Legal Action Worldwide, Collated Information from Victims/Witnesses” (“**Legal Action Worldwide, Collated Information**”). It appears that this document was simply given to The Gambia by Legal Action Worldwide (“**LAW**”). The Gambia appears to know nothing about the document apart from the fact that it was submitted by the founder and executive director of LAW to the Victims Participation and Reparations Section of the International Criminal Court (“**ICC**”).
- 7.65 This document does not give the identities of the claimed victims/witnesses, and The Gambia itself apparently does not know their identities. It is therefore unclear on what basis even The Gambia could be confident about the reliability of this document. Two

⁸⁶⁰ RG, para. 4.42.

⁸⁶¹ RG, para. 4.43.

⁸⁶² RG, para. 4.43.

⁸⁶³ CMM, paras. 5.29-5.30.

⁸⁶⁴ See RG, para. 4.42 first and second sentences.

of the accounts, purportedly given by different witnesses under different pseudonyms, are materially identical.⁸⁶⁵ None of the witness accounts is signed or thumb-printed, and there is nothing to indicate that each of those persons giving an account confirmed the accuracy of the contents attributed to them, or confirmed that what is stated is the truth. There is nothing to indicate that they were even given the opportunity to do so. Details are not provided of the circumstances in which, and dates on which, the information was provided by the individuals in question to LAW. The written statements in Annex 336 do not bear any of the features that would normally be expected in witness statements in judicial proceedings. It appears that the persons concerned gave their accounts to LAW after July 2019, some two years after the events in question. It is unknown how those who provided the information were found or selected for interview. The document does not indicate who conducted the interviews, who prepared the written records of the interviews, and who interpreted at the interviews, or what were the qualifications of any of these people. The document also does not give dates of the claimed incidents.

- 7.66 The Reply of The Gambia provides no response to any of these matters. The Gambia confirms only that this document was prepared for purposes of proceedings before the International Criminal Court, at a stage when the Pre-Trial Chamber had not yet even authorised the Prosecutor to open an investigation, and accepts that the personal accounts in the version annexed to its Memorial “are unsigned and the names are anonymized”.⁸⁶⁶
- 7.67 The discrepancies between the account given in this document by witness CK0526, and the account given in the subsequent signed witness statement of the same person⁸⁶⁷ (see paragraphs 7.22(3) and 7.29(3) above) is a stark example of the dangers inherent in the use of anonymised documents obtained by The Gambia from other organisations.
- 7.68 The Gambia apparently contends that any organisation that is not a party to these proceedings must be considered an impartial organisation, and that this document

⁸⁶⁵ CMM, para. 7.53, and this Rejoinder, paragraph 7.39(2) above.

⁸⁶⁶ See RG, paras. 4.58-4.59.

⁸⁶⁷ Legal Action Worldwide, Witness statement No. 039, RG, Vol. IV, Annex 62.

must therefore be deemed to have been produced by an impartial organisation.⁸⁶⁸ Such a contention must be rejected. LAW is not a non-partisan organisation for the reasons given in the Counter-Memorial,⁸⁶⁹ and in paragraphs 7.73, 7.76 and 7.77 below. Furthermore, the persons whose accounts are given in this document were *clients* of LAW,⁸⁷⁰ and were apparently being represented by LAW in proceedings before the ICC pursuant to Rule 50 of its Rules of Procedure and Evidence.⁸⁷¹ They cannot be considered disinterested in the outcome of these proceedings, especially when they are themselves participants in proceedings before the ICC.⁸⁷²

- 7.69 The Gambia argues that these witness summaries are anonymized and unsigned in order to “protect the victims’ safety and dignity”, and that even if they are anonymous and unsigned, they nonetheless “attest to their personal knowledge of the facts”.⁸⁷³ On neither account is this correct.
- 7.70 First, there is no rational basis whatsoever why the “witnesses” could not have signed (or fingerprinted) statements to confirm that the information that they had provided was a true and accurate reflection of their personal knowledge of events. The Gambia could then have subsequently argued before the Court, if it wished to do so, that the Court has the power to order witness protection measures, and that the Court should do so. It remains absolutely possible to preserve the dignity of “witnesses” while simultaneously ensuring the integrity, and enhancing the reliability, of evidence for judicial processes. There is no reason why their identities had to be withheld from even The Gambia.
- 7.71 Second, The Gambia cannot demonstrate with any clarity which alleged “facts” are truly within the “personal knowledge” of a given witness in view of the fact there is such a confusion of purported first-hand and reported third-hand content. As the IIMM has now discovered, “many people” from Chut Pyin gathered together in the camps

⁸⁶⁸ RG, paras. 4.45-4.46

⁸⁶⁹ CMM, paras. 7.64, 7.80 and 7.163.

⁸⁷⁰ Witness statement of Antonia Mulvey, MG, Vol. XI, Annex 373, paras. 5 and 11, referred to in RG, para. 4.58 footnote 281.

⁸⁷¹ *Ibid.*

⁸⁷² See paragraphs 5.45, 7.11 and 7.13 above.

⁸⁷³ RG, para. 7.96.

and then relayed what was, in essence, a collective narrative to be shared more widely.⁸⁷⁴

4. Individual witness statements taken by Legal Action Worldwide

7.72 Paragraphs 7.66 to 7.81 of the Counter-Memorial of Myanmar set out the evidential deficiencies of the 33 individual witness statements taken by LAW, which are found at Annexes 339 to 358, 360 to 370 and 372 to the Memorial of The Gambia.⁸⁷⁵

7.73 These deficiencies are in summary as follows. These witness statements are anonymous. It is not possible to know with certainty if they have even been signed. They were prepared for purposes of these proceedings before the Court. Those interviewed are said to be “clients” of LAW, which cannot be regarded as a non-partisan organisation. The statements were taken two and a half to three years after the events they describe.⁸⁷⁶ Some were apparently taken remotely by “senior investigators” from another NGO, Justice Rapid Response, via Microsoft Teams. Some were taken by police investigators from the Royal Canadian Mounted Police (“RCMP”), but details are not provided of the terms under which these investigators were involved in the exercise conducted by LAW. It is unclear who was physically with each of the “clients” during, and immediately before and after, the interview. The names of the interpreters have been redacted, and the interpreters may have had no formal or appropriate qualifications. Those interviewed were in camps in Cox’s Bazar, where the influence of ARSA and the resulting climate of fear mean that people living there cannot be relied on to give objective accounts of events that conflict with ARSA’s narrative. The method by which people were selected for interview is unclear, but some were identified through a “network of 50 Rohingya survivor advocates located within the camps in Cox’s Bazar”.⁸⁷⁷

⁸⁷⁴ See paragraph 7.27 above.

⁸⁷⁵ Two of these witness statements, Witness Statement No. 020 and Witness Statement No. 028, at MG, Annexes 357 and 366 respectively, are not in fact relied on in either the Memorial or the Reply of The Gambia.

⁸⁷⁶ The additional witness statements from LAW that are annexed to the Reply of The Gambia were taken even longer after the events in question: see paragraph 7.74 below.

⁸⁷⁷ See generally CMM, paras. 7.66-7.81.

- 7.74 A further 11 witness statements taken by LAW have now been added as Annexes 44-47, 61-62, 64-66 and 68-69 to the Reply of The Gambia. (One is in fact a duplicate of a witness statement that was already annexed to the Memorial of The Gambia.⁸⁷⁸) These also suffer from the same evidential deficiencies. They were taken six and a half to seven years after the events they describe, specifically for purposes of these proceedings. Only two of the eight new statements were taken by members of the RCMP,⁸⁷⁹ and still no explanation is given as to how members of the RCMP came to take these new statements.⁸⁸⁰ No explanation is given as to who took the other nine new statements,⁸⁸¹ or in what circumstances, other than to state that they were “taken by the NGO Legal Action Worldwide”.⁸⁸²
- 7.75 The Reply of The Gambia does not engage at all with most of these deficiencies identified in the Counter-Memorial. In respect of others, The Gambia provides only a perfunctory response.
- 7.76 The Gambia argues that “these statements were produced by independent, professional sources”.⁸⁸³ However, of the 44 witness statements provided by LAW that are annexed to the Memorial and Reply of The Gambia, only 21 appear to have been taken by members of the RCMP.⁸⁸⁴ In relation to these witness statements, as already noted above, The Gambia still has not provided any details of the terms under which these investigators were involved in the exercise conducted by LAW.⁸⁸⁵ Furthermore, the RCMP is an organ of Canada, which is an intervener in this case,

⁸⁷⁸ See paragraph 7.39(1) above.

⁸⁷⁹ Witness Statement Nos. 036 and 037, at Annexes 46 and 47 of the Reply of The Gambia.

⁸⁸⁰ The witness statement of Antonia Mulvey, MG, Vol. XI, Annex 373, states at para. 9 only that interviewees would “come to LAW’s secure centre near the camps in Cox’s Bazar for the interview, with investigator, interpreter and a notetaker joining through video conferencing technology. The witness would return to LAW’s centre at a later date to finalise and sign their statement”.

⁸⁸¹ Witness Statement Nos. 034, 035, 038, 039, 040, 041, 042, 043 and 044 at Annexes 44, 45, 61, 62, 64, 65, 66, 68 and 69 of the Reply of The Gambia.

⁸⁸² RG, para. 4.44.

⁸⁸³ RG, para. 4.44.

⁸⁸⁴ Witness Statement Nos. 007, 008, 009, 010, 011, 018, 019, 020, 021, 022, 024, 025, 026, 027, 028, 029, 030, 031 and 032 at Annexes 344, 345, 346, 347, 348, 355, 356, 357, 358, 360, 362, 363, 364, 365, 366, 367, 368, 369 and 370 of the Memorial of The Gambia; and witness Statement Nos. 036 and 037, at Annexes 46 and 47 of the Reply of The Gambia. Where the witness statements are taken by members of the RCMP, this is indicated in the statement itself.

⁸⁸⁵ See CMM, paras. 7.72-7.74.

and therefore cannot be considered non-partisan. In 2020, Canada issued a joint statement with the Netherlands, stating that it intended to intervene in this case. That joint statement contains allegations of “Myanmar’s ... targeted and systemic atrocities against the Rohingya” and “Myanmar’s ... commission of genocide against the Rohingya”, and states that the proposed intervention was to “support these efforts” of The Gambia which is said to have taken the “laudable step” of bringing this case before the Court.⁸⁸⁶ Canada overtly sides with The Gambia against Myanmar, and cannot be considered non-partisan.

- 7.77 The Gambia has not provided any details of the interviewers who took the remaining 23 witness statements,⁸⁸⁷ other than to suggest that those annexed to the Memorial were taken by “senior investigators” from a separate NGO, Justice Rapid Response,⁸⁸⁸ and to say that those annexed to the Reply were taken by “senior criminal investigators”.⁸⁸⁹ In some of these witness statements, even the name of the investigator has been redacted.⁸⁹⁰ Details of the qualifications of these other investigators, their methodologies, and their relationships to Justice Rapid Response, are not provided. It is noted that the founder and executive director of LAW is a rostered expert with Justice Rapid Response,⁸⁹¹ as is The Gambia’s expert witness, Professor Michael A. Newton.⁸⁹² In May 2021, a joint press release was issued by Justice Rapid Response and LAW, stating that “Rohingya people have been subject to killings, rape and torture, as well as the razing of their homes and villages in their home country Myanmar”, and that “Justice Rapid Response and Legal Action Worldwide have worked towards gathering evidence to support these legal cases [the case brought by The Gambia before this Court, the investigation by the Prosecutor of

⁸⁸⁶ See Joint statement of Canada and the Kingdom of the Netherlands regarding intention to intervene in The Gambia v. Myanmar case at the International Court of Justice, Diplomatic statement, 2 September 2020, RM, Vol. V, Annex 182.

⁸⁸⁷ Witness Statement Nos. 001, 002, 003, 004, 005, 006, 012, 013, 014, 015, 016, 017, 023 and 033 at Annexes 335, 339, 340, 341, 342, 343, 349, 350, 351, 352, 353, 354, 361 and 372 of the Memorial of The Gambia; and Witness Statement Nos. 034, 035, 038, 039, 040, 041, 042, 043 and 044, at Annexes 44, 45, 61, 62, 64, 65, 66, 68 and 69 of the Reply of The Gambia.

⁸⁸⁸ See CMM, para. 7.73.

⁸⁸⁹ RG, para. 4.44.

⁸⁹⁰ RG, Annexes 45, 46, 62, 64, 65, 66, 68, and 69 all have at least one LAW interviewer’s name withheld. RG, Annex 63 also has no witness to the signature of the interviewer.

⁸⁹¹ Witness statement of Antonia Mulvey, para. 4, MG, Vol. XI, Annex 373.

⁸⁹² Expert Report of Professor Michael A. Newton, October 2020, para. 6, MG, Vol. XI, Annex 359.

the ICC, and petition of civil society organisations before the courts of Argentina]”.⁸⁹³ The materials produced by LAW and Justice Rapid Response were provided by those organisations to The Gambia and not to Myanmar. It is obvious that those organisations are openly seeking to assist The Gambia in these proceedings. It is therefore mere assertion for The Gambia to state that all of these statements were taken by “independent, professional sources”. In these proceedings, they are partisan.

- 7.78 The Gambia states that those who took these statements “exercised due care to record only facts within the witness’s personal knowledge”.⁸⁹⁴ That is not correct. The witness statements provided by LAW are replete with statements about matters that were not within the personal knowledge of those giving the statements.⁸⁹⁵
- 7.79 The Gambia states that these statements “corroborate the findings of the UN Fact-Finding Mission reports”.⁸⁹⁶ This argumentation should be rejected, for the reasons given in paragraphs 7.17, 7.42 ad 7.43 above. In any event, The Gambia does not establish that the witness statements provided by LAW are in all respects consistent with the FFM Reports. The Gambia merely asserts that the former corroborates the latter.
- 7.80 LAW cannot be considered to be a non-partisan organisation, for the reasons given in paragraphs 7.64, 7.80, 7.95, 7.163 and 7.204 of the Counter-Memorial of Myanmar, and paragraphs 7.73, 7.76 and 7.77 above.

⁸⁹³ Justice Rapid Response and Legal Action Worldwide, Press Release, “Paths to Justice: The international pursuit of justice for the Rohingya”, 25 May 2021, RM, Vol. V, Annex 164.

⁸⁹⁴ RG, para. 4.44.

⁸⁹⁵ To give just a few examples: Witness Statement No. 038, RG, Vol. IV, Annex 61, paras. 24, 28, 31, 46, 47, 48, 67, 68, 103: “I had heard that ...”; “I heard that ...”; “We also heard that ...”; “He told me that ...”; “I heard that ...”; “I heard that ...”; “The people who fled our village told us ...”; “she told me that ...”; “We heard that ...” Witness Statement No. 039, RG, Vol. IV, Annex 62, paras. 13, 18, 45, 46, 78: “My maternal grandmother-in-law told me ...”; “He told me ...”; “he told me ...”; “I heard that ...”; “This is what I was told ...”. Witness Statement No. 040, RG, Vol. IV, Annex 64, paras. 15, 28, 52, 60, 61, 64, 74, 81, 113, 131: “I heard that ...”; “He told us about ...”; “He told me ...”; “My husband told me ...”; “The people told me ...”; “They told me ...”; “My sons told me ...”; “My sons later told me ...”. Witness Statement No. 041, RG, Vol. IV, Annex 65, paras. 24, 43, 45: “my husband ... told me”; “I was told ...”; “They told me ...”. Witness Statement No. 042, RG, Vol. IV, Annex 66, paras. 27, 29, 31, 32, 57, 71, 80: “I heard that ...”; “My sister-in-law told me ...”; “My wife told me ...”. Witness Statement No. 043, RG, Vol. IV, Annex 68, para. 17, 31: “I heard that ...”; “Other villagers told me ...”. Witness Statement No. 044, RG, Vol. IV, Annex 69, paras. 25, 37: “I heard that ...”; “Then we heard that ... they told us”.

⁸⁹⁶ RG, para. 4.44.

- 7.81 The Gambia argues that “promoting and encouraging respect for human rights” is one of the defined purposes of the United Nations.⁸⁹⁷ However, the United Nations itself does not conduct “strategic advocacy”, or act for individual “clients” in cases before this Court or the ICC, or seek to assist one particular party in judicial proceedings. LAW has for instance also filed a document before the ICC calling on the ICC to recognise a document filed before the ICC by the “National Unity Government”, which is not the Government of Myanmar recognised by this Court.⁸⁹⁸ According to the LAW website, the executive director of LAW has stated that “Our clients were disappointed and frustrated to see Aung San Suu Kyi defend the Tatmadaw at the International Court of Justice case brought by The Gambia against Myanmar”.⁸⁹⁹ The Gambia’s claims about the impartiality of LAW are thus no more than assertions, and indeed, are contradicted by the available evidence.
- 7.82 The Gambia contends that “In full transparency, LAW has detailed the Standard Operating Procedures that it abided by in taking these statements”.⁹⁰⁰ However, as has been noted in the Counter-Memorial of Myanmar, it is not clear that those Standard Operating Procedures applied to the interviews conducted by the RCMP.⁹⁰¹ In any event, as outlined in the Counter-Memorial, the Standard Operating Procedures leave many questions open,⁹⁰² none of which has been answered by The Gambia. In the circumstances, it can hardly be said that there has been “full transparency”, as claimed by The Gambia.⁹⁰³
- 7.83 In sum, Myanmar maintains that no evidential weight can be given to these witness statements.

⁸⁹⁷ RG, para. 4.45.

⁸⁹⁸ Legal Action Worldwide, Website, ‘Where we work – Myanmar’, accessed 15 November 2024, RM, Vol. V, Annex 170.

⁸⁹⁹ Legal Action Worldwide, “ICC Victim Submission for Rohingya clients following NUG Declaration”, 25 August 2021, RM, Vol. V, Annex 165.

⁹⁰⁰ RG, para. 4.46.

⁹⁰¹ CMM, para. 7.74.

⁹⁰² CMM, paras. 7.73-7.80.

⁹⁰³ RG, para. 4.46 last sentence.

5. “First-hand testimonies” taken by Fortify Rights

7.84 Paragraphs 7.82 to 7.98 of the Counter-Memorial of Myanmar set out the evidential deficiencies of the document entitled “Fortify Rights, First-hand Testimonies from August-September ‘Clearance Operations’ in Myanmar” (the “**Fortify Rights Document**”). The document contains 46 “witness testimonies”, only three of which are contained in the extract from that document found at Annex 338 of the Memorial of The Gambia (“**Annex 338**”).

7.85 The whole of this document was provided by The Gambia only two and a half years after its Memorial was filed, following a request by Myanmar.⁹⁰⁴ The Gambia now claims that it did not purposefully withhold the remaining 43 “witness testimonies”.⁹⁰⁵ However, The Gambia’s explanation for not initially providing the whole document is not creditworthy and should not be accepted, for the reasons given in paragraph 7.85 of the Counter-Memorial of Myanmar. In any event, The Gambia does not answer directly Myanmar’s observation that “[a] number of the other accounts [that were not annexed to the Memorial of The Gambia] ... reveal a picture that contradicts The Gambia’s case”, and that “[b]y including only three of the 46 accounts in its Annex 338, The Gambia gives a misleading impression of what this document as a whole indicates was the context in which the counter-terrorism operations took place”.⁹⁰⁶

7.86 The Gambia claims that it “has always noted that the ‘clearance operations’ were undertaken on the false pretext that they were targeted at ARSA rather than the Rohingya as a group”.⁹⁰⁷ That is incorrect. This claim of The Gambia was made for the first time in its Reply.⁹⁰⁸ The Gambia’s argument is in any event unsustainable, for the reasons given in Chapter 3 above of this Rejoinder.⁹⁰⁹

⁹⁰⁴ See CMM, paras. 7.7, 7.8(2) and 7.9(2).

⁹⁰⁵ RG, para. 4.54.

⁹⁰⁶ CMM, para. 7.84.

⁹⁰⁷ RG, para. 4.54.

⁹⁰⁸ See RG, paras. 1.17, 3.16, 3.21, 4.54, 5.23, 7.3, 7.4, 7.14, 7.18, 7.76, 7.133, 7.147, 9.9 and 9.42.

⁹⁰⁹ See paragraphs 3.5-3.6 above and paragraphs 8.4-8.6 below.

- 7.87 Myanmar maintains that this document should be excluded from the case file, and should not be considered by the Court, for the reasons given in paragraphs 7.11 to 7.47 of the Counter-Memorial of Myanmar, and in paragraphs 7.42 to 7.63 above.
- 7.88 In any event, no meaningful weight can be given to this Fortify Rights Document, for the reasons set out in the Counter-Memorial,⁹¹⁰ which are in summary as follows. The Gambia was simply given this document by Fortify Rights, and knows nothing else about it. The circumstances in which the document was prepared are unknown. It is in all probability a document containing a compilation of material taken from other documents. It is unknown when, or by whom, or why, this compilation document was produced, and neither of the parties is capable of verifying whether this compilation fully and accurately reproduces the information in the original documents. The information in the document is also selective. It contains information from only 46 of at least 242 people interviewed by Fortify Rights. It is not known by whom, or when, or according to what criteria the 46 people were selected for inclusion in this document. It contains statements of anonymous witnesses. None of the individual accounts is signed. There is nothing to indicate that each person read the written statement attributed to them and confirmed that it is true and accurate. The Gambia does “not have information” on whether the witnesses at Annex 338 overlap with any of the witnesses mentioned as sources for the reports in Annex 114 and/or Annex 192 to the Memorial of The Gambia. It thus appears that all these documents may be based on the same sources.
- 7.89 The Reply of The Gambia does not engage with most of these deficiencies.
- 7.90 The Gambia now provides a witness statement of Matthew Smith, the CEO of Fortify Rights, that is said to provide further information about the circumstances in which the Fortify Rights Document was produced.⁹¹¹ From that witness statement, the following emerges:
- (1) The witness statement says that Mr Smith was “personally involved” in each interview represented in the Fortify Rights Document, but appears deliberately

⁹¹⁰ CMM, paras. 7.85-7.98.

⁹¹¹ Witness Statement of Matthew F. Smith, RG, Vol. IV, Annex 71. See RG, para. 4.56.

not to say *how* he was personally involved.⁹¹² It is apparent that Mr Smith is not a lawyer or a professional investigator.⁹¹³ It is not stated who else was involved in those interviews. Mr Smith says that “my colleagues and I” conducted the interviews,⁹¹⁴ but no details are given about the colleagues or their qualifications.

- (2) The witness statement says that the Fortify Rights Document was personally prepared by Mr Smith,⁹¹⁵ but fails to address the fact that the Fortify Rights Document is a compilation of information taken from other documents, and that those other documents have not been provided. The result is that Myanmar is prevented from checking whether the Fortify Rights Document accurately reflects the content of those other documents, or from checking the methodology by which those other documents were produced.
- (3) It appears that Fortify Rights interviewed 242 people. The witness statement says that “I documented 49 testimonies of Rohingya eyewitnesses”, but no details are given of who interviewed the others. The Fortify Rights Document contains accounts of only 46 people. It is not stated whether all of these were amongst the 49 people in whose interviews Mr Smith was “personally involved”, but even if they were, no explanation is given of how these 46 were selected from those 49, or why the others were excluded from the Fortify Rights Document.
- (4) The witness statement contains bare statements to the effect that “Our methodologies adhere to the highest ethical standards”,⁹¹⁶ “we observe standard international best practices in interviewing techniques”⁹¹⁷ and “Fortify Rights is committed to upholding the highest standards of integrity, professionalism, and accountability”.⁹¹⁸ However, the mere fact that Mr Smith makes such

⁹¹² Witness Statement of Matthew F. Smith, para. 27, RG, Vol. IV, Annex 71.

⁹¹³ *Ibid.*, paras. 2, 3, 8-10.

⁹¹⁴ *Ibid.*, paras. 2, 3, 8-10.

⁹¹⁵ *Ibid.*, para. 26.

⁹¹⁶ *Ibid.*, para. 19.

⁹¹⁷ *Ibid.*, para. 33.

⁹¹⁸ *Ibid.*, para. 35.

generalised statements does not mean that they must be true. This is a mere expression of opinion by Mr Smith. In any event, this is a self-certifying statement, since there is no indication that the practices followed have been independently assessed as suitable for use in judicial proceedings. No evidence is provided on the basis of which the Court could reach its own conclusions about these matters. The awards that Fortify Rights is said to have received⁹¹⁹ are not for standards of evidence gathering for use in judicial proceedings.

- (5) The witness statement does not give details of the qualifications of translators, other than to make the bare statement that they are either employees of Fortify Rights who happen to speak the language in question, or are “professional translators”.⁹²⁰
- (6) The witness statement says that interviews were “*often* for appropriately long durations of time at the discretion of the interviewee”,⁹²¹ suggesting that some interviews were *not* of “appropriately long durations”. No indication is given of which interviews were “for appropriately long durations of time” and which were not. No objective indication is given of what was considered to be an “appropriately long duration of time”.
- (7) The witness statement confirms that the interviews were generally not audio or video recorded to check accuracy.⁹²²
- (8) The witness statement confirms that accounts were given via telephone interview.⁹²³ This raises serious questions about the integrity of the interviews. No information is given as to what safeguards were in place to ensure that the person on the other end of the telephone line was a genuine witness to events. Given what is known about ARSA requiring persons to give false accounts, this is a real and not speculative danger.

⁹¹⁹ *Ibid.*, para. 17.

⁹²⁰ *Ibid.*, paras. 21-22.

⁹²¹ *Ibid.*, para. 26 (emphasis added).

⁹²² *Ibid.*, paras. 26 and 29.

⁹²³ *Ibid.*, para. 24.

(9) The witness statement now confirms that the Fortify Rights Document was the source of information for the reports in Annex 114 and Annex 192 of the Memorial of The Gambia (the Fortify Rights Report, *They Gave Them Long Swords*,⁹²⁴ and the joint report by Fortify Rights and the United States Holocaust Memorial Museum⁹²⁵), and it thus appears that all of these documents were indeed based on the same source. The Court has warned about the caution to be exercised where multiple documents have a single source.⁹²⁶ There is an obvious risk of duplication and of the same witness's testimony being viewed as "corroborative" of itself.

7.91 Mr Smith's witness statement thus answers virtually none of the points in paragraphs 7.85 to 7.98 of the Counter-Memorial of Myanmar, as summarised in paragraph 7.88 above.

7.92 The Gambia states that the "witness testimonies" in the Fortify Rights Document "confirm and corroborate the findings of the UN Fact-Finding Mission and other sources".⁹²⁷ This argumentation should be rejected for the reason given in paragraphs 7.17, 7.42 and 7.43 above. Furthermore, there is no way of knowing whether the persons interviewed by the FFM were different to those who were interviewed by Fortify Rights.⁹²⁸ If in fact the persons interviewed by the FFM were wholly or partially the same as those interviewed by Fortify Rights, then the information in the documents of the FFM and Fortify Rights would be wholly or partially based on the same sources.

7.93 Fortify Rights cannot be considered to be a non-partisan organisation, for the reasons given in paragraphs 5.36, 5.37 and 7.95 of the Counter-Memorial of Myanmar. It states openly that "states should join and support The Gambia's case as the

⁹²⁴ Fortify Rights, *They Gave Them Long Swords*, 19 July 2018 ("**Fortify Rights, Long Swords**"), extracts at MG, Vol. IV, Annex 114, and CMM, Vol. VII, Annex 279.

⁹²⁵ Fortify Rights and United States Holocaust Memorial Museum, *They Tried to Kill Us All: Atrocity Crimes against the Rohingya Muslims in Rakhine State, Myanmar*, November 2017, MG, Vol. VII, Annex 192.

⁹²⁶ CMM, paras. 5.50, 5.62, 5.63, 7.203 and 7.216.

⁹²⁷ RG, para. 4.55.

⁹²⁸ See paragraphs 7.16-7.23 above.

International Court of Justice (ICJ) against Myanmar”.⁹²⁹ Like LAW and Justice Rapid Response, it is clearly seeking to assist one of the parties in these proceedings in its case against the other party, and is therefore partisan. Any contention that any organisation that is not a party to these proceedings must be considered an impartial organisation is in any event clearly without merit.⁹³⁰

6. Witness statement of Mohammadul Hassan

- 7.94 The witness statement of Mohammadul Hassan annexed to the Memorial of The Gambia⁹³¹ is unsigned.⁹³² The Reply of The Gambia now annexes a second signed statement confirming the accuracy of the first statement.⁹³³ This remedies the lack of signature on the original witness statement, but does not overcome any of the other flaws with this statement, including the fact that Fortify Rights, the organisation which took the statement, is not impartial.⁹³⁴ It is noted that the statement, like the witness statements provided by Fortify Rights, conspicuously contains no reference to the activities in Maung Nu in August 2017 of ARSA or local villagers who had been mobilised by ARSA, and appears to adopt the same contrived approach of deliberate silence about ARSA.⁹³⁵
- 7.95 The Gambia states that the witness statement of Mohammadul Hassan corroborates the reports of the UN Fact-Finding Mission.⁹³⁶ This argumentation should be rejected, for the reasons given in paragraphs 7.17, 7.42 and 7.43 above. Mohammadul Hassan may in fact himself have been one of the persons interviewed by the FFM,⁹³⁷ in which

⁹²⁹ Fortify Rights, News Release, “U.N. Member States: Join and Support Genocide Trial Against Myanmar Junta”, 22 July 2022, RM, Vol. V, Annex 166.

⁹³⁰ See paragraphs 7.11, 7.68, 7.73, 7.76, 7.77 and 7.80 above.

⁹³¹ MG, Vol. X, Annex 337.

⁹³² CMM, paras. 7.99-7.100.

⁹³³ Second Witness Statement of Mohammadul Hassan, RG, Vol. IV, Annex 63.

⁹³⁴ See CMM, paras. 5.36-5.37 and 7.95, and this Rejoinder, paragraph 7.93 above.

⁹³⁵ See CMM, paras. 8.103-8.104.

⁹³⁶ RG, para. 4.55.

⁹³⁷ See paragraphs 7.16-7.23 above.

case information in his witness statement and in the FFM reports would be based on the same source.⁹³⁸

7. Interviews of claimed former soldiers (deserters)

- 7.96 Paragraphs 4.60 to 4.62 of the Reply of The Gambia provide no substantive response to paragraphs 7.101 to 7.118 of the Counter-Memorial of Myanmar, dealing with the interviews of two purported former Tatmadaw soldiers.
- 7.97 The Reply of the Gambia does not deny that it was simply given these interviews by the Government of Bangladesh, and that The Gambia itself knows nothing about the interviewees or the circumstances in which the interviews were taken, and has no means of verifying the identities of the interviewees or even of the interviewers.⁹³⁹
- 7.98 The Reply of The Gambia addresses none of the evidential deficiencies identified in paragraphs 7.103 to 7.109 of the Counter-Memorial. The lack of any response by The Gambia indicates that it must concede what is stated in the Counter-Memorial in this respect.
- 7.99 The Gambia states, erroneously, that “it is established that both individuals are indeed former Tatmadaw soldiers”, and that “Myanmar confirms that both were former members of the military”.⁹⁴⁰ Myanmar is unable to verify the identities of the two persons who were interviewed, and has clearly referred to them as “claimed former soldiers” and “purported former Tatmadaw soldiers”.⁹⁴¹ Myanmar has confirmed only that there were two Tatmadaw soldiers who deserted, who had the same names as those given by the two people who were interviewed, who did not in fact serve in front-line military operations in Maungdaw region during the counter-terrorism operations.⁹⁴²
- 7.100 Furthermore, by reference to documentary evidence, Myanmar has shown that details given by these persons in the interviews as to their military service do not correspond

⁹³⁸ See also paragraph 3.13(2) above.

⁹³⁹ CMM, para. 7.102.

⁹⁴⁰ RG, para. 4.60.

⁹⁴¹ CMM, para. 7.101, and the title immediately above that paragraph.

⁹⁴² CMM, paras. 7.113 and 7.116.

with the details of the former soldiers with those names,⁹⁴³ which casts doubt on whether those interviewed really were the two former soldiers in question. The Gambia's only response is to assert that what the interviewees state should be treated as more reliable than what the documentary evidence shows because deployment orders "may" change quickly in an active operation.⁹⁴⁴ This is purely speculative, and no proper basis has been established by The Gambia for any suggestion that the documentary evidence may be unreliable.

- 7.101 The interviewees claim to be deserters, and the soldiers with those names were deserters. Any military, anywhere in the world, would issue warrants of arrest for deserters. The suggestion that these interviews should be considered reliable evidence, on the ground that they were given "at great personal risk" due to the arrest warrants,⁹⁴⁵ is untenable. The Gambia appears to argue that evidence given by a fugitive from justice should always be considered more reliable than evidence from someone who is not, on the ground that a fugitive gives evidence "at great personal risk", even if the "risk" in question is prosecution for committing an alleged offence.
- 7.102 The suggestion that the interviews should be considered as reliable because they are consistent with the FFM reports⁹⁴⁶ should be rejected for the reasons given in paragraphs 7.17, 7.42 and 7.43 above.

8. Witness statement of Christina Lamb

- 7.103 The Reply of The Gambia provides no response to paragraphs 7.119 to 7.121 of the Counter-Memorial of Myanmar,⁹⁴⁷ other than to suggest that the witness statement of the journalist Ms Lamb,⁹⁴⁸ recounting facts that she was told by others in Cox's Bazar, is somehow, in relation to the correctness of those facts, a "first-hand account[] based on ... interviews" rather than hearsay.⁹⁴⁹ That is plainly incorrect: it is the very

⁹⁴³ CMM, paras. 7.110-7.117.

⁹⁴⁴ CMM, paras. 7.110-7.117.

⁹⁴⁵ RG, para. 4.62.

⁹⁴⁶ RG, para. 4.62.

⁹⁴⁷ See RG, paras. 4.48-4.51, which deal substantively only with the witness statement of Jonathan Head.

⁹⁴⁸ Witness Statement of Christina Lamb, p. 6, MG, Vol. XI, Annex 371.

⁹⁴⁹ See RG, para. 4.48.

definition of hearsay. The lack of any tenable response by The Gambia indicates that it must concede what is stated in the Counter-Memorial in this respect. The established case law of the Court is that virtually no weight can be given to hearsay.⁹⁵⁰

9. Witness statement of Alex Crawford and Neville Lazarus

- 7.104 The Reply of The Gambia provides no response at all to paragraphs 7.122 to 7.127 of the Counter-Memorial of Myanmar,⁹⁵¹ other than to suggest that the witness statement of the journalists Mr Crawford and Mr Lazarus,⁹⁵² recounting facts that they were told by others on the Myanmar side of the Naf River, is somehow, in relation to the correctness of those facts, a “first-hand account[] based on ... interviews” rather than hearsay.⁹⁵³ Again, that is plainly incorrect: it is the very definition of hearsay. Again, the lack of any tenable response by The Gambia indicates that it must concede what is stated in the Counter-Memorial in this respect. The established case law of the Court is that virtually no weight can be given to hearsay.⁹⁵⁴

10. Witness statement of Jonathan Head

- 7.105 The two preceding paragraphs apply *mutatis mutandis* to the witness statement of the journalist, Mr Jonathan Head.⁹⁵⁵
- 7.106 Paragraphs 4.48 to 4.51 of the Reply of The Gambia express disagreement with paragraphs 7.128 to 7.131 of the Counter-Memorial of Myanmar, dealing with that witness statement.
- 7.107 The Gambia states that the witness statement of Mr Head “relates that a Hindu man told him that the military attacked his village; the man was pulled aside and came back and changed his story, saying that Muslims attacked the village”.⁹⁵⁶ However, Mr Head states that at the relevant time, he was “not pay[ing] too much attention”, and it

⁹⁵⁰ See CMM, paras. 5.31-5.34.

⁹⁵¹ See RG, paras. 4.48-4.51, which deal substantively only with the witness statement of Jonathan Head.

⁹⁵² Witness Statement of Alex Crawford and Neville Lazarus, p. 1, paras. 5–6, MG, Vol. XI, Annex 374.

⁹⁵³ See RG, para. 4.48.

⁹⁵⁴ See CMM, paras. 5.31-5.34.

⁹⁵⁵ Witness Statement of Jonathan Head, 14 October 2020, MG, Vol. XI, Annex 375 (“**witness statement of Jonathan Head**”). See also the analysis of this witness statement at paragraphs 9.175 to 9.177 below.

⁹⁵⁶ RG, para. 4.49, referring to witness statement of Jonathan Head, para. 16.

seems that he did not witness this interaction himself, since he states that “[m]y Burmese colleagues observed this interaction and translated it for me”.⁹⁵⁷ This was therefore not a first-hand observation by Mr Head of what happened.

7.108 According to The Gambia, the witness statement of Mr Head “reports that Muslim residents of Maungdaw felt unable to speak freely because of the police presence”.⁹⁵⁸ However, this was merely Mr Head’s own opinion or conclusion. He states that while interviewing local community leaders in the presence of officials and police, “No one would talk about the violence”, and “I formed the impression that the presence of officials and police caused them not to talk about this”.⁹⁵⁹ This is an expression of opinion, not evidence of a fact. The established case law of the Court is that no weight can be given at all to mere opinions.⁹⁶⁰

7.109 The Gambia argues that the witness statement of Mr Head “testifies as to how he uncovered the fabrication of the supposed evidence of Rohingya burning their own village, which Myanmar officials had distributed—the photos were staged by Hindu villagers”.⁹⁶¹ However, again, The Gambia’s claim is in reality only based on Mr Head’s own opinion or conclusion. A proper analysis of the underlying evidence shows that Mr Head claims that when he was in Maungdaw, photographs were provided by a Buddhist monk that were said to show Muslims setting fire to their own homes. Mr Head says that “some of us felt immediately that they looked odd, that perhaps the scene had been staged”.⁹⁶² Clearly, this was plainly an expression of opinion, based on his subjective impression. He said that the monk provided the photographs “to the Burmese journalists”, suggesting that Mr Head himself did not receive a copy of the photographs.⁹⁶³ Mr Head said that later, when he was back in Yangon, when looking at other video material he had taken, he identified two displaced Hindus who were posing as two of the Muslims in the photograph he had

⁹⁵⁷ Witness statement of Jonathan Head, para. 16.

⁹⁵⁸ RG, para. 4.49, referring to witness statement of Jonathan Head, para. 17.

⁹⁵⁹ Witness statement of Jonathan Head, para. 17.

⁹⁶⁰ See CMM, paras. 5.31-5.34.

⁹⁶¹ RG, para. 4.49, referring to witness statement of Jonathan Head, paras. 18-19.

⁹⁶² Witness statement of Jonathan Head, para. 18.

⁹⁶³ *Ibid.*

seen. Mr Head says that “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”. Again, it is evident that Mr Head is simply expressing an opinion. Without seeing a copy of the relevant photograph, and without being able to compare that with the other video material to which Mr Head refers, it is impossible for Myanmar to comment or for the Court to form its own conclusion.⁹⁶⁴

7.110 The Gambia asserts that “Mr. Head also reports that not a single person whom he interviewed in Maungdaw said that they were afraid of ARSA, which directly contradicts Myanmar’s narrative about ARSA”.⁹⁶⁵ However, what Mr Head in fact said was the following. When at a Muslim market, most people did not want to talk to him. The few that did, stated that they were frightened. Apart from one person who said that they were frightened of the Government, no one would answer when asked who they were frightened of.⁹⁶⁶ Contrary to what The Gambia claims, this does not “directly contradict” the possibility that they were frightened of ARSA. There is powerful and extensive evidence of the fear of ARSA, which is set out in Chapter 3 of the Counter-Memorial of Myanmar and in Section D of Chapter 3 of this Rejoinder, and which was confirmed by IIMM Witness 1299.⁹⁶⁷ The fact that only one person was willing to say who they were afraid of suggests that everyone was so frightened that they were not even willing to state who they were frightened of. The fact that one person was willing to say that they were frightened of the Government suggests that those who were frightened of the Government were willing to state that. This suggests, or at least is consistent with, the conclusion that everyone else was frightened of something other than the Government. Fear of ARSA would be an obvious explanation, and would be consistent with other evidence about the fear inspired by ARSA. The evidence would also be consistent with the conclusion that the one person was so afraid of ARSA, that that person attributed their unwillingness to speak to fear of the Government rather than to ARSA.

⁹⁶⁴ See CMM, para. 7.130.

⁹⁶⁵ RG, para. 4.49, referring to witness statement of Jonathan Head, para. 21.

⁹⁶⁶ Witness statement of Jonathan Head, para. 21.

⁹⁶⁷ See paragraphs 7.29(1) and 7.33 above.

7.111 According to The Gambia, “Mr. Head uncovered evidence indicating that neither ARSA nor the Rohingya themselves, was behind the burning of Rohingya villages”, that he “witnessed local Rakhine men with long swords in the vicinity of burning Rohingya houses and a madrasa”, that “he was told by a witness there that the Rakhine and police had burned the buildings”, and that “he directly observed that there was no effort to stop the burning or otherwise respond to it”.⁹⁶⁸ In fact, what Mr Head says is that he and other journalists “discussed among ourselves what we had seen”, and that “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”.⁹⁶⁹ Mr Head’s opinion was just his opinion, and appeared to differ from the opinions of others.

7.112 The Gambia contends that “Mr. Head also testifies about the evidence of the erasure of Rohingya villages”, stating that (1) newly constructed refugee reception centres were built on top of old Bengali villages, Ri Tu Lar and Thar Zay Kone; (2) “the Rohingya village Myar Zin was the site of a newly built resettlement camp fenced in with barbed wire”; (3) a new police barracks had been built on the site of an old Muslim village Myo Thu Kyi; and (4) “the old Rohingya part of Inn Din was razed, and there was a newly-built Border Guard Police (‘BGP’) barracks on top”.⁹⁷⁰ Myanmar responds to this as follows:

- (1) Hla Phoe Khaung transit camp is situated in northern Maungdaw township, about 5 miles to the west of Kyee Ken Pyin village. Assemble Board Houses were temporarily set up near two villages (Kyauk Hlay Kar and Thet Kay Pyin) for receiving Bengalis who will be repatriated from Bangladesh systematically. However, there is no evidence of that two former villages existed where the site of the reception centre is located.
- (2) Assemble Board Houses were set up in a temporary place only near Kyein Chaung (South) village, not in Myar Zin Bengali village. The statement of Mr Head, that officials in Kyein Chaung, “speaking off the record”, had “confirmed

⁹⁶⁸ RG, para. 4.50, referring to witness statement of Jonathan Head, paras. 24-29.

⁹⁶⁹ Witness statement of Jonathan Head, para. 30. See CMM, para. 7.129.

⁹⁷⁰ RG, para. 4.51, referring to witness statement of Jonathan Head, paras. 39-44.

that Myar Zin had been razed to make way for the new resettlement camp”,⁹⁷¹ is hearsay, and cannot be given significant evidential weight. The resettlement centre at Kyein Chaung is not surrounded by barbed wire.

- (3) No (5) Border Guard Police building was built near the Lae Kya Taung and Ywar Haung villages, which are part of Myo Thu Gyi village tract, located outside of Maungdaw Township. These police facilities were built in 2017 due to the terrorist acts committed by ARSA against Muslim, Hindu and Rakhine communities living in nearby villages. The police station was set up to prevent the recurrence of such terrorist acts.
- (4) No (6) Border Guard Police building was built in 2017 to provide security for the Muslim, Hindu and Rakhine communities living in nearby Inn Din Village. It was also intended to provide security when constructing the resettlement housing for the returnees. The police facilities were built after the 2017 ARSA terrorist incidents, with a purpose of preventing the recurrent of such incidents. The Border Guard Police building was built on the farmland (31.85 acres (12.89 hectares) in total) owned by 16 Rakhine farmers.

11. International State Crime Initiative (ISCI)

- 7.113 Paragraph 4.52 of the Reply of The Gambia, dealing with the anonymous witness statement at Annex 335 of the Memorial of The Gambia, provides no substantive response to footnote 872 of the Counter-Memorial of Myanmar. The lack of any substantive response indicates that The Gambia must concede what is stated in the Counter-Memorial in this respect.

C. Reports and documents of United Nations bodies

- 7.114 Paragraphs 4.35 and 4.36 of the Reply of The Gambia provide no substantive response to, and do not in any way engage with, paragraphs 7.132 to 7.161 of the Counter-Memorial of Myanmar. Again, the lack of any substantive response by The Gambia

⁹⁷¹ Witness statement of Jonathan Head, para. 40.

is telling and indicates that it must concede what is stated in the Counter-Memorial in this respect.

- 7.115 In relation to resolutions of political organs of international organisations, including the United Nations General Assembly and the Human Rights Council,⁹⁷² the following must be noted. These are political resolutions of political organs.⁹⁷³ To the extent that they contain statements concerning the factual situation in a particular State, or express legal conclusions in relation to such facts, they are statements of the political position of the States voting in favour of the resolution. Many of those States may have little or no detailed knowledge of the facts in question, and it cannot be assumed (and indeed, is unlikely) that all of those States will have fully examined all available evidence in an objective and impartial way before deciding how to vote on the resolution. Such statements of political positions cannot be treated in judicial proceedings as *evidence of facts*. It would be contrary to the Court's judicial function to base findings of fact or law on such political statements in resolutions of political organs.
- 7.116 As regards fact-finding reports by bodies of the United Nations and other bodies, the fact remains that without seeing the original sources on which information in the reports is based, it is not possible to determine that they should be given any meaningful evidential weight. Interviews of claimed eyewitnesses by such bodies may have been cursory. The ICTY in fact published guidance for humanitarian institutions and other agencies operating on the ground during or immediately after an armed conflict, in the following terms:

Much of this information requires careful verification, and should not be unquestioningly relied on to select cases for prosecution. Instead, institutions and agencies should be encouraged to record the details of potential witnesses, including and especially their future contact information, but should be

⁹⁷² The Memorial of The Gambia also relies, for instance, on resolutions of the Organisation of Islamic Cooperation and the European Union Parliament.

⁹⁷³ Thus, even in relation to issues of customary international law, the International Law Commission has noted that "Because the attitude of States towards a given resolution (or a particular rule set forth in a resolution), expressed by vote or otherwise, is often motivated by political or other non-legal considerations, ascertaining acceptance as law (*opinio iuris*) from such resolutions must be done with 'all due caution'": International Law Commission, Draft conclusions on identification of customary international law, with commentaries (2018), *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, p. 108, para. (6), RM, Vol. IV, Annex 122, quoting *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 255, para. 70.

encouraged not to attempt to take comprehensive witness statements. Rather, they should simply record in a general way the statements of potential witnesses based on their own direct experiences, and they should understand that the taking of statements is a professional process that is best left to the criminal justice system and to trained investigators. It is good practice to issue guidelines to outside agencies regarding proper practices.⁹⁷⁴

7.117 Paragraphs 6.17 to 6.19 above apply also to reports and documents of United Nations bodies.

D. Reports by NGOs

7.118 Paragraph 4.63 of the Reply of The Gambia provides no substantive response to, and does not engage with, paragraphs 7.162 to 7.208 of the Counter-Memorial of Myanmar. The lack of any substantive response by The Gambia indicates that it must concede what is stated in the Counter-Memorial in this respect.

7.119 Paragraph 7.116 above applies equally to reports of NGOs. As one publication observes:

Clearly, fact-work in preparation for a legal case is different from fact-work done for the traditional purposes of human rights NGOs. Two full days may be required to draft a courtroom testimony with the level of detail and in the particular form needed by a litigation lawyer. On the other hand, for the purpose of an NGO report, one hour might be sufficient. This difference alone would be enough to indicate the tension that inevitably arises when NGOs consider turning their fact-work into evidence.⁹⁷⁵

This publication quotes an interview of a representative of Amnesty International, who is recorded as stating that “we are trying to get the facts but they’re not facts that have to stand up in a court of law”.⁹⁷⁶

⁹⁷⁴ *ICTY Manual on Developed Practices* (UNICRI Publisher, 2009), p. 16, para. 23, RM, Vol. IV, Annex 114.

⁹⁷⁵ W. Kaleck and C. Tewindt, “Non-Governmental Organisation Fact-Work: Not Only a Technical Problem”, in M. Bergsmo (ed.), *Quality Control in Fact-Finding* (TOAEP 2013), pp. 403-426, at pp. 405-406 (footnote omitted), RM, Vol. II, Annex 40.

⁹⁷⁶ *Ibid.*, p. 403, quoting E. Meldrum, “Time for a Change? The Traditional Human Right NGO Fact Finding Methodology in Relation to National and International Prosecutions of Gross Human Right Violations”, written for MA Oxford, 31 August 2009, p. 36.

7.120 As discussed above, The Gambia now finally confirms that some of the witness interviews referred to in the 2018 Fortify Rights report,⁹⁷⁷ and some of the witness interviews referred to in the joint report by Fortify Rights and the United States Holocaust Memorial Museum,⁹⁷⁸ are the interviews found in the Fortify Rights Document.⁹⁷⁹ It is highly probable that, more generally, reports of various different NGOs are based on interviews of the same people, especially if the NGOs relied on a local organisation or individual to assist in identifying interviewees.⁹⁸⁰ It is impossible to know whether this is the case without knowing the identities of those who were interviewed by these NGOs. It is recalled that the Court must “show particular caution” where multiple items of evidence derive from a single source.⁹⁸¹ It must similarly treat with caution evidentiary materials that *may* emanate from a single source. The Gambia effectively asks the Court to ignore this possibility.

7.121 Paragraphs 6.17 to 6.19 above apply also to reports and documents of NGOs.

E. Reports of official bodies of States and the European Union

7.122 Paragraph 4.64 of the Reply of The Gambia provides no substantive response to, and does not in any way engage with, paragraphs 7.209 to 7.219 of the Counter-Memorial of Myanmar. The lack of any substantive response by The Gambia indicates that it must concede what is stated in the Counter-Memorial in this respect.

7.123 Paragraphs 6.17 to 6.19 above apply also to reports of official bodies of States and the European Union.

F. Media articles

7.124 Paragraphs 4.65 and 4.66 of the Reply of The Gambia provide no substantive response to, and do not in any way engage with, paragraphs 7.220 to 7.230 of the Counter-

⁹⁷⁷ Fortify Rights, *Long Swords*, extracts at MG, Vol. IV, Annex 114, and CMM, Vol. VII, Annex 279.

⁹⁷⁸ Fortify Rights and United States Holocaust Memorial Museum, *They Tried to Kill Us All: Atrocity Crimes against the Rohingya Muslims in Rakhine State, Myanmar*, November 2017, MG, Vol. VII, Annex 192.

⁹⁷⁹ See RG, para. 4.56, last paragraph of the quote from the witness statement of Matthew Smith. See also CMM, paras. 7.203 and 7.215, and this Rejoinder, paragraph 7.90(9) above.

⁹⁸⁰ Compare CMM, paras. 6.60-6.64.

⁹⁸¹ See CMM, para. 5.62, and this Rejoinder, paragraph 5.85 above.

Memorial of Myanmar. These paragraphs of the Counter-Memorial apply correspondingly to the additional media articles cited in the Reply of The Gambia.⁹⁸² The lack of any tenable response by The Gambia indicates that it must concede what is stated in the Counter-Memorial in this respect.

- 7.125 The Reply of The Gambia suggests that there are media reports annexed to Myanmar's pleadings that "contain verbatim admissions from Myanmar government officials or other State actors".⁹⁸³ Crucially, however, The Gambia does not identify any such media reports.⁹⁸⁴
- 7.126 The Gambia argues that the media articles on which it relies should be given evidential weight because they corroborate the FFM reports.⁹⁸⁵ This argumentation should be rejected for the reasons given in paragraphs 7.17, 7.42 and 7.43 above.
- 7.127 Paragraphs 6.17 to 6.19 above apply also to media articles.

G. Material incorrectly claimed not to have been challenged

1. General

- 7.128 The Gambia erroneously claims that the Counter-Memorial of Myanmar does not directly attack three items or categories of material annexed to the Memorial of The Gambia.⁹⁸⁶
- 7.129 Chapter 7 of the Counter-Memorial states that it is not practicable for Myanmar to address the evidential deficiencies of every single individual item of material relied on by The Gambia, and that Chapter 7 of the Counter-Memorial is therefore confined to dealing with the evidential deficiencies of each of the documents cited as evidence in Chapters 8 and 9 of The Gambia's Memorial.⁹⁸⁷ The Counter-Memorial of

⁹⁸² Contrary to Article 50 of the Rules of Court, most of these media articles cited in the Reply of The Gambia are not annexed to its Reply.

⁹⁸³ RG, para. 4.66.

⁹⁸⁴ See further paragraphs 7.133-7.135 below.

⁹⁸⁵ RG, para. 4.65.

⁹⁸⁶ RG, paras. 4.68-4.71.

⁹⁸⁷ CMM, para. 7.2.

Myanmar also expressly notes that the points made in Chapter 7 of the Counter-Memorial apply equally to other documents annexed to the Memorial of The Gambia.⁹⁸⁸

- 7.130 To be clear: the fact that any specific item of evidence relied on in the Memorial or the Reply of The Gambia is not expressly challenged in Chapter 7 of the Counter-Memorial or in this chapter of this Rejoinder of Myanmar does not mean that Myanmar does not challenge it or that it is accepted.
- 7.131 In fact, the evidence that The Gambia says is not directly challenged by Myanmar was not relied on by The Gambia in Chapters 8 and 9 of its Memorial. It is for this reason that this material is not addressed in Chapter 7 of the Counter-Memorial.
- 7.132 As has been emphasised by Myanmar,⁹⁸⁹ annexes to a pleading are relevant in the proceedings only to the extent that they are relied on as evidence of the claims made in the text of the pleading. A respondent cannot be expected to respond to each and every statement contained in a document annexed to a pleading of the other party, whether or not the specific statement is referred to in the body of the pleading itself. The Gambia cannot now rely on the annexes to its Memorial and Reply as evidence of any additional facts that have not been asserted in the text of the Memorial or Reply. It would be impossible for a party to respond to every matter contained in every annex to a pleading of the other party, regardless of whether or not that matter is referred to in the text of the pleading itself. It would also be absurd to require a party to do so, as pleadings would become impossibly vast if it did so. More fundamentally, as a matter of proper and fair pleading, it is for the party relying on the material to explain what it takes from it and why. It is not for the other party to speculate as to the material's purported significance.

2. Statements and documents of Myanmar

- 7.133 The Gambia asserts that it has annexed to its pleadings “dozens of documents, statements, reports, publications, laws, and policies of Myanmar and of Myanmar

⁹⁸⁸ CMM, para. 7.2 footnote 773. Chapters 8 and 9 of the Memorial deal with the acts alleged to have been committed during the counter-terrorism operations that are claimed to be acts of genocide.

⁹⁸⁹ CMM, paras. 1.30-1.32.

officials”, and that these should be treated as admissions or statements against interest by Myanmar.⁹⁹⁰ However, The Gambia fails to identify which particular statements in which particular documents are said by The Gambia to amount to such admissions or statements against interest. Accordingly, this assertion is not properly particularised by The Gambia and must be dismissed.

7.134 In its Counter-Memorial, Myanmar has expressly accepted the accuracy of some statements or documents emanating from Myanmar.⁹⁹¹ In relation to others, Myanmar has for instance disputed that the document or statement was issued or made by an official of Myanmar,⁹⁹² or has disputed that the document or statement bears the meaning that The Gambia seeks to attribute to it.⁹⁹³

7.135 To the extent that The Gambia may be seeking to suggest that every document issued or statement made by an official of Myanmar must be interpreted as having the meaning that The Gambia seeks to attribute to it, on the ground that it is an admission or a statement against interest by Myanmar,⁹⁹⁴ that suggestion is clearly absurd and must be rejected.

3. Satellite imagery and analysis

7.136 The Gambia incorrectly claims that the Counter-Memorial of Myanmar does not directly attack the satellite imagery and analysis relied on by The Gambia.⁹⁹⁵ This evidence and analysis are dealt with in paragraphs 8.66, 9.277, and 13.202 to 13.208 of the Counter-Memorial of Myanmar, and at paragraphs 13.163 to 13.174 below.

⁹⁹⁰ RG, para. 4.69.

⁹⁹¹ See, for instance, CMM, para. 10.120 footnote 1798 (accepting the correctness of Regional Order 1/2005 annexed to the Memorial of The Gambia) and para. 10.146 footnotes 1852 to 1856 (accepting the correctness of the Myanmar language versions of the four “Race and Religion Protection Laws” annexed to the Memorial of The Gambia).

⁹⁹² See, for instance, CMM, paras. 11.64, 11.67, 11.93, 11.94, 11.99, 11.109, and 11.132-11.134.

⁹⁹³ For just a few of very many examples, see CMM, paras. 11.143-11.161.

⁹⁹⁴ RG, para. 4.69.

⁹⁹⁵ RG, para. 4.70.

4. Video interviews taken by the Shoah Foundation

- 7.137 The Gambia continues to misrepresent Myanmar’s position by contending that the Counter-Memorial of Myanmar does not directly attack the interviews of two purported eyewitnesses that were taken by the University of Southern California’s Shoah Foundation.⁹⁹⁶
- 7.138 The Memorial of The Gambia refers to these two interviews in a single footnote.⁹⁹⁷ Statements made during these two interviews are relied on by The Gambia solely in support of the claim that “Myanmar has destroyed, buried and disposed of the remains of many of the Rohingya victims”.⁹⁹⁸ The Reply of The Gambia does not suggest it relies on these interviews as evidence of any other claimed fact.⁹⁹⁹
- 7.139 As noted in the Counter-Memorial,¹⁰⁰⁰ the criticisms made in Chapter 7 of the Counter-Memorial of other witness accounts relied upon by The Gambia apply equally to these interviews. It is not known, for instance, what the circumstances were in which these interviews were taken, how the interviewees were selected, what the qualifications of the interviewer and the interpreter were, and who else was present during the interview.¹⁰⁰¹ These were not interviews taken by professional investigators for use in judicial proceedings. Accordingly, they cannot be given evidential weight.
- 7.140 The content of these witness statements is further considered in paragraphs 8.89 to 8.95, and 8.146 to 8.148, below.

H. New material annexed to the Reply of The Gambia

1. Additional witness statements taken by Legal Action Worldwide

- 7.141 A further 11 witness statements taken by LAW have now been added as Annexes 44-47, 61-62, 64-66 and 68-69 to the Reply of The Gambia. The points made in

⁹⁹⁶ RG, para. 4.71, referring to MG, Vol. V, Annexes 137 and 138.

⁹⁹⁷ MG, para. 11.41 footnote 1422.

⁹⁹⁸ MG, para. 11.41 footnote 1422 and accompanying text.

⁹⁹⁹ See RG, para. 8.33 footnote 1002 and accompanying text.

¹⁰⁰⁰ CMM, para. 7.2 footnote 773.

¹⁰⁰¹ It is clear for instance that someone else was present during at least a part of one interview, since that person is recorded as interrupting the interview: see MG, Vol. V, Annex 137, nos. 66 to 72.

paragraphs 7.66 to 7.81 of the Counter-Memorial of Myanmar and in paragraph 7.72 to 7.83 above apply equally to these new witness statements. Additional issues and flaws with this material are also dealt with in Chapters 8 and 9 below.

2. Material from the IIMM

a. General

- 7.142 The Reply of The Gambia annexes additional material obtained from the IIMM. The Gambia's arguments as to its evidential value are found at paragraphs 4.73 to 4.79 of its Reply.
- 7.143 Myanmar's position on the IIMM material generally is set out at paragraphs 6.5 and 6.6 above.
- 7.144 The additional IIMM material relied on by The Gambia consists of 12 witness statements¹⁰⁰² (as to which see paragraphs 7.145 to 7.150 below) and five analytical reports prepared by the IIMM¹⁰⁰³ (as to which see paragraphs 7.151 to 7.154 below).

b. The IIMM witness statements

- 7.145 As regards the witness statements taken by the IIMM,¹⁰⁰⁴ for the reasons given in paragraphs 7.44 to 7.63 above, these should be excluded from the case file, and should not be considered by the Court.¹⁰⁰⁵ Without prejudice to this position, Myanmar's alternative submission is that even if these are at least intended to be better evidence than the FFM reports,¹⁰⁰⁶ no evidential weight can be given to them.

¹⁰⁰² RG, Vol. IV, Annexes 48-51 and 53-60.

¹⁰⁰³ RG, Vol. II, Annexes 5, 7, 8, 9 and 10. Another Annex to the Reply, Francis Wade, "IIMM Rohingya Report" (January 2022), RG, Vol. II, Annex 4, is not an analytical report prepared by the IIMM, but the work of a journalist. The Gambia relies on this document solely in relation to the claim that "The Rohingya ... are 'overwhelmingly' Muslim" (RG, para. 2.12 footnote 43), and for its references to the work of Francis Buchanan (RG, para. 2.11 footnote 37), dealt with in CMM paras. 2.24, 2.107-2.172, and Chapter 2 above of this Rejoinder.

¹⁰⁰⁴ RG, Volume IV, Annexes 48, 49, 50, 51, 53, 54, 56, 57, 59, 60.

¹⁰⁰⁵ See paragraphs 7.50-7.51 above.

¹⁰⁰⁶ See paragraph 6.15 above.

- 7.146 First, the identities of the witnesses have been redacted by the IIMM, and at present it appears that even The Gambia does not know their identities.¹⁰⁰⁷ No weight can be given to wholly anonymous witness statements, especially in a case such as the present where a very high standard of proof applies.¹⁰⁰⁸
- 7.147 Secondly, the witnesses have not (yet) been made available for cross-examination, and their witness statements are at present untested evidence, as is the case for the entirety of The Gambia’s testimonial evidence.¹⁰⁰⁹ Various of the people giving witness statements to the IIMM have given earlier inconsistent statements to other organisations.¹⁰¹⁰ Myanmar reserves its right to cross-examine all witnesses upon whose evidence The Gambia relies.
- 7.148 Thirdly, some of these witness statements cannot in any event be given evidential weight in relation to the specific matters for which The Gambia relies on them as evidence. For instance, Witness Statement No. IIMM0001557475¹⁰¹¹ is referred to three times in the Reply of The Gambia. In the first and second references, reliance is placed on it for an expression of opinion,¹⁰¹² and it can be given no evidential weight for this purpose.¹⁰¹³ In the second and third references, the statement is also relied on as evidence for a claim that Myanmar revoked the travel and activity permissions of all humanitarian agencies “only a few weeks before the August 2017 violence”.¹⁰¹⁴ In fact, the only first-hand evidence in this respect is that the person giving this statement says that his travel authorisation and that of the field coordinator of Action Contre la Faim (ACF) were revoked, with the result that ACF’s “OTPs in the villages essentially could not operate”.¹⁰¹⁵ The further statement that other agencies were affected appears

¹⁰⁰⁷ In the event that the IIMM were to provide unredacted versions to the Court alone, the Court could not receive them: see paragraphs 7.50 and 7.51(2) above.

¹⁰⁰⁸ CMM, especially paras. 5.29-5.30, 5.40(2), 7.47, 13.40, 13.41, 13.139, and 13.140, and see this Rejoinder, paragraphs 7.15, 7.16-7.23, and 7.35-7.38 above.

¹⁰⁰⁹ CMM, especially paras. 5.27 and 16.15.

¹⁰¹⁰ See paragraphs 7.24-7.32 above.

¹⁰¹¹ IIMM, Witness Statement No. IIMM0001557475 (Andrew Riley), RG, Vol. IV, Annex 48.

¹⁰¹² RG, para. 5.54.

¹⁰¹³ See especially CMM, para. 5.31.

¹⁰¹⁴ RG, paras. 5.65 and 7.28 footnote 644.

¹⁰¹⁵ Witness Statement No. IIMM0001557475 (Andrew Riley), para. 96, RG, Vol. IV, Annex 48.

to be hearsay,¹⁰¹⁶ to which no evidential weight can be attached.¹⁰¹⁷ Myanmar's position in this respect is set out in its Counter-Memorial.¹⁰¹⁸

7.149 Furthermore, even if evidential weight could be given to these witness statements in principle, this would not mean that evidential weight could, or should, be given to every individual statement of fact found in these witness statements.

7.150 The content of these witness statements is further considered in paragraphs in Chapters 8 and 9 below.

c. The IIMM analytical reports

7.151 No significant evidential weight can be given to the five IIMM analytical reports relied on by The Gambia,¹⁰¹⁹ especially in a case such as the present where the very high standard of proof applies.

7.152 These analytical reports consist of descriptions and summaries of evidence said to be held by the IIMM, and set out the IIMM's own analysis of this material, and the IIMM's own conclusions based on this material.

7.153 These analytical reports are not the "best evidence" of the facts stated in them.¹⁰²⁰ The primary material on which the reports are based is obviously higher evidence than the reports themselves. The reports themselves are merely second-hand descriptions of that evidence, accompanied by analysis, expression of opinion and conclusions. To the extent that the reports contain analysis, expression of opinion and conclusions of the IIMM, they are not evidence of facts, and no evidential weight should be attached to them. The arguments in paragraphs 5.40 to 5.61 of the Counter-Memorial of Myanmar apply correspondingly to these analytical reports of the IIMM.

¹⁰¹⁶ *Ibid.*: "ACF's field coordinator informed me of this decision ...".

¹⁰¹⁷ CMM, especially paras. 5.33-5.34.

¹⁰¹⁸ CMM, para. 7.205 footnote 1013, and paras. 10.236-10.241.

¹⁰¹⁹ RG, Vol. II, Annexes 5, 7, 8, 9 and 10.

¹⁰²⁰ See paragraph 5.88 above on the "best evidence rule".

7.154 In any event, the Reply of The Gambia ultimately places limited reliance on these reports. It contains only five references to the IIMM *Hate Speech Report*,¹⁰²¹ two of which¹⁰²² deal only with the methodology adopted by the IIMM. Another report of the IIMM is relied on in only a single paragraph of the Reply,¹⁰²³ while the other two reports of the IIMM are relied on in only two paragraphs of the Reply.¹⁰²⁴ The IIMM *Gender Based Crimes Report* is cited in 10 footnotes of the Reply.¹⁰²⁵

3. Video of interview with Nazmul Islam

7.155 The Reply of The Gambia annexes a video recording and transcript of an interview given by Nazmul Islam, a claimed former Tatmadaw soldier, to Jason Motlagh, a journalist.¹⁰²⁶

7.156 The Memorial of The Gambia does not rely on any witness account given by Nazmul Islam. Rather, it relies on an article written by Mr Motlagh and published in *Rolling Stone* magazine,¹⁰²⁷ which used an interview with Nazmul Islam as one of its sources of information. The Memorial of The Gambia also relies on another article, written by the journalist Poppy McPherson and published in *The Guardian* newspaper,¹⁰²⁸ which was based in part on a separate interview conducted by that journalist with Nazmul Islam.

¹⁰²¹ United Nations Independent Investigative Mechanism for Myanmar, *Anti-Rohingya Hate Speech on Facebook: Content and Network Analysis* (2023) (“**IIMM Hate Speech Report**”), RG, Vol. II, Annex 5.

¹⁰²² RG, footnotes 478-479.

¹⁰²³ RG, para. 5.30, referring to United Nations Independent Investigative Mechanism for Myanmar, *Analysis of the Myanmar Government’s Encouragement of Resettlement by Buddhists from Bangladesh to Rakhine State*, 22 March 2024, para. 3, RG, Vol. II, Annex 7.

¹⁰²⁴ (1) RG, paras. 7.16 and 9.41, referring to United Nations Independent Investigative Mechanism for Myanmar, *Evidence of ARSA Weapons Possession and Use*, 29 April 2024, para. 35, RG, Vol. II, Annex 9. (2) RG, paras. 7.87 and 9.70, referring to United Nations Independent Investigative Mechanism for Myanmar, *Evidence Related to Detention of Rohingya in Buthidaung Prison and Other Locations*, 15 May 2024, RG, Vol. II, Annex 10.

¹⁰²⁵ RG, footnotes 925, 927, 937, 975, 983, 987, 988, 991, 993, and 994.

¹⁰²⁶ RG, para. 4.79, referring to interview of Nazmul Islam, RG, Vol. III, Annex 41.

¹⁰²⁷ J. Motlagh, “The Survivors of the Rohingya Genocide: An investigation into Myanmar’s state-orchestrated murder of thousands of Rohingya Muslims—and the second tragedy unfolding in the refugee camps”, *Rolling Stone*, 9 August 2018, MG, Vol. IX, Annex 286. See CMM, para. 7.226.

¹⁰²⁸ P. McPherson, “Witness to a massacre: the former Myanmar soldier who saw his village burn”, *The Guardian*, 5 February 2018, MG, Vol. IX, Annex 278. See CMM, para. 7.225.

- 7.157 The Reply of The Gambia appears to place no reliance on this interview with Nazmul Islam, other than in order to rebut the criticisms made in the Counter-Memorial about the evidential deficiencies of the media articles by Mr Motlagh and Ms McPherson, to the extent that they are based on information obtained by those journalists directly from Nazmul Islam.¹⁰²⁹
- 7.158 The criticisms of these two media articles thus remains unchanged, to the extent that they are based on information obtained from sources other than Nazmul Islam.
- 7.159 The article by Mr Motlagh is in fact cited in the Memorial *only* in relation to statements in that article that are based on information provided to Mr Motlagh by persons other than Nazmul Islam.¹⁰³⁰ This interview with Nazmul Islam that The Gambia has now produced therefore does not affect the criticisms in the Counter-Memorial of Myanmar of the article by Mr Motlagh.
- 7.160 The article by Ms McPherson is cited in the Memorial only twice. First, it is cited as claimed evidence of the statement that “The Tatmadaw systematically killed children”.¹⁰³¹ However, the article does not as such state that, and The Gambia does not indicate which specific words in the article are said to support that claim. Secondly, the article is cited for certain information provided by Nazmul Islam in relation to events in Min Gyi (Tula Toli).¹⁰³²
- 7.161 Given that no video recording or transcript of Ms McPherson’s interview of Nazmul Islam is available, the criticisms of her article remains unchanged, both generally, and in particular to the extent that it is based on any information obtained from Nazmul Islam that goes beyond the information that he gave in the interview with Mr Motlagh.
- 7.162 The evidential weight and content of this interview of Nazmul Islam is further considered in paragraphs 8.81 to 8.88 below. Its quality is extremely poor, and it is

¹⁰²⁹ The Reply of The Gambia appears to refer to the interview with Nazmul Islam for this purpose only in RG, paras. 4.38, 4.79, and 7.10 footnote 558.

¹⁰³⁰ See MG, para. 8.86 footnote 845, para. 8.92 footnote 859, para. 8.57 footnote 1082. The reference to this article in MG, para. 8.88 footnote 848 appears to be a mistake, since the footnote gives a reference to a quote that is from a FFM report, and not from Mr Motlagh’s article.

¹⁰³¹ MG, para. 8.91 footnote 854.

¹⁰³² MG, para. 7.75.

apparent that he could not in fact have been a first-hand observer to much of what is reported in his name.

- 7.163 In any event, it remains the case that the interviews conducted by Mr Motlagh and Ms McPherson were conducted by journalists for purposes of a media article, and not by forensic investigators for use in judicial proceedings. The qualifications of the interpreters are not known. Nazmul Islam reportedly has now passed away in Bangladesh and is not available to be questioned further about what he said.¹⁰³³

4. Second report of Professor Newton

- 7.164 The Memorial of The Gambia annexes an expert report of Professor Michael A. Newton.¹⁰³⁴ This is dealt with in paragraphs 13.218 to 13.222 of the Counter-Memorial of Myanmar.
- 7.165 The Reply of The Gambia annexes a second expert report of Professor Newton.¹⁰³⁵ This is dealt with in paragraphs 13.175 to 13.180 below.

I. Conclusion

- 7.166 Nothing in the Reply of The Gambia alters the conclusion in Chapter 7 of the Counter-Memorial of Myanmar. The material relied on by The Gambia is not capable of proving the facts necessary to establish all of the elements of the claimed violations of the Genocide Convention, to the very high standard of proof that applies in cases of this kind.

¹⁰³³ Statement of Jason Motlagh, para. 9, RG, vol. IV, Annex 70.

¹⁰³⁴ Expert report of Professor Michael A. Newton, MG, Vol. XI, Annex 359.

¹⁰³⁵ Second expert report of Professor Michael A. Newton, RG, Vol. IV, Annex 67.

CHAPTER 8

THE MAIN LOCATIONS

A. Introduction

- 8.1 This Chapter and the next Chapter of this Rejoinder respond to Section III of Chapter 7 of The Gambia's Reply, entitled "The Execution of the 'Clearance Operations' Was Characterized by Extreme Brutality, Massive and Indiscriminate Killing and Destruction, and Pervasive Sexual Violence".¹⁰³⁶
- 8.2 Myanmar categorically denies this allegation. As Myanmar has demonstrated in its Counter-Memorial and in this Rejoinder, this allegation is based overwhelmingly on evidence that is either unreliable and/or not creditworthy, and The Gambia's analysis of this evidence is furthermore selective and misleading.
- 8.3 It is accepted by both parties that operations were conducted by the Myanmar Defence Services in northern Rakhine State in 2016 and 2017.
- 8.4 The Memorial of The Gambia says that these operations took place in 2016-2018. It refers to them as "clearance operations", consistently placing that expression in quotation marks, without explaining the intended meaning of the quotation marks. The Gambia's Memorial contains virtually no reference to ARSA or to its activities in the area at the material time, thereby conveying the misleading impression that the operations of the Myanmar Defence Services occurred over a prolonged and sustained period from "2016-2018", and were unprovoked and wanton attacks against peaceful villages.
- 8.5 The Counter-Memorial of Myanmar corrects these misleading impressions, explaining as follows. The operations of the Myanmar Defence Services were counter-terrorism operations, that were a response to coordinated simultaneous deadly attacks carried out by ARSA in the region, particularly on or about 9 October 2016, 11 November 2016, and 24-25 August 2017. The operations occurred only in the periods

¹⁰³⁶ Myanmar's response to Section I and Section II of Chapter 7 of The Gambia's Reply is contained in Chapter 3 of this Rejoinder.

from 9 October 2016 to 1 February 2017, and from 25 August 2017 until 5 September 2017.¹⁰³⁷ In fact, almost all of these operations occurred in the few days immediately following each of the three main series of ARSA attacks commencing on 9 October 2016, 11 November 2016, and 24-25 August 2017.

- 8.6 The Reply of The Gambia does not dispute the presence of ARSA in the area at the time.¹⁰³⁸ Although The Gambia does not admit that attacks were carried out by ARSA in the region, particularly on 9 October 2016, 11 November 2016, and 24-25 August 2017, it does not seek to dispute this.¹⁰³⁹ It does not seek to dispute that the operations of the Myanmar Defence Services occurred only in the periods from 9 October 2016 to 1 February 2017, and from 25 August 2017 until 5 September 2017, and that almost all of the operations occurred in the few days immediately following 9 October 2016, 11 November 2016, and 24-25 August 2017. However, the Reply of The Gambia now claims that the ARSA attacks were merely used as a “pretext” to conduct operations “that resulted in the indiscriminate killing, extreme brutality, and sexual violence against the civilian population”.¹⁰⁴⁰
- 8.7 The crux of The Gambia’s case is that the operations were conducted in a very large number of villages throughout northern Rakhine State, and that in all of these villages they followed the same “consistent pattern of conduct”,¹⁰⁴¹ and had the same “*modus*

¹⁰³⁷ CMM, para. 1.14 contains an erratum, in that it states that “the counter-terrorism operations in fact occurred only in the periods from 9 October 2016 to 1 February 2017, and from 25 August 2017 until 25 October 2017”. That paragraph should state “the counter-terrorism operations in fact occurred only in the periods from 9 October 2016 to 1 February 2017, and from 25 August 2017 until 5 September 2017”: see CMM, paras. 3.87, 9.197, 13.105, 13.107 and 13.201, and this Rejoinder, paragraphs 3.103, 13.107, 13.108, 13.120, 13.132, 13.163 and 13.172 above.

¹⁰³⁸ The Reply deploys the word “allegedly” with respect to the presence of ARSA terrorists in specific locations. However, The Gambia does not deny that ARSA was in fact present in each of those locations. In reality, and in the face of incontrovertible and uncontroverted evidence, including from some of its own witnesses, The Gambia *cannot* now sensibly deny that this was the case. Moreover, the available evidence demonstrates that ARSA was not simply present in each location, often in large numbers, but was also highly active and, in a number of instances, lethally so.

¹⁰³⁹ See RG, paras. 7.67 (“alleged ARSA attacks”); 9.44 (“Even assuming that there were ARSA attacks in and around certain Rohingya villages ...”).

¹⁰⁴⁰ RG, para. 7.76.

¹⁰⁴¹ **Memorial of The Gambia:** MG, paras. 5.6 (“The genocide of the Rohingya followed this pattern”); 8.33 (“The UN Fact-Finding Mission likewise ‘verified a pattern ...’”); 8.79 (“the evidence shows a consistent pattern of conduct”); 9.2 (“a pattern of widespread human rights violations”), 9.3 (“almost every woman and girl I spoke with described patterns”), 9.4 (“the pattern of persecution and collective punishment”); 9.6 (“occurrences and patterns”); 10.2 (“the operations exhibited a ‘consistent pattern of conduct ...’”); 10.53 (“‘clearance operations’ ... followed a strikingly similar pattern”); 10.55 (“victims and witnesses from across the three townships and many village tracts described the same patterns of conduct”); 10.63

operandi”,¹⁰⁴² involving the same acts of brutality.¹⁰⁴³ In particular, this claimed “consistent pattern of conduct” is relied on by The Gambia as the basis for inferring the existence of a genocidal intent.¹⁰⁴⁴ If The Gambia cannot prove this claimed “consistent pattern of conduct”, little if anything remains of its case.

- 8.8 The Memorial of The Gambia originally contended that this “consistent pattern of conduct”, involved “mass executions”, gang rapes and sexual mutilations, and systematic burning of villages, and that this “consistent pattern of conduct” was repeated in *hundreds* of villages across northern Rakhine State.¹⁰⁴⁵

(“Other Tatmadaw units followed the same pattern in Rohingya villages throughout northern Rakhine State”); 10.68 footnote 1301 (“The same pattern occurred throughout northern Rakhine State”); 12.69 (“The UN Fact-Finding Mission identified as a ‘notable pattern’”); 12.88 (“The pattern was repeated all across Rakhine State”); 12.91 (“the inference of genocidal intent, from the State’s pattern of conduct”); 12.104 (“a pattern of conduct that infers genocidal intent”). **Reply of The Gambia:** RG, paras. 7.12 (“the systematic pattern of indiscriminate killing ..., the extreme brutality ..., pervasive sexual violence ..., and the burning of homes ... and villages”); 7.43 (“a pattern of widespread human rights violations”); 7.48 (“the same pattern of conduct—the same *modus operandi*—of the ‘clearance operations’ in villages throughout northern Rakhine State”); 7.50 (“a methodical pattern”); 7.53 (“Myanmar’s attacks on the Rohingya civilian population followed the same pattern and included the same *modus operandi*”); 9.10 (“the pattern of the ‘clearance operations’ indicates that ...”); 9.57 (“The evidence thus clearly establishes the existence of a consistent *pattern*”); 9.84 (“Myanmar’s pattern of conduct in conducting the ‘clearance operations’”).

¹⁰⁴² **Memorial of The Gambia:** MG, paras. 10.2 (“the ‘clearance operations’ ... carried out in hundreds of villages ... had a common *modus operandi*”); 10.53 (“The common *modus operandi*”); 10.55 (“the attackers employed a consistent *modus operandi*”, “The *modus operandi* of these attacks was recognisable and consistent throughout”); 10.62 (“the same *modus operandi*”); 12.78 (“the consistent *modus operandi*”); 12.82 (“the perpetrators employed a consistent *modus operandi* across multiple attacks”); 12.87 (“‘clearance operations’ ... carried ... out by strikingly similar means across hundreds of Rohingya villages throughout northern Rakhine state”, “The common *modus operandi*”); 12.89 (“The *modus operandi* of these attacks was recognisable and consistent”). **Reply of The Gambia:** RG, paras. 3.20 (“A common *modus operandi*”); 7.48 (“the same pattern of conduct—the same *modus operandi*—of the ‘clearance operations’ in villages throughout northern Rakhine State”); 7.51 (“the same *modus operandi*”); 7.53 (“Myanmar’s attacks on the Rohingya civilian population followed the same pattern and included the same *modus operandi*”); 7.113 (“The same *modus operandi*”); 9.53 (“the *modus operandi* was generally the same ...”, “The *modus operandi* of these attacks was recognisable and consistent throughout”).

¹⁰⁴³ The alleged “pattern” or “*modus operandi*” said by The Gambia to have been followed is set out in MG, paras. 10.53-10.54 and 12.87.

¹⁰⁴⁴ See, in particular, MG, paras. 12.82, 12.88 (“The existence of a plan of destruction can also be proved through evidence that the perpetrators employed a consistent *modus operandi* across multiple attacks”, “The pattern was repeated all across Rakhine State. Different military units, separated by considerable distances, employed the same tactics”). RG, paras. 9.10 (“the pattern of the ‘clearance operations’ indicates that they were targeted directly at the civilian population of Rohingya villages, rather than in hot pursuit of alleged ARSA attackers”), 9.25 (“The Gambia has proven the *mens rea* of genocide—an intention to destroy the Rohingya as a group in whole or in part—by direct evidence and by a pattern of conduct from which the only reasonable inference is an intention to commit genocide”). In fact, The Gambia does not provide any *direct* evidence of a genocidal intent.

¹⁰⁴⁵ MG, para. 1.53 (“Such acts, committed by different Tatmadaw units in hundreds of Rohingya villages”); 10.53 (“The Tatmadaw carried out its ‘clearance operations’ in hundreds of Rohingya villages. They followed a strikingly similar pattern”); 12.87 (“The organized nature of the ‘clearance operations’ is further

- 8.9 However, as the Counter-Memorial of Myanmar points out, the evidence relied on by The Gambia in its Memorial only relates to acts of violence said to have been committed by members of the Myanmar Defence Services in 40 locations.
- 8.10 The Counter-Memorial of Myanmar further points out the following. The Memorial of The Gambia focuses on the events in three specific villages, Min Gyi, Chut Pyin and Maung Nu, which are apparently the three places where The Gambia considers that it can cite significant evidence of alleged violent acts. The Memorial of The Gambia otherwise contains only generalised descriptions of the kinds of acts alleged to have been committed during the operations as a whole. The Gambia thereby seeks to convey the misleading impression that events in Min Gyi, Chut Pyin and Maung Nu were typical examples of what happened also in hundreds of other villages in northern Rakhine State.
- 8.11 The Counter-Memorial of Myanmar then undertakes a location-by-location analysis of the evidence relating to each of the 40 locations to which the evidence relied on in the Memorial of The Gambia refers. Chapter 8 of the Counter-Memorial addresses the evidence relating to the three main locations of Min Gyi, Chut Pyin and Maung Nu, and Chapter 9 addresses the evidence relating to the remaining 37 locations. That analysis demonstrates that the counter-terrorism operations took place in locations proximate to places where there were attacks and activity by ARSA and its supporters, and that while the loss of life is alleged to be relatively large in the three main locations, Min Gyi, Chut Pyin and Maung Nu, in other villages the alleged violence was significantly less or non-existent.¹⁰⁴⁶ In short, the evidence does not support The Gambia's claim that there was a "consistent pattern of conduct" involving the kinds of acts alleged by The Gambia in large numbers of villages across the whole of northern Rakhine State.
- 8.12 In its Reply, The Gambia appears to accept that the question whether there was a "consistent pattern of conduct" must be determined by means of a village-by-village analysis. However, The Gambia nonetheless maintains that "when the Tatmadaw's actions are examined on a village-by-village basis", it becomes apparent that there

highlighted by the fact that the Tatmadaw carried them out by strikingly similar means across hundreds of Rohingya villages throughout northern Rakhine state").

¹⁰⁴⁶ CMM, para. 9.306.

was indeed “the same pattern of conduct—the same *modus operandi*—of the ‘clearance operations’ in villages throughout northern Rakhine State”.¹⁰⁴⁷

- 8.13 Yet despite making this bold claim, the Reply of The Gambia, without any hint of irony, then proceeds to set out a village-by-village analysis that includes only 10 of the 40 locations dealt with in the Counter-Memorial of Myanmar,¹⁰⁴⁸ and three additional new locations that were not previously mentioned in the Memorial or the Counter-Memorial.¹⁰⁴⁹ The Gambia thus suggests that it can establish a “consistent pattern of conduct” by means of a “village-by-village” analysis that deliberately excludes analysis of 75% of the locations dealt with in the Counter-Memorial of Myanmar. Even in relation to the 13 locations that are considered in its Reply, The Gambia acknowledges that not all locations experienced events of the kind that are alleged to have occurred in Min Gyi, Chut Pyin and Maung Nu. The Reply simply says, again without any hint of irony, that in order to establish a “pattern of conduct”, The Gambia is “not required to show that the same level of brutality and killing took place in each of the 37 villages discussed in Chapter 9 of Myanmar’s Counter-Memorial”.¹⁰⁵⁰ The Gambia thereby suggests that it can establish a “pattern of conduct” even in the absence of any pattern. These suggestions obviously cannot be seriously entertained.
- 8.14 The Reply of The Gambia thus now resiles from the claim made in its Memorial that a “consistent pattern of conduct” involving “mass executions” and sexual violence occurred in *hundreds* of villages. The fact that The Gambia deals with only 13 out of 43 locations in its “village-by-village” analysis¹⁰⁵¹ must be taken to indicate that it now accepts that there is no evidence of significant acts of violence in any other

¹⁰⁴⁷ RG, para. 7.48.

¹⁰⁴⁸ RG, paras. 7.50-7.51 and 7.54-7.147, dealing with the evidence in relation to the following locations that were considered in the Counter-Memorial: (1) Naung Dar Khar Li, (2) Min Gyi, (3) Kyauk Pan Du, (4) Chut Pyin, (5) Myin Hlut, (6) Maung Nu, (7) Ah Lel Than Kyaw, (8) Gu Dar Pyin, (9) Inn Din, and (10) Koe Tan Kauk/Chein Khar Li.

¹⁰⁴⁹ RG, paras. 7.49-7.52, dealing with the evidence in relation to the following locations which were not previously considered in the Memorial or Counter-Memorial: (1) Kar Lar Day Hpet, (2) Tha Pyay Taw, and (3) Pan Be Chaung.

¹⁰⁵⁰ RG, para. 9.57. See also RG, paras. 7.48 footnote 687, 9.18 and 9.54.

¹⁰⁵¹ The 13 locations dealt with in the Reply of The Gambia are those referred to in footnotes 1048 and 1049 above. The total 43 locations are the 40 locations dealt with in the Counter-Memorial of Myanmar plus the additional 3 locations referred to in footnote 1049 above.

villages. As of August 2017 there were 897 villages and 35 wards in northern Rakhine State¹⁰⁵² (a total of 932 locations), of which 465 villages and 13 wards (a total of 478 locations) were entirely inhabited by Bengalis, and 13 villages and 18 wards (a total of 31 locations) were partially inhabited by Bengalis.¹⁰⁵³ There were thus 509 locations in northern Rakhine State that were wholly or partly inhabited by Bengalis. The Gambia must thus be taken to accept that the “consistent pattern of violence” alleged to have occurred across the whole of northern Rakhine State in fact allegedly affected only *less than three percent* of the locations in northern Rakhine State inhabited by Bengalis (13 out of 509 locations). Thus, even if The Gambia could establish some consistent “pattern of conduct” in these 13 locations (*quod non*), there is no sense in which it could be said that this pattern of conduct spans the whole of northern Rakhine State, much less that it was directed against the Bengali Muslim population as such.¹⁰⁵⁴

- 8.15 In any event, as is demonstrated in the Counter-Memorial of Myanmar, and is further demonstrated below, even in relation to the 13 locations dealt with in the Reply of The Gambia, the evidence does not show any “consistent pattern of conduct” involving mass executions and pervasive sexual violence in these locations, as alleged by The Gambia.
- 8.16 The Gambia’s claims about “hundreds of villages” being targeted in the counter-terrorism operations of “2016-2018” now appear to be a reference solely to its claim that hundreds of Bengali villages have been destroyed or damaged by fire.¹⁰⁵⁵ The

¹⁰⁵² See Myanmar, Ministry of Immigration and Population, List of population in all the administrative villages and villages tracts of Maungdaw Township, Buthidaung Township, Rathedaung Township, information provided for: Before 2017 ARSA Attack, and 30 June 2023, p. A21, No. 55, CMM, Vol. IX, Annex 465. Villages are administrative sub-divisions of village tracts (in rural areas). Wards are administrative sub-divisions of towns (in urban areas). Towns and village tracts in turn are the administrative sub-divisions of townships. It should be noted that “northern Rakhine State” is not an expression used officially in Myanmar, and that it simply means the northern part of Rakhine State. Here, it is used to mean Maungdaw Township, Buthidaung Township and Rathedaung Township.

¹⁰⁵³ See The List of Population of the Communities residing in Wards/ Villages in Northern Rakhine State before 2017 ARSA Attack sent by the Ministry of Immigration and Population, RM, Vol. III, Annex 79.

¹⁰⁵⁴ Even if, in relation to some of these locations, it were alleged that the violence occurred in more than one village, the total number of villages in which violence is said to have occurred would still be a similarly small percentage of the 509 locations in northern Rakhine State inhabited by Bengalis.

¹⁰⁵⁵ RG, para. 1.4 (“Hundreds of villages were targeted by the ‘clearance operations’ and were burned down”), 1.8 (“the complete or partial destruction of hundreds of Rohingya villages”), 9.4 (“a conflagration across hundreds of villages in which tens of thousands of homes and other structures are systematically burned”).

Gambia claims that 392 Bengali villages in northern Rakhine State have been “completely, mostly or partially destroyed between August 2017 and March 2018”.¹⁰⁵⁶ The Gambia appears simply to assume that all damage caused by fire to villages must necessarily have been caused by the authorities of Myanmar, and appears to categorise each village that has suffered any form of fire damage as having been subjected to a “clearance operation”, even if the damage may have occurred after the counter-terrorism operations of 2016 and 2017 had ended.¹⁰⁵⁷ The allegations concerning the burning of villages are dealt with elsewhere.¹⁰⁵⁸ The evidence relied on by The Gambia does not establish that villages suffered fire damage to the extent alleged, or that the Myanmar Defence Services were responsible for all fire damage, or that all fire damage was deliberate, or that fire damage only affected Bengalis. Nor does The Gambia establish that all fire damage occurred during the counter-terrorism operations when villages were inhabited: Figure 1.3 in the Memorial of The Gambia is based on image data from 31 August 2017 to March 2018, when counter-terrorism operations had already very largely concluded. For present purposes, it is simply noted that the alleged commission of “mass executions” and sexual violence in a small number of villages on the one hand, and, on the other hand, the alleged infliction of fire damage on villages in which there is no evidence of physical harm to the inhabitants, can hardly be said to be events that follow the same “consistent pattern of conduct”, even assuming that both events could be proved.

- 8.17 The inevitable conclusion is that The Gambia has failed to prove the existence of the claimed “consistent pattern of killing, extreme brutality and sexual violence perpetrated by the Tatmadaw during the ‘clearance operations’ across villages in different parts of northern Rakhine State”.¹⁰⁵⁹ Given that conclusion, The Gambia’s entire case has no basis at all.

¹⁰⁵⁶ RG, paras. 1.10, 9.79, and MG Figure 1.3. See also RG, paras. 1.11 and 9.52, in which The Gambia claims that some degree of destruction by fire took place in 188 of 329 villages that have been identified by Myanmar as locations where no counter-terrorism operations took place. However, The Gambia fails entirely to substantiate its claim that there was “absolutely no ARSA presence” in any of these locations. The Gambia also fails to prove that any of these villages was inhabited at the time that any alleged destruction took place, or that the Myanmar Defence Services were responsible for such fire damage.

¹⁰⁵⁷ RG, para. 9.57. See also RG, paras. 7.48 footnote 687, 9.18 and 9.54.

¹⁰⁵⁸ See CMM, paras. 13.198-13.208, and this Rejoinder, paragraphs 13.163-13.174 below. See also CMM, para. 9.175.

¹⁰⁵⁹ RG, para. 9.57.

- 8.18 This Chapter of this Rejoinder is structured in the following way.
- 8.19 First, **Section B of this Chapter** responds to the contention in Chapter 7, Section III, Sub-section A of The Gambia's Reply¹⁰⁶⁰ that "Myanmar fails to respond to the evidence showing extreme brutality, massive and indiscriminate killing and destruction, and pervasive sexual violence". It will be demonstrated that the Counter-Memorial of Myanmar does indeed provide a full response to the evidence in The Gambia's Memorial, and that it is in fact the Reply of The Gambia that fails to engage with the evidence presented by Myanmar in its Counter-Memorial.
- 8.20 Secondly, **Section C of this Chapter** responds to Chapter 7, Section III, Sub-section B(1) of The Gambia's Reply,¹⁰⁶¹ which deals with three new locations that have not been previously considered in the Memorial or the Counter-Memorial, and another location that was given only fleeting mention in the Memorial.¹⁰⁶² The Gambia contends that "extreme brutality, sexual violence, and destruction" occurred in these four villages even though "Myanmar admits there were no ARSA attacks" in these locations. The Gambia suggests that this demonstrates that the counter-terrorism operations of 2016 and 2017 were not in reality directed against ARSA. It will be demonstrated that The Gambia is in fact incorrect in suggesting that there were no ARSA attacks in or in the vicinity of these four locations, and that the evidence in relation to these four locations does not in any event show that the Myanmar Defence Services acted in these four locations in the way that The Gambia alleges.
- 8.21 Thirdly, **Sections D, E and F of this Chapter** respond respectively to the parts of The Gambia's Reply dealing with Min Gyi,¹⁰⁶³ Chut Pyin¹⁰⁶⁴ and Maung Nu,¹⁰⁶⁵ which are the three main locations singled out by The Gambia for particular prominence in its Memorial. These are the locations that are dealt with in Chapter 8 of the Counter-Memorial of Myanmar. It will be demonstrated that nothing in the Reply of The

¹⁰⁶⁰ RG, paras. 7.33-7.46.

¹⁰⁶¹ RG, paras. 7.49-7.52.

¹⁰⁶² The map on page 591 of this Rejoinder is the same as that on p. 277 of the Counter-Memorial of Myanmar, with the addition of further locations mentioned in Chapters 3, 8, 9 and 13 of this Rejoinder.

¹⁰⁶³ RG, paras. 7.54-7.68.

¹⁰⁶⁴ RG, paras. 7.78-7.98.

¹⁰⁶⁵ RG, paras. 7.103-7.112.

Gambia affects the conclusions in the Counter-Memorial in relation to these three locations.¹⁰⁶⁶

- 8.22 **Chapter 9** of this Rejoinder will then subsequently examine the evidence in relation to the 37 other locations where genocidal acts are said to have taken place. These are the locations that are dealt with in Chapter 9 of the Counter-Memorial of The Myanmar. As has already been noted, most of these other locations are not addressed by The Gambia in its Reply at all. It will be demonstrated that nothing in the Reply of The Gambia affects the conclusions in the Counter-Memorial in relation to these locations.¹⁰⁶⁷

B. Myanmar has responded to The Gambia's evidence

- 8.23 Chapter 7, Section III, Sub-section A of The Gambia's Reply¹⁰⁶⁸ accuses Myanmar of failing to engage with the evidence presented in The Gambia's Memorial in support of its claims about the extreme brutality of the counter-terrorism operations of 2016 and 2017.¹⁰⁶⁹ In fact, contrary to what The Gambia claims, all of that evidence is subject to very detailed consideration in the Counter-Memorial.
- 8.24 The source on which The Gambia's entire case is primarily based is the 2018 FFM Detailed Findings.¹⁰⁷⁰ There is no basis for suggesting that Myanmar fails to address this document. In fact, the whole of Chapter 6 of the Counter-Memorial of Myanmar is devoted to a detailed analysis of the evidential value of the FFM reports.¹⁰⁷¹

¹⁰⁶⁶ See CMM, paras. 8.108-8.111.

¹⁰⁶⁷ See CMM, paras. 9.305-9.306.

¹⁰⁶⁸ RG, paras. 7.33-7.46.

¹⁰⁶⁹ RG, paras. 7.34 ("nowhere does Myanmar attempt to engage, in any significant measure, with the evidence or conclusions drawn from such evidence ... The Counter-Memorial studiously avoids engaging with this evidence"); 7.42 ("Myanmar also refuses to engage with the UN Mission's determination ..."); 7.44 ("Neither does Myanmar engage with the witness evidence ..."). See also RG, paras. 7.67 ("Instead of engaging with this evidence ..."); 7.77 ("Rather than directly engage with the evidence ..."); 7.78 ("Myanmar also fails to engage with the evidence ..."); 7.91 ("Myanmar completely fails to engage with the evidence in this regard ..."); 7.96 ("Once again, Myanmar fails to engage with the evidence ...").

¹⁰⁷⁰ CMM, paras. 6.1-6.6; and see paragraphs 6.2-6.3 above of this Rejoinder. The Gambia's reliance on the FFM material is also evident from its repeated references to it in RG, Chapter 7, Section III, Subsection A at paras. 7.34, 7.42, 7.44, 7.45.

¹⁰⁷¹ CMM, paras. 6.32-6.70.

- 8.25 Chapter 7 of the Counter-Memorial of Myanmar then undertakes a similar analysis of the evidential value of all of the other material on which The Gambia relies as evidence in Chapters 8 and 9 of its Memorial, dealing with the acts alleged to have been committed during the counter-terrorism operations. In this long chapter of the Counter-Memorial, Myanmar gives separate analysis to each individual source of evidence relied on by The Gambia.
- 8.26 Following this detailed analysis, the Counter-Memorial expresses the conclusion that no evidential weight can be given to the FFM reports,¹⁰⁷² and that no evidential weight can be given to the other material relied on by The Gambia, or at least, no evidential weight that would be sufficient to discharge the very high standard of proof that applies in cases involving the Genocide Convention.¹⁰⁷³
- 8.27 Chapters 8 and 9 of the Counter-Memorial of Myanmar then take the proper (and transparent) approach of addressing separately the evidence relevant to *each and every* location identified in the evidence relied upon by The Gambia as one where brutal conduct by the Myanmar Defence Services is alleged to have taken place. There are 40 such locations. The Memorial of The Gambia itself does not even specifically name all of these 40 locations. When the Counter-Memorial of Myanmar was prepared, these locations were identified through a careful analysis by Myanmar of the content of The Gambia's Memorial and the material annexed to it. These Chapters of the Counter-Memorial analyse, in relation to each location separately, both the evidence annexed to the Memorial of The Gambia and the additional evidence annexed to the Counter-Memorial. Chapter 8 of the Counter-Memorial addresses the evidence relating to the three main locations of Min Gyi, Chut Pyin and Maung Nu, and Chapter 9 addresses the evidence relating to the remaining 37 other locations.
- 8.28 The result of that analysis of the evidence is set out in the Counter-Memorial, which notes amongst other matters as follows. The evidence demonstrates that the counter-terrorism operations of 2016 and 2017 took place in or near the locations of attacks by ARSA and its supporters on the state security apparatus and its personnel, and civilians. While there was some loss of life in the three main locations, Min Gyi, Chut

¹⁰⁷² CMM, paras. 6.68-6.70.

¹⁰⁷³ CMM, para. 7.4.

Pyin and Maung Nu (although not to the extent alleged by The Gambia), in other villages the death toll was low or non-existent.¹⁰⁷⁴ The Gambia has made no attempt to quantify how many of those killed were ARSA members or mobilised local supporters involved in the attacks; how many were legitimate collateral casualties of the counter-terrorism operations, and how many are claimed to be unjustified or unlawful killings of innocent civilians.¹⁰⁷⁵ Furthermore, even if the allegations of The Gambia were accepted wholly uncritically (and they cannot be so accepted), at their very highest, they amount to a claim that a miniscule percentage of the population of Bengali Muslims in northern Rakhine State at the time died in the events.¹⁰⁷⁶

- 8.29 Nothing in The Gambia’s Reply undermines these conclusions, as is demonstrated in Chapters 6, 7, 8 and 9 of this Rejoinder. The Gambia may disagree with these conclusions, but it is disingenuous for The Gambia to state repeatedly that Myanmar has ignored the evidence presented in its Memorial.¹⁰⁷⁷
- 8.30 The Gambia’s real complaint is that Myanmar has pointed out the evidential deficiencies of the FFM reports, which remain the evidential centre-piece of The Gambia’s case. Most of The Gambia’s claims that Myanmar has failed to engage with the evidence are made in the context of The Gambia’s reliance on FFM reports, and in particular the 2018 FFM Detailed Findings,¹⁰⁷⁸ the contents of which are repetitiously emphasised by The Gambia. In this Sub-section of its Reply, over 40% of the references to material relied on by The Gambia as evidence (21 out of 51 references)¹⁰⁷⁹ are to the 2018 FFM Detailed Findings. Other evidence cited by The Gambia is said to be significant because it “corroborates” the FFM reports.¹⁰⁸⁰ The effect of this Sub-section of The Gambia’s Reply is to confirm just how very heavily

¹⁰⁷⁴ CMM, para. 9.306.

¹⁰⁷⁵ CMM, paras. 8.110 and 9.306.

¹⁰⁷⁶ CMM, para. 8.111.

¹⁰⁷⁷ CMM, paras. 8.110 and 9.306.

¹⁰⁷⁸ The passages of the Reply referred to in footnote 1069 above are almost all made in the context of discussions of FFM material.

¹⁰⁷⁹ RG, footnotes 654-685.

¹⁰⁸⁰ RG, paras. 7.37 (“the Mission’s findings are corroborated by”); 7.38 (“these findings [of the FFM] are corroborated by”); 7.39 (“that finding [of the FFM] is corroborated by”); 7.40 (“Again, the corroborative evidence [of that determination of the FFM] is”); 7.44 (“the witness evidence from villages across northern Rakhine State that corroborates these determinations [of the FFM]”); 7.46 (“The eyewitness and victim testimony is corroborative [of the FFM]”).

The Gambia's case relies upon the FFM reports, and in particular, the 2018 FFM Detailed Findings. However, The Gambia's continual repetition of what is stated in the FFM reports does not address, let alone answer, what is stated in Chapter 6 of the Counter-Memorial of Myanmar and Chapter 6 of this Rejoinder.

- 8.31 It is in fact the Reply of The Gambia that fails to engage with the evidence presented by Myanmar in its Counter-Memorial. For instance, as has been noted, the Reply fails to engage with the evidence in relation to 75% of the 40 locations specifically addressed by Myanmar in its Counter-Memorial (30 out of 40 of the locations), and fails to address the treatment in the Counter-Memorial of the evidence relating to those locations.¹⁰⁸¹
- 8.32 More generally, instead of engaging with the details of the evidence, The Gambia resorts to making sensationalist allegations of a general nature. For instance, at paragraph 7.40 of its Reply, it refers to claims in FFM reports of “beheading; severing limbs, hands and feet; gouging out eyes; castrating, and cutting off tongues and testicles”, which it says are the subject of “impressive” “corroborative evidence”, namely a Fortify Rights Report which cites a document from Legal Action Worldwide (LAW).¹⁰⁸² However, The Gambia undertakes no analysis of the numbers of incidents of such acts that are said to have occurred, the places in which they are said to have occurred, the numbers of victims, or the credibility or reliability of the evidence relating to each of the claimed incidents. Nor does The Gambia make any attempt to identify specific incidents referred to in the FFM reports which are said to be corroborated by evidence obtained from other sources. The reality is, therefore, that passages of the FFM reports relied on by The Gambia are not evidence, and the other material said to corroborate the FFM reports is not shown to be “corroborative” at all, let alone “impressive”.
- 8.33 By avoiding any engagement with the details of the evidence, and by instead referring in a generalised way to all violent acts said to have been committed in northern Rakhine State as a whole, the Reply of The Gambia seeks to create the impression that such acts were committed uniformly throughout northern Rakhine State. This is what

¹⁰⁸¹ See paragraph 8.13 above.

¹⁰⁸² RG, para. 7.40.

The Gambia already sought to do in its Memorial.¹⁰⁸³ However, analysis of the details of the evidence relied on by the parties does not support The Gambia's claims. That is no doubt why The Gambia, rather than engaging with the evidence, instead continuously emphasises the findings of the FFM.

C. Locations where there were allegedly no ARSA attacks

1. General

- 8.34 Chapter 7, Section III, Sub-section B(1) of The Gambia's Reply deals with four locations in which, The Gambia says, "Myanmar admits there were no ARSA attacks".¹⁰⁸⁴ One of these, Naung Dar Khar Li, is a location that was considered in the Counter-Memorial of Myanmar.¹⁰⁸⁵ The other three were not previously mentioned by The Gambia.
- 8.35 The Gambia contends that "extreme brutality, sexual violence, and destruction" occurred in these four locations despite the fact that there were no ARSA operations there. The Gambia suggests that this demonstrates that the counter-terrorism operations of 2016 and 2017 were not in reality directed against ARSA.
- 8.36 In fact, there was ARSA activity in the close vicinity of all four of these locations.
- 8.37 Furthermore, the material on which The Gambia relies in relation to these four locations cannot be given evidential weight, for the reasons given in Chapters 6 and 7 of the Counter-Memorial of Myanmar and Chapters 6 and 7 of this Rejoinder.
- 8.38 In any event, even if the contents of the material relied on by The Gambia in relation to these four locations were to be accepted in full (*quod non*), it does not demonstrate that widespread violence of the kind alleged by The Gambia was committed by the Myanmar Defence Services against villagers in these locations.

¹⁰⁸³ See paragraph 8.10 above.

¹⁰⁸⁴ RG, paras. 7.49-7.52.

¹⁰⁸⁵ CMM, paras. 9.222-9.224.

2. Naung Dar Khar Li

- 8.39 ARSA was engaged in serious terrorist activity in the close vicinity of this village. As is evident from the map of northern Rakhine State in the Counter-Memorial of Myanmar,¹⁰⁸⁶ Naung Dar Khar Li is situated in a tight cluster of villages which includes Zin Paing Nyar (2 kilometres south).¹⁰⁸⁷ As discussed in the Counter-Memorial,¹⁰⁸⁸ an Amnesty International report identifies Zin Paing Nyar as being a *particular area of ARSA activity* involving “multiple attacks” “over several hours” (entailing “the explosion of 17 improvised explosive devices (IEDs) over a two-hour period” on 26 August 2017).¹⁰⁸⁹
- 8.40 The Memorial of The Gambia contains a single reference to Naung Dar Khar Li, stating that “A victim from Naung Dar Khar Li, in Maungdaw Township, described being bitten repeatedly as four soldiers took turns raping her”.¹⁰⁹⁰ The evidence cited for this is an Amnesty International report, which contains a description of an account said to have been given to that organisation by the victim, identified only as “Y.A.”¹⁰⁹¹
- 8.41 The Counter-Memorial of Myanmar notes that the Memorial of The Gambia does not allege that any other crime was committed in Naung Dar Khar Li, and that the evidence in relation Naung Dar Khar Li, taken at its highest, therefore consists of a single incident of sexual violence.¹⁰⁹² The Counter-Memorial further notes that evidential weight cannot be given to a description in a report of an NGO of what an anonymous person is said to have said to that organization.¹⁰⁹³

¹⁰⁸⁶ CMM, p. 277.

¹⁰⁸⁷ CMM, paras. 9.194–9.200.

¹⁰⁸⁸ CMM, para. 9.197.

¹⁰⁸⁹ Amnesty International, “*We Will Destroy Everything*”: *Military responsibility for crimes against humanity in Rakhine State*, 27 June 2018 (“**Amnesty International, Destroy Everything**”), p. 39 (not included in the extract at MG, Vol. IV, Annex 112), CMM, Vol. VI, Annex 269.

¹⁰⁹⁰ MG, para. 9.29.

¹⁰⁹¹ Amnesty International, *Destroy Everything*, p. 93, MG, Vol. IV, Annex 112.

¹⁰⁹² CMM, paras. 9.222–9.224.

¹⁰⁹³ *Ibid.*

- 8.42 In relation to this location, the Reply of The Gambia now simply refers to this same incident, relying on the same source.¹⁰⁹⁴ Myanmar’s response has already been given in the Counter-Memorial.¹⁰⁹⁵
- 8.43 The Reply of The Gambia says that Y.A. stated that “soldiers entered the village and shot at the Rohingya civilians who were trying to flee”.¹⁰⁹⁶ That is incorrect. According to Amnesty International, she said that “As villagers tried to run away, soldiers opened fire”.¹⁰⁹⁷ She did *not* say that the soldiers shot *at* civilians who were trying to flee.
- 8.44 The Reply of The Gambia says that three other women were abducted from the same house.¹⁰⁹⁸ It is correct, at least, that the Amnesty International report says that Y.A. said this.¹⁰⁹⁹ However, even if that is so, no information is given as to what happened to the other three. Indeed, no information is given as to whether Y.A. even knows what happened to them.
- 8.45 The Reply of The Gambia says that this village was more than 90% destroyed by fire.¹¹⁰⁰ However, there is no evidence that any burning of the village took place at a time when the village still remained inhabited. Satellite imagery in Figure 7.4 of the Reply of The Gambia is dated 24 October 2017, almost two months after residents are said to have left the village. There is no evidence as to who was responsible for any destruction.
- 8.46 It thus remains the case that the only evidence of violence against a person in this village is a single incident of rape, and that even this incident is not supported by evidence to which evidential weight can be attached.

¹⁰⁹⁴ RG, para. 7.51.

¹⁰⁹⁵ CMM, paras. 9.222-9.224.

¹⁰⁹⁶ RG, para. 7.51.

¹⁰⁹⁷ Amnesty International, *Destroy Everything*, p. 93, MG, Vol. IV, Annex 112.

¹⁰⁹⁸ RG, para. 7.51.

¹⁰⁹⁹ RG, para. 7.51.

¹¹⁰⁰ RG, para. 7.50.

3. Kar Lar Day Hpet

- 8.47 The Gambia incorrectly claims that “Myanmar admits that there were no ARSA attacks” in this village.¹¹⁰¹ In fact, the Counter-Memorial of Myanmar expressly refers to ARSA’s killing of five Daingnet villagers in this location.¹¹⁰²
- 8.48 The Gambia presents no evidence of any violence by the Myanmar Defence Services against any person in this village. The only available evidence of violence in this village thus relates to the killings carried out by ARSA.
- 8.49 The Gambia’s only claim in relation to this village is that it was destroyed by fire.¹¹⁰³
- 8.50 There is no evidence as to who may have been responsible for the fire-damage to the approximately 20 structures that can be seen in Figures 7.5 and 7.6 of the Reply of The Gambia. There is no evidence that any fire-damage occurred prior to October 2017,¹¹⁰⁴ or at any time before the village ceased to be inhabited.

4. Tha Pyay Taw

- 8.51 The Gambia appears to confuse two entirely different villages with the same name. Tha Pyay Taw village tract in southern Maungdaw Township is the village referred to in the paragraphs of the 2018 FFM Detailed Findings cited in paragraph 7.52 of its Reply.¹¹⁰⁵ However, the satellite imagery in Figures 7.1 and 7.2 of the Reply depict Tha Pyay Taw village in northern Rathedaung Township, some 16 kilometres to the east over the Mayu mountain range, and 3.5 kilometres north of Zay Di Pyin.¹¹⁰⁶
- 8.52 As to Tha Pyay Taw village tract in southern Maungdaw Township, this lies on the southern Maungdaw coastline between the villages of Ah Lel Than Kyaw (6 kilometres north-west) and Myin Hlut (2 kilometres southeast). ARSA was engaged in serious terrorist activity in the close vicinity of this village.

¹¹⁰¹ RG, para. 7.50.

¹¹⁰² CMM, para. 3.54.

¹¹⁰³ RG, para. 7.50.

¹¹⁰⁴ RG, Figure 7.6 is dated 24 October 2017.

¹¹⁰⁵ RG, para. 7.52, citing 2018 FFM Detailed Findings, para. 907, MG, Vol. II, Annex 40, and 2018 FFM Detailed Findings, para. 976, RG, Vol. II, Annex 1.

¹¹⁰⁶ See the map on page 591 of this Rejoinder.

- 8.53 As described in the Counter-Memorial, in the early hours of 25 August 2017, ARSA carried out multiple attacks, involving many hundreds of terrorists, across northern Rakhine State. One of these attacks was upon Border Guard Police posts in Ah Lel Than Kyaw, in which an immigration officer was killed.¹¹⁰⁷ (In its Memorial, The Gambia omits any discussion of the ARSA attack on Ah Lel Than Kyaw, and mentions only that further soldiers were sent to this village.)¹¹⁰⁸
- 8.54 Another of these attacks, involving a very large number of ARSA terrorists and supporters, was on the main Border Guard Police base in Myin Hlut, in which two police officers were killed.¹¹⁰⁹ Myin Hlut is within walking distance of Tha Pyay Taw.
- 8.55 The Reply of The Gambia refers to the 2018 FFM Detailed Findings, according to which the FFM was told by a single person, whose identity is not revealed, that military personnel set fire to houses from one end of one village in the village tract, and that his 80-year old mother who was unable to run died in the fire.¹¹¹⁰ Evidential weight cannot be given to this second-hand account in an FFM report of what a person is said to have said to the FFM. Furthermore, and in any event, this source refers only to the death of a single person in this village, and does not suggest that the death was the result of an intentional killing by soldiers. This source does not support The Gambia's claim that military personnel "set fire to Rohingya homes ..., killing Rohingya villagers who were too old to flee".¹¹¹¹
- 8.56 As to Tha Pyay Taw village in Rathedaung Township, ARSA was engaged in serious terrorist activity in the close vicinity of this village. As Myanmar explains, ARSA was highly active in the areas in and around the neighbouring near-by villages of Zay Di Pyin¹¹¹² and Chut Pyin.¹¹¹³

¹¹⁰⁷ CMM, paras. 9.23–9.30. See also this Rejoinder, paragraph 9.42 above, and Witness Statement of U Aung Thu Win, 25 October 2017, pp. 1-2, RM, Vol. III, Annex 93.

¹¹⁰⁸ MG, para. 10.28.

¹¹⁰⁹ CMM, paras. 9.31–9.33.

¹¹¹⁰ RG, para. 7.52, citing 2018 FFM Detailed Findings, para. 907, MG, Vol. II, Annex 40.

¹¹¹¹ RG, para. 7.52.

¹¹¹² CMM, para. 3.57.

¹¹¹³ CMM, para. 8.73(1)–(6).

- 8.57 The Gambia presents no evidence of any violence by the Myanmar Defence Services against any person in this village. It refers solely to fire damage in this village.
- 8.58 There is no evidence that fire-damage there was caused by the Myanmar Defence Services, or that such damage was caused at a time when the village was inhabited. The relevant satellite image was captured only on 26 December 2017.¹¹¹⁴

5. Pan Be Chaung

- 8.59 ARSA was engaged in serious terrorist activity in the vicinity of this village. Pan Be Chaung lies approximately 3.5 kilometres to the west of Yin Ma Kyaung Taung,¹¹¹⁵ and the same distance to the northwest of Taung Bazar, in Buthidaung Township.¹¹¹⁶ Both of these locations are the subject of specific analysis in the Counter-Memorial,¹¹¹⁷ which demonstrates widespread ARSA activity in the area in and around these locations.
- 8.60 One of the witness accounts in the Fortify Rights Document,¹¹¹⁸ which The Gambia originally withheld from the Court and Myanmar, admits that the violence in the area commenced with multiple bomb blasts in the village of Thin Ga Net, adjacent to Yin Ma Kyaung Chaung, where Al Yaqin / ARSA terrorists and supporters then numbered approximately 250. Some 200 of them were each seen to be armed with either an explosive device or a knife. The same witness estimates that, around this time, there were approximately 800 Al Yaqin terrorists and supporters positioned in the nearby forests.¹¹¹⁹

¹¹¹⁴ RG, Figure 7.2.

¹¹¹⁵ CMM, paras. 9.251–9.257.

¹¹¹⁶ CMM, paras. 9.258–9.264.

¹¹¹⁷ CMM, paras. 9.251-9.257 and 9.258-9.264 respectively.

¹¹¹⁸ Fortify Rights, “First-hand Testimonies from August-September ‘Clearance Operations’ in Myanmar”, August-September 2017 (“**Fortify Rights Document**”), MG, Vol. X, Annex 338.

¹¹¹⁹ CMM, para. 9.256, citing Fortify Rights Document, #25, pp. 41-42 (not included in the extract at MG, Vol. X, Annex 338), CMM, Vol. VII, Annex 278.

- 8.61 The Counter-Memorial of Myanmar further describes the attack in the early hours of 25 August 2017 upon a Myanmar Defence Services base next to nearby Taung Bazar involving some 200 ARSA terrorists, which resulted in armed clashes.¹¹²⁰
- 8.62 The Gambia presents no evidence of any violence by the Myanmar Defence Services against any person in Pan Be Chaung. It apparently refers solely to fire damage in this village.
- 8.63 Pan Be Chaung is not in fact even referred to in the text of the Reply itself. This Subsection of the Reply simply includes two satellite images of the village,¹¹²¹ the claimed significance of which is not explained. All that can reasonably be taken from these images is that this particular village appears to have been damaged by fire at some point between 16 January 2017 and 20 December 2017. There is no evidence that fire-damage there was caused by the Myanmar Defence Services, or that such damage was caused at a time when the village was inhabited.

6. Conclusion

- 8.64 It can reasonably be assumed that the locations referred to in this Sub-section of The Gambia's Reply were deliberately selected as the best, or indeed *only*, examples that The Gambia thought that it could find of "[e]xtreme brutality, sexual violence, and destruction in villages where Myanmar admits there were no ARSA attacks". In fact, there were ARSA attacks in the vicinity of all of these locations. Furthermore, the material relied on by The Gambia does not even contain any suggestion of violence by the Myanmar Defence Services against any person in three of these five locations. In a fourth of these locations, the material refers to the sexual assault of a single victim. In the fifth, it refers to the death of a single person in a fire, which is not said to have been an intentional killing. All of these villages are said to have been destroyed or damaged by fire, but for four of these five villages, the material does not indicate who was responsible for this, and does not indicate that the fire occurred at a time when the village was still inhabited. The material relied on by The Gambia in relation to these locations cannot be given significant evidential weight. However, even if it could, it is not evidence of the kind of widespread brutal violence of which The

¹¹²⁰ CMM, para. 9.260.

¹¹²¹ RG, Figure 7.7 and Figure 7.8.

Gambia claims there was a “consistent pattern”. This evidence does not support The Gambia’s case.

D. Min Gyi

1. General

- 8.65 The Memorial of The Gambia would leave an uninformed reader with the false impression that what occurred in Min Gyi was a unilateral use of force by the Myanmar Defence Services upon a defenceless and innocent civilian population.¹¹²² As demonstrated in the Counter-Memorial, the available evidence shows that this was not the case.¹¹²³
- 8.66 In its Reply, The Gambia now accepts (as it must) the active presence of ARSA terrorists in Min Gyi, but claims that the military force which took place in Min Gyi “occurred *after* the ARSA insurgents had fled”¹¹²⁴ and when “there was no ‘terror’ left to ‘counter’”.¹¹²⁵ This claim is based on the false assertion that there were *only* “40 Al Yaqin [terrorists] in the village” and that *all* 40 terrorists had “run away” by the time that the Myanmar Defence Services began counter-terrorism operations.¹¹²⁶
- 8.67 In support of this claim, The Gambia relies on the account of a witness contained in the Fortify Rights Document.¹¹²⁷ This account does not in fact state that *all* Al Yaqin terrorists had fled, but rather, that the witness himself fled with *two* of the armed Al Yaqin terrorists. The Gambia ignores all of the other evidence, from multiple sources, that describes how ARSA and its mobilised supporters were repeatedly assembling in large numbers (in the many hundreds) and carrying out deadly armed attacks prior to, and during, the counter-terrorism operations in, and throughout, the vicinity of Min Gyi.

¹¹²² MG, para. 8.54, and see also this Rejoinder, paragraphs 8.4-8.5 above.

¹¹²³ CMM, paras. 8.22–8.70.

¹¹²⁴ RG, paras. 7.57-7.67.

¹¹²⁵ RG, para. 7.67.

¹¹²⁶ RG, para. 7.56.

¹¹²⁷ Fortify Rights Document, #39, pp. 72-73, CMM, Vol. VII, Annex 278.

- 8.68 Myanmar denies categorically that the Myanmar Defence Services “perpetrated crimes against Rohingya civilians with exceptional brutality or that it committed systematic acts of sexual violence in Min Gyi”.¹¹²⁸ Myanmar also denies categorically that the Myanmar Defence Services “systematically and methodically kill[ed] men, women and children alike”.¹¹²⁹ As discussed below, these claims are not supported by credible and reliable evidence sufficient to discharge the very high burden of proof which applies in this case. In fact, The Gambia’s evidence presents a false and selective narrative of events.
- 8.69 In its Reply, The Gambia relies on evidence concerning Min Gyi that it previously already annexed to its Memorial.¹¹³⁰ The Reply refers to sensational allegations including “throat-slitting, beheading, burning and throwing Rohingya into the river”,¹¹³¹ and an assertion that “The militaries would each take one leg [of baby boys] and pull them apart, killing the boys in that manner”.¹¹³² Only one person is said to have made the latter allegation, which is therefore uncorroborated despite the supposed plenitude of observers to events at the river beach in Min Gyi. This allegation is also implausible since it describes what appears to be something that would be physically impossible. Given the ubiquity of smartphones with cameras and their noted presence in Min Gyi¹¹³³ it is highly improbable that no photographic or video imagery of such events at Min Gyi would be available, if they occurred. However, none is produced.¹¹³⁴ Various witnesses make claims that their phones were lost prior to arrival in Bangladesh¹¹³⁵ or that their phones have otherwise been lost, or

¹¹²⁸ As alleged in RG, para. 7.56.

¹¹²⁹ As alleged in RG, para. 7.57.

¹¹³⁰ Legal Action Worldwide, Witness Statement No. 013, MG, Vol. X, Annex 350; Witness Statement No. 010, MG, Vol. X, Annex 347; Witness Statement No. 027, MG, Vol. XI, Annex 365; Witness Statement No. 022, MG, Vol. XI, Annex 360; Witness Statement No. 018, MG, Vol. XI, Annex 355; Witness Statement No. 031, MG, Vol. XI, Annex 369; Witness Statement No. 030, MG, Vol. XI, Annex 368; Witness Statement No. 019, MG, Vol. XI, Annex 356.

¹¹³¹ RG, para. 7.57.

¹¹³² RG, para. 7.64, citing Witness Statement No. 031, para. 24, MG, Vol. XI, Annex 369.

¹¹³³ See, for instance, IIMM, Witness Statement No. IIMM0027992990, para. 44, RG, Vol. IV, Annex 51. See also Legal Action Worldwide, Witness Statement No. 037, paras. 8-9, RG, Vol. IV, Annex 47; IIMM, Witness Statement No. IIMM0019629206, para. 91, RG, Vol. IV, Annex 50.

¹¹³⁴ See CMM, paras. 3.100-3.107.

¹¹³⁵ IIMM, Witness Statement No. IIMM0019629265, para. 97, RG, Vol. IV, Annex 53.

that their phones have stopped working,¹¹³⁶ or that they no longer have a phone, or that the relevant data has been deleted.¹¹³⁷ The number of people making such excuses for not having video-recordings is of itself remarkable. It is in any event simply implausible that not a single witness would still have any video-recordings of the events, if they had occurred as claimed.

- 8.70 It is simply wrong to say that Myanmar does not contradict the allegation of slaughter of old people.¹¹³⁸ Myanmar denies that such unlawful targeted killings took place. Far from refusing to “engag[e] with” evidence of alleged crimes in Min Gyi, Myanmar has responded at length, and in detail, with evidence and arguments both within its Counter-Memorial¹¹³⁹ and in this Rejoinder, countering The Gambia’s claims.
- 8.71 Such new evidence as The Gambia does provide does not undermine any of Myanmar’s evidence that the Myanmar Defence Services were engaged in multiple armed clashes with ARSA terrorists and its supporters in, and proximate to, Min Gyi over the course of several days in late August 2017.
- 8.72 Myanmar’s evidence is additionally corroborated by contemporaneous further testimony from Captain Zwe who was a platoon commander within the No. (315) Light Infantry Regiment. He testifies to multiple attacks in Min Gyi by large numbers of ARSA terrorists (in the hundreds) armed with “swords, spears, sticks and guns”, who repeatedly sought to launch attacks, including by gun-fire, upon the military from the early hours of 30 August 2017.¹¹⁴⁰
- 8.73 Captain Zwe describes the proportionate and incremental use of force by Myanmar military personnel: warning shots being initially fired to fend off attack, followed by his order “to shoot the lower body parts of legs and thighs of the terrorists who were

¹¹³⁶ IIMM, Witness Statement No. IIMM0027992990, para. 44, RG, Vol. IV, Annex 51; IIMM, Witness Statement No. IIMM0019629206, para. 188, RG, Vol. IV, Annex 51; IIMM, Witness Statement No. IIMM0027995869, para. 139, RM, Vol. IV, Annex 138.

¹¹³⁷ IIMM, Witness Statement No. IIMM0028059734, para. 67, RM, Vol. IV, Annex 143.

¹¹³⁸ As claimed in RG, para. 7.62.

¹¹³⁹ CMM, paras. 8.22–8.70.

¹¹⁴⁰ Witness Statement of Captain Zwe, 5 September 2017, pp. 1-3, RM, Vol. III, Annex 83.

assumed to be leaders”, only once the terrorists had continued to advance upon military personnel to within 50 yards (45 metres).¹¹⁴¹

- 8.74 Captain Zwe further describes, *inter alia*, that notwithstanding the deaths of 14 terrorists in one confrontation, by 9:00 a.m. the terrorists had regrouped to over 700 and commenced an armed attack against the base camp of military Column (2), and additional attacks in the afternoon upon his Column “from the southern and western sides”.¹¹⁴²

2. Witness P1299

- 8.75 The Gambia’s Reply claims that “[a]dditional testimony from the survivors of Min Gyi further confirms” the accounts given in the Memorial of The Gambia.¹¹⁴³ One of these pieces of “additional testimony” annexed to the Reply is an anonymised witness statement of a person identified as “P1299”.¹¹⁴⁴ In fact, as The Gambia has subsequently confirmed in a letter to the Registrar,¹¹⁴⁵ this person is the same person who gave the earlier witness statement to LAW that is found at Annex 347 to the Memorial of The Gambia, under a different pseudonym.
- 8.76 This person was the Deputy Chairman (“Tawankan”) of Min Gyi. He now accepts and confirms in his new witness statement that there *was* a series of attacks upon multiple security posts in and around Min Gyi village tract by a “Muslims group” immediately prior to the counter-terrorism operations.¹¹⁴⁶
- 8.77 It is apparent that P1299 is afraid of ARSA, and that this prevents him from speaking truthfully and fully about what occurred in Min Gyi. He says:

...I can’t speak about the names of the people in this group, it is *not possible for me to speak about this, these people are still around in the camps here [Bangladesh] now.*

¹¹⁴¹ Witness Statement of Captain Zwe, 5 September 2017, p. 2, RM, Vol. III, Annex 83.

¹¹⁴² *Ibid.*, pp. 2-3.

¹¹⁴³ RG, para. 7.58.

¹¹⁴⁴ IIMM, Witness Statement No. IIMM0027992990, RG, Vol. IV, Annex 51.

¹¹⁴⁵ Letter from the Agent of The Gambia to the Registrar, 1 July 2024, RM, Vol. V, Annex 215. See paragraph 7.22(1) above.

¹¹⁴⁶ IIMM, Witness Statement No. IIMM0027992990, p. 42, para. 194, RG, Vol. IV, Annex 51.

Being asked, I say these people were from my village and *they came from all four of our hamlets.*

Being asked, I say I know that these people were involved in the attack on these security outposts on 25th August 2017, but *I can't speak more about this.*"¹¹⁴⁷

8.78 P1299 now also acknowledges that he was *untruthful* when providing his earlier witness statement to LAW. In his earlier statement, he said, when asked about the existence of militants operating in the area of Min Gyi: "I have never seen members of the Arakan Rohingya Salvation Army [ARSA] and *I am not aware of any attacks by ARSA near my village.*"¹¹⁴⁸ The fact that even a person of his high status was willing to be untruthful in a signed witness statement is critical to the integrity of all of the evidence concerning Min Gyi.

8.79 The claim by P1299 in his earlier witness statement that there was no ARSA presence in the area of Min Gyi is strikingly similar to the blanket denials found in each of the 20 anonymous signed witness statements procured by LAW, and annexed to the Memorial of The Gambia.¹¹⁴⁹ Likewise, 53 out of 54 claimed "eye-witnesses" interviewed by the FFM fail to acknowledge ARSA's presence, let alone its lethal violence.¹¹⁵⁰ The only plausible explanations for such a systematic failure to even acknowledge ARSA's presence are: (1) that there was highly coordinated management and control of "witnesses" being presented to the various organisations who interviewed them (including the FFM), and/or (2) that fears of violent repercussions¹¹⁵¹ from ARSA, or loyalties to ARSA, are so entrenched that those who were interviewed by these organisations were afraid or unwilling to provide a true, or any, account concerning ARSA's activities.

¹¹⁴⁷ *Ibid.*, paras. 194-196 (emphases added).

¹¹⁴⁸ Legal Action Worldwide, Witness Statement No. 010, para. 12 (emphasis added), MG, Vol. X, Annex 347.

¹¹⁴⁹ CMM, paras. 8.59–8.62.

¹¹⁵⁰ CMM, para. 8.55.

¹¹⁵¹ See Witness Statement of U Idirids, 7 September 2017, p. 1, RM, Vol. III, Annex 85 ("that terrorist group (ARSA) threatened us through phone calls and through villagers so many times that they would kill those who had good relationships and cooperated with the government."). See also Witness Statement of U Shu Kuali, 7 September 2017, p. 1, RM, Vol. III, Annex 86, who describes how Bengalis were threatened (with death) into leaving Min Gyi by the terrorists who also burned abandoned houses in the village.

8.80 The implausibility of claims by witnesses that they were unaware of *any* activity of ARSA in the Min Gyi area is illustrated by P1299’s more recent statement. In this account, he says as follows. On the night of 25 August 2017, “at least 50 people” from the “Muslim rebel group” were *very loudly* screaming “Naraye Takbir Allahu Akbar” in Min Gyi shortly before gunfire was heard coming from the direction of the Nagrasaung [*Nay Khra Zound*] security post. The shooting continued until “around 4:30 a.m. There were big sounds ‘Doom Doom, Dung Dung’”.¹¹⁵² Such an account is consistent with the course of events described in Myanmar’s Counter-Memorial,¹¹⁵³ as borne out by the supporting evidence. It is inconceivable that *any* villagers present in Min Gyi at the time could have been unaware of these events, whether or not they participated in them.

3. Nazmul Islam

8.81 The Gambia draws specific attention to the interview of Nazmul Islam,¹¹⁵⁴ which it claims merits “considerable evidential weight”,¹¹⁵⁵ not least on the exceptional basis that a video-recording of his interview is actually available. The Gambia claims that the Court can consider factors such as the “independent and impartial source of the video recording”, “the contemporaneous nature of the eye-witness account”, “the ability to observe the witness”, and “the fact he is testifying about facts within his own personal knowledge”.¹¹⁵⁶ However, none of these claimed factors is a reason for giving weight to this interview.

8.82 First, the “independent and impartial source of the recording” does *not* add evidential weight to Mr Islam’s account itself. It is recalled that eight Hindu women kidnapped by ARSA from Kha Maung Seik gave a media interview in which, due to death threats from ARSA, they falsely attributed the massacre in that village to the Myanmar Defence Services.¹¹⁵⁷ Their interview was video-recorded by Reuters News Agency,

¹¹⁵² IIMM, Witness Statement No. IIMM0027992990, para. 153, RG, Vol. IV, Annex 51.

¹¹⁵³ CMM, paras. 8.23–8.41.

¹¹⁵⁴ See RG, para. 4.79, and the video and transcript of interview of Nazmul Islam, RG, Vol. III, Annex 41. See also the statement of Jason Motlagh, RG, Vol. IV, Annex 70, confirming that Mr Islam is no longer alive.

¹¹⁵⁵ See RG, para. 4.80.

¹¹⁵⁶ See RG, para. 4.79.

¹¹⁵⁷ CMM, paras. 3.108–3.119.

which is likewise not suggested to lack independence or impartiality. The fact that the interview was given to an independent and impartial organisation did not mean that its contents were true.¹¹⁵⁸ This is a salutary example.

8.83 Second, Mr Islam’s account was recorded on 28 February 2018,¹¹⁵⁹ six months after the events of August 2017. His account was *not* contemporaneous to the events in question, as claimed.

8.84 Third, while the video-recording shows Mr Islam providing his account, it is not possible to observe his demeanour and presentation when challenged on his account, because he never was challenged during his interview. Nor can he ever be challenged on his account, as he is believed to have passed away in August 2018.¹¹⁶⁰ In assessing his credibility, it would have been important to observe his responses to such challenges. He acknowledges that he was an “influential person in the village”,¹¹⁶¹ and was undoubtedly aware of ARSA’s deadly and unlawful violence, yet fulsomely supported its activities, saying “what they [ARSA] are doing is right”.¹¹⁶² Any court would view with scepticism his improbable claims that he did not “know any ARSA and don’t know whether they are white or black”, and that “they [ARSA] never came to Tula Toli [Min Gyi]”.¹¹⁶³

8.85 Fourth, The Gambia conspicuously refuses to set out which particular “facts” are said to have been within Mr Islam’s “personal knowledge”. It soon becomes clear that Mr Islam could not possibly have been a direct witness to many of the matters that he recounts in his interview, and in reality, he relays little more than community hearsay and gossip. At no stage is there unambiguous clarification as to which aspects of his account are first-hand observation and which aspects are merely reported information. He was arrested on 27 August 2017¹¹⁶⁴ (prior to the events on 30 August 2017 in Min

¹¹⁵⁸ See paragraph 7.11 above.

¹¹⁵⁹ Statement of Jason Motlagh, para. 5, RG, Vol. IV, Annex 70.

¹¹⁶⁰ *Ibid.*, para. 9.

¹¹⁶¹ Video and transcript of interview of Nazmul Islam, 28 February 2018, [02:29:02.25], RG, Vol. III, Annex 41.

¹¹⁶² *Ibid.*, at Part 1, [02:23:35:04].

¹¹⁶³ *Ibid.*, at Part 1, [01:33:44.28 – 01:33:59:00].

¹¹⁶⁴ *Ibid.*, at Part 1, [02:31:03.00].

Gyi on which The Gambia focusses), and was detained at the Police guard house situated next to the Rakhine village, *not* in the Bengali part of Min Gyi.¹¹⁶⁵ He was detained for a period of “1 month and 3 days”,¹¹⁶⁶ and he concedes that his point of observation *whilst in detention* was “very close just 1000 yards [about 915 metres]”.¹¹⁶⁷

- 8.86 The interview of Mr Islam is close to worthless. The questioning by the journalist-interviewer is chaotic; it is replete with leading questions and suggested answers for Mr Islam to adopt from extraneous and unspecified “reports”; the interviewing process and Mr Islam’s account is contaminated by repeated suggested input from his wife, who is present throughout and interjects during questioning; the quality of translation throughout is poor; and the transcript itself bears little resemblance to what is purportedly said by those involved, and is often inaccurate.
- 8.87 In short, this is a *prima facie* unreliable interview of a person who is subject to serious credibility concerns. It appears that, at best, this person is able to say that he personally saw smoke rising from Min Gyi and saw people fleeing from the village with their cattle.¹¹⁶⁸
- 8.88 It is troubling, but nevertheless revealing, that The Gambia would place such heavy reliance on an interview such as this, which is so obviously lacking in evidential weight. This is an indicator of how the vast majority of the claimed witness evidence relied upon by The Gambia, which is invariably incapable of proper testing by Myanmar or this Court, is even more lacking in evidential weight.

4. Hansu Mala

- 8.89 The video of the interview of Hansu Mala¹¹⁶⁹ is similarly deeply flawed. Indeed, The Gambia appears to acknowledge its deficiencies, as it merely asks for this interview

¹¹⁶⁵ *Ibid.*, at Part 1, [02:33:40:22 – 02:35:11.13].

¹¹⁶⁶ *Ibid.*, at Part 2, [00:15:09:28].

¹¹⁶⁷ *Ibid.*, at Part 1, [03:31:45.19].

¹¹⁶⁸ *Ibid.*, at Part 1, [03:33:30 – 03:35:10].

¹¹⁶⁹ University of Southern California Shoah Foundation, interview of Hansu Mala, MG, Vol. V, Annex 138.

to be “taken into account by the Court”,¹¹⁷⁰ as opposed to asking for it to be accorded “considerable evidential weight”.¹¹⁷¹ A number of issues arise with this interview.

- 8.90 First, the University of Southern California Shoah Foundation which produced this video-interview is not an investigative organisation. It is an “institute for visual history and education”,¹¹⁷² and the interview displays none of the indicators of rigour necessary for the collection of accurate and reliable evidence for use in judicial proceedings.
- 8.91 Second, The Gambia again commends the “independent and impartial source of these statements”.¹¹⁷³ However, the interviewee herself is neither independent nor impartial. As to the Shoah Foundation, the mere fact that a video-recording is taken by an organisation that is independent and impartial does not mean that statements made by the interviewee are true: see paragraph 8.82 above.
- 8.92 Third, The Gambia likewise lauds what it says is the “level of detail and care by which they [the statements] were produced”.¹¹⁷⁴ This is a highly ambitious claim for what is in reality a confused and misleading account. Hansu Mala initially gives what purports to be an eye-witness account of what happened to her and her family and others on the river bank in Min Gyi. Then, 37 minutes in to the 54-minute interview, the translator clarifies that “she and her family was [sic] *not* at the riverbank”.¹¹⁷⁵ The interviewer says, “but you just said, when ‘we’ were at the riverbank, they killed all the men... so, who’s the ‘we’?”¹¹⁷⁶ When asked where she and her family had in fact been “when all this was happening... your kids and you. Where were you all?”, she replies, “we have already escaped. We rushed to get out of there. We crossed the river and escaped.”¹¹⁷⁷ She never confirms where she was at the time of the events she

¹¹⁷⁰ RG, para. 4.71.

¹¹⁷¹ RG, para. 4.80.

¹¹⁷² Website of the University of Southern California Shoah Foundation, “Collecting Testimonies”, accessed 19 November 2024, RM, Vol. V, Annex 171.

¹¹⁷³ RG, para. 4.71.

¹¹⁷⁴ RG, para. 4.71.

¹¹⁷⁵ University of Southern California Shoah Foundation, interview of Hansu Mala, at [00:36:49], MG, Vol. V, Annex 138.

¹¹⁷⁶ *Ibid.*, at [00:37:05].

¹¹⁷⁷ *Ibid.*, at [00:35:24].

describes, save to concede that she was “far away”.¹¹⁷⁸ It thus appears that she was giving hearsay accounts of information obtained from multiple unknown other sources.

8.93 Fourth, the quality of translation throughout the interview is poor. Furthermore, the transcript is not verbatim, nor does it accurately reflect what the interviewee appears to have said. It cannot sensibly be maintained that the *substance* of this interview merits weight by virtue of the care and level of detail it is *claimed* to have.

8.94 Fifth, this was *not* a contemporaneous account. The interview was conducted in March 2018, more than 6 months after the events in question, and after the interviewee arrived in Bangladesh. Predictably, after such passage of time in the camps, her account is entirely silent about ARSA and contains no mention of the violent confrontation between ARSA and the Myanmar Defence Services.

8.95 Sixth, and finally, given that her account is untested, only a most limited assessment of “reliability and trustworthiness” can be made by viewing the recording.

5. Witness P1289

8.96 Between December 2023 and May 2024, The Gambia was provided with 41 signed witness statements by the IIMM.¹¹⁷⁹ The Gambia elected to annex only 12 of the 41 to its Reply. One of the statements that The Gambia did not annex to its Reply was that of P1289, a 50-year-old Bengali man from Min Gyi / Tula Toli.

8.97 According to P1289, prior to the ARSA attacks in August 2017, the Border Guard Police attended the village and advised villagers “not to feed bad people, not to be like them, and [to] report any bad people they see to the Border Guard.”¹¹⁸⁰ P1289 states: “[t]he Border Guard singled out the three houses we dismantled because the families

¹¹⁷⁸ *Ibid.*, at [00:39:37].

¹¹⁷⁹ Letter from the Head of the IIMM to Counsel for Myanmar, 3 May 2024, RM, Vol. IV, Annex 146; IIMM Sharing Packs provided to The Gambia, received 21 May 2024, RM, Vol. IV, Annex 148.

¹¹⁸⁰ IIMM, Witness Statement No. IIMM0019925094, para. 41, RM, Vol. IV, Annex 135.

were suspected to have been ‘bad people’. In general, we knew the people the Border Guard referred to as bad people were suspected members of Al-Yakin.”¹¹⁸¹

- 8.98 This witness thus confirms that Myanmar’s security forces were searching for ARSA terrorists in Min Gyi prior to the counter-terrorism operations. This is inconsistent with the claim that there was no ARSA presence or activity in the area at the time.

6. Alleged sexual violence

- 8.99 The Gambia claims that “systematic acts of sexual violence” were committed in Min Gyi.¹¹⁸² As discussed below, the Reply is both internally repetitious, as well as repetitious of evidence already relied on in the Memorial. Further, the single piece of new evidence advanced by The Gambia in support of its allegations of sexual violence in Min Gyi is deficient for several reasons, and is in any event clearly insufficient to establish that “pervasive” sexual violence characterised the conduct of the counter-terrorism operations.
- 8.100 Despite stating that it will not repeat the evidence it already described in its Memorial,¹¹⁸³ that is exactly what The Gambia does in its Reply.
- 8.101 The Reply of The Gambia makes the same allegations found in its Memorial that acts of sexual violence were committed by the Tatmadaw in Min Gyi.¹¹⁸⁴ An examination of the Memorial’s footnotes reveals that all of those allegations are based on reports of the FFM and of NGOs, media reports, and four anonymous witness statements produced by LAW.¹¹⁸⁵ None of these sources can be accorded any evidential weight for the reasons set out in Chapters 6 and 7 of the Counter-Memorial and Chapters 6 and 7 above.

¹¹⁸¹ *Ibid.*, para. 43. See Witness Statement of U Hla Tun, 5 September 2017, pp. 1-2, RM, Vol. III, Annex 84, a man from Min Gyi who was able to contemporaneously identify the names of a number of terrorists in the village.

¹¹⁸² RG, para. 7.56.

¹¹⁸³ RG, para. 7.57.

¹¹⁸⁴ RG, para. 7.57, citing MG, paras. 9.46-9.54.

¹¹⁸⁵ MG, footnotes 1055 to 1082. The four witness statements are Legal Action Worldwide, Witness Statement nos. 009, 012, 018 and 022, MG, Vol. X, Annexes 346 and 349, and Vol. XI, Annexes 355 and 360.

- 8.102 The Reply of The Gambia also makes the same allegations found in the Memorial that in Min Gyi, soldiers separated women from men, took the women to nearby houses, raped and gang raped them, and then set the houses on fire with the women inside.¹¹⁸⁶ The evidence cited for this allegation is again the 2018 FFM Detailed Findings. Again, for the reasons given in Chapter 6 of the Counter-Memorial and Chapter 6 above of this Rejoinder, no evidential weight can be given to the FFM reports, including the 2018 FFM Detailed Findings.
- 8.103 The serious problems with the witness statements provided by LAW¹¹⁸⁷ are now compounded by the recent revelations concerning Witness P1299, the witness from Min Gyi, who, as already discussed above, provided witness statements to two different organisations, LAW and the IIMM, and who now admits in the latter statement that he was untruthful in the former.¹¹⁸⁸
- 8.104 The only new evidence provided by The Gambia that relates to sexual violence in Min Gyi is the video-recorded interview of Shafika Begum which was taken by the University of Southern California Shoah Foundation.¹¹⁸⁹ According to The Gambia, this interviewee recounts that “a group of six women, including her, [were taken] into a house. They were beaten, ‘stripped naked and raped’. They were then ‘left unconscious’ and the military ‘set the house on fire’”.¹¹⁹⁰
- 8.105 There are several problems with this interview, and with The Gambia’s reliance on it.
- 8.106 First, there are general evidential problems with the material produced by the Shoah Foundation, which have already been dealt with elsewhere.¹¹⁹¹

¹¹⁸⁶ RG, para. 7.57, citing MG, paras. 9.46-9.54. The same allegation in almost the same terms is made for Min Gyi at MG, para. 9.45, with the 2018 FFM Detailed Findings, para. 909 being cited in support. At RG, para. 7.66, reference is made to the 2018 FFM Detailed Findings, para. 909.

¹¹⁸⁷ See CMM, paras. 7.66-7.81, and this Rejoinder, paragraphs 7.72-7.83 and 7.141 above.

¹¹⁸⁸ See paragraphs 8.75-8.80 above.

¹¹⁸⁹ It appears that The Gambia forgets that it has annexed this witness’s interview, since it is not discussed in the sections of its Reply that deal with the statements prepared by the Shoah Foundation: see RG, paras. 4.37, 4.38 and 4.71.

¹¹⁹⁰ RG, para. 7.66, citing University of Southern California Shoah Foundation, video and transcript of interview of Shafika Begum, pp. 31-33, RG, Vol. III, Annex 42.

¹¹⁹¹ See paragraphs 7.137-7.140 and 8.89-8.95 above.

- 8.107 Second, the repeated failure during interview to clarify ambiguities in the account given at the interview constitutes a fundamental problem. If it is to be used as evidence to found such a serious claim as genocide, then the account needs to be properly and meaningfully tested.
- 8.108 Third, the three other pieces of evidence cited at paragraph 7.66 of the Reply in apparent support of Shafika Begum are all anonymous witness statements procured by LAW, to which evidential weight cannot be attached.¹¹⁹² In any event, none of these other witness statements mentions any form of sexual violence.¹¹⁹³ Therefore, Shafika Begum's account of rape in Min Gyi is uncorroborated by these statements.
- 8.109 Fourth, not only do the three anonymous witness statements procured by LAW fail to mention sexual violence, one of those, Witness No. 013, provides only secondary hearsay evidence about "what happened in the house".¹¹⁹⁴ According to this statement, another person told No. 013 about "the violence, the beating and [the] taking of their jewelry (*sic*)."¹¹⁹⁵ This witness statement does not corroborate Shafika Begum's account of sexual violence in Min Gyi.¹¹⁹⁶
- 8.110 Thus, a full and fair analysis of all the available material shows that the material does not substantiate The Gambia's allegations that sexual violence occurred in Min Gyi.

E. Chut Pyin

1. General

- 8.111 In its Reply,¹¹⁹⁷ The Gambia approaches Chut Pyin in the same flawed way as in its Memorial: by ignoring the context and circumstances in which the counter-terrorism operations took place. The Reply also relies heavily upon summarised witness

¹¹⁹² See CMM, paras. 7.66-7.81.

¹¹⁹³ The reference in RG footnote 726 to Legal Action Worldwide, Witness statement No. 010 is wrong. It should be to Legal Action Worldwide, Witness statement No. 012, MG, Vol. X, Annex 349, which was already cited in the Memorial: see MG, para. 9.46.

¹¹⁹⁴ Legal Action Worldwide, Witness statement No. 013, para. 25, MG, Vol. X, Annex 350.

¹¹⁹⁵ *Ibid.*

¹¹⁹⁶ This argument is without prejudice to the position of Myanmar that no evidential weight can be given to the LAW witness statements.

¹¹⁹⁷ RG, paras. 7.78-7.98.

accounts that were annexed to The Gambia's Memorial, which overwhelmingly fail to communicate what truly took place, through their deliberate silence over the role played by ARSA and its supporters during the violent clashes with Myanmar Defence Services in and around Chut Pyin.

- 8.112 Myanmar categorically denies the allegations that the Myanmar Defence Services engaged in any indiscriminate physical and/or sexual violence in Chut Pyin, including the killing of "Rohingya civilians".¹¹⁹⁸
- 8.113 In so far as destruction by fire is concerned, The Gambia states that Myanmar has claimed that *all* fire-damage to the village was *exclusively* carried out by ARSA and its supporters,¹¹⁹⁹ and The Gambia then seeks to refute that claim. However, that is not what Myanmar has said.
- 8.114 Myanmar has never claimed that damage by fire to villages was caused *exclusively* by ARSA or its supporters or other Bengalis. Rather, Myanmar has challenged the assumption of The Gambia that any fire damage to any villages in northern Rakhine State must have been caused exclusively by, or at the behest of, military or governmental authorities of Myanmar. The mere fact that a structure has been damaged by fire obviously does not of itself answer the question of who is responsible for the fire. Furthermore, the mere fact that The Gambia can point to (disputed) evidence that the authorities were responsible for fire damage in one location in northern Rakhine State would not of itself say anything about whether the authorities were responsible for fire damage in any other location. What Myanmar has argued,

¹¹⁹⁸ RG, para. 7.78.

¹¹⁹⁹ RG, paras. 7.85-7.88.

and supported with credible evidence in relation to Chut Pyin¹²⁰⁰ and elsewhere,¹²⁰¹ is that ARSA, its supporters and others, were responsible for burning structures across northern Rakhine State. It is also possible that some fires were not started deliberately, but resulted from the armed clashes between ARSA and its supporters and the Myanmar Defence Services. If it is the position of The Gambia that the military or governmental authorities of Myanmar were responsible for deliberately causing damage by fire in a particular location, then it is for The Gambia, as the party bearing the burden of proof, to establish that this is the case in relation to the specific location in question.

8.115 The Reply of The Gambia states that its case on destruction by fire is supported by “extensive witness testimony”,¹²⁰² and gives references in the accompanying footnote to 23 signed witness statements.¹²⁰³ However, not one of those signed witness statements relates to Chut Pyin.

8.116 In fact, The Gambia did not annex to its Memorial a single signed witness statement in support of any of its allegations relating to Chut Pyin. It now relies on three signed witness statements,¹²⁰⁴ the earliest of which is dated 20 February 2023, almost 7 years after the events in question. None of these accounts can properly be said to be contemporaneous in nature, or uninfluenced by life in the camps of Bangladesh.¹²⁰⁵

¹²⁰⁰ Sworn Statement of U Kay Phar Yad Aulla, confirming his account given on 2 November 2017 (24 February 2023), CMM, Vol. V, Annex 159; Sworn Statement of U Kay Phar Yad Aulla, confirming his account given on 2 November 2017 (24 February 2023) (corrected translation), RM, Vol. III, Annex 105; Witness Statement of U Kay Phar Yad Aulla, 2 November 2017, RM, Vol. III, Annex 101. Sworn Statement of Maw Go Lar Mauk, confirming his account given on 2 November 2017, CMM, Vol. V, Annex 160; Sworn Statement of Maw Go Lar Mauk, confirming his account given on 2 November 2017 (24 February 2023) (corrected translation), RM, Vol. III, Annex 106; Witness Statement of Maw Go Lar Mauk, 2 November 2017, p. 1, RM, Vol. III, Annex 100. See also Witness Statement of U Baw Shee Ullah, 2 November 2017, p. 1, RM, Vol. III, Annex 99. See also Witness Statement of U Aung Thein Mya, 16 October 2017, p. 1, RM, Vol. III, Annex 87, that confirms that Bengalis were responsible for burning their houses.

¹²⁰¹ See, for example paragraphs 13.165-13.167 below; and CMM, paras. 8.49-8.51 and 9.186-9.187. See also CMM, para. 3.79, in relation to destruction of Rakhine villages by ARSA.

¹²⁰² RG, para. 7.87.

¹²⁰³ RG, footnote 768.

¹²⁰⁴ IIMM, Witness Statement No. IIMM0027971404, RG, Vol. IV, Annex 55; IIMM, Witness Statement No. IIMM0027992301, para. 42, RG, Vol. IV, Annex 57; IIMM, Witness Statement No. IIMM0027999848, RG, Vol. IV, Annex 59.

¹²⁰⁵ CMM, paras. 3.120–3.145.

- 8.117 Such belated evidence relied upon by The Gambia is to be contrasted with the contemporaneous accounts from ARSA members themselves (see paragraph 8.114 above) which is consonant with contemporaneous Myanmar military evidence, such as the testimony of Captain Maung, a company commander from the No. (4) Infantry Regiment.¹²⁰⁶
- 8.118 Captain Maung describes his role in the events at Chut Pyin, including the orders he gave to his subordinates to act “in accordance with the Right to Protect and Rules of Engagement (ROE).”¹²⁰⁷ He further details the series of attacks upon Myanmar security personnel by hundreds of ARSA members and its supporters, including through the use of sticks, swords, hand-made mines, grenades, and guns. When the terrorists refused to heed warnings to disperse, Captain Maung describes the use of proportionate and defensive force to fend off attack.¹²⁰⁸

2. Statements of ARSA members

- 8.119 Myanmar’s Counter-Memorial included witness statements from two ARSA members who provided evidence, against self-interest, about their recruitment, training and participation in the violent ARSA attacks at Chut Pyin.¹²⁰⁹ The Gambia’s attempts to undermine the credibility of these witnesses are feeble and unimpressive.¹²¹⁰ Contrary to what The Gambia claims, there is nothing “far-fetched” about these signed statements.
- 8.120 The Gambia argues that the statements of these two ARSA members should be disregarded for the simple reason that they self-identify as “Bengali”, which The Gambia *claims* is a term that has been “rejected by *the Rohingya*”, without

¹²⁰⁶ Witness Statement of Captain Maung xxxxx, 16 October 2017, RM, Vol. III, Annex 86*bis*.

¹²⁰⁷ *Ibid.*, pp. 1-2.

¹²⁰⁸ *Ibid.*, pp. 2-4.

¹²⁰⁹ Sworn Statement of U Kay Phar Yad Aulla, 24 February 2023, confirming his account given on 2 November 2017, pp. 1-2, CMM, Vol. V, Annex 159; Sworn Statement of Maw Go Lar Mauk, 24 February 2023, confirming his account given on 2 November 2017, p. 1, CMM, Vol. V, Annex 160. See CMM, para. 8.73(6).

¹²¹⁰ RG, para. 7.87 and footnote 767.

exception.¹²¹¹ Such an unsubstantiated and absolutist claim does not survive the evidence from the United States Institute of Peace.¹²¹²

- 8.121 The Gambia claims that these two witness statements are inconsistent with previous accounts given by the same witnesses two months earlier to the journalist Rick Heizman.¹²¹³
- 8.122 As to the first of these witness, U Kar Phay Yad Aulla, The Gambia contends that he says in his signed statement that he was part of a group of 100, while in the earlier account he said he was part of a group of 200. In fact, in his earlier account, he describes the *initial* group of terrorists as “100 Bengalis from Chut Pyin”, who were then joined by “Bengalis from Ni Lin Paw and Auk Nan Yar villages”.¹²¹⁴ His signed witness statement, given 2 months later, is consistent with this: “Our group had more than 200 attackers, including villagers from Ni Lin Baw Village, Auk Nan Ra Village and Chut Pyin Village”.¹²¹⁵
- 8.123 The Gambia contends that in the earlier account he says that the attack took place in the early morning of 27 August, while in the later account he says that it was in the afternoon of 27 August. The original notes of the interview with Rick Heizman are not available. The summary account of the interview was drafted by a non-native Bengali speaker. This witness does not appear to have had *at that time* an opportunity to verify the recorded account and timings, and plainly has not signed what has been recorded in his name in the English language.
- 8.124 As to the second of these witnesses, Ma Go Lar Mauk, the only issue raised by The Gambia as far as his signed statement is concerned is an apparent “discrepanc[y]” in his recorded age. There is in fact no error. The Gambia appears not to have carefully read the signed witness statement, which is a *confirmation* in 2023 that the contents

¹²¹¹ RG, para. 7.87.

¹²¹² CMM, para. 2.156.

¹²¹³ RG, para. 7.87 and footnote 767.

¹²¹⁴ Interview of Kay Fayad Ullah by Rick Heizman (15 September 2017), p. 2, RG, Vol. III, Annex 38. Ni Lin Paw is also known as Ni Lin Baw.

¹²¹⁵ Sworn Statement of U Kay Phar Yad Aulla, confirming his account given on 2 November 2017 (24 February 2023) (corrected translation), RM, Vol. III, Annex 105; Witness Statement of U Kay Phar Yad Aulla, 2 November 2017, RM, Vol. III, Annex 101.

of his earlier statement, *as given on 2 November 2017*, is true. That includes a record of the witness' age *at that time* of giving the original statement.¹²¹⁶ This is, unsurprisingly, the same age (48) as reported as being given on 15 September 2017, 2 months prior. The Gambia does not suggest that any aspect of the *substance* of his account is unreliable.

8.125 There is simply no evidence that either of these two witnesses was coerced or forced into making false statements.¹²¹⁷ Their signed statements (contemporaneous to the events in question) are detailed as to times, places and persons involved, who are often named and identified. They are also mutually corroborative. They are accounts which are consistent with ARSA's activities across the breadth of northern Rakhine State at that time.

8.126 Finally, the statements of Ma Go Lar Mauk and U Kar Phay Yad Aulla are now yet further corroborated by the evidence of U Baw Shee Ullah,¹²¹⁸ a villager from nearby Ni Lin Baw who describes his late recruitment by Chut Pyin villagers (including two religious leaders: Mawlawi Zubai and Mawlawi Dilu) shortly before the attack upon the Chut Pyin police outpost. Specifically, he describes being among about 100 Bengali villagers armed with sticks and swords following in support of 10 terrorists who "used handmade mines and guns for the attacks".¹²¹⁹ U Baw Shee Ullah states that the clerics had threatened that "the whole family of ours would be killed by slitting their throats" if he and others did not participate in ARSA's attacks.¹²²⁰

3. IIMM witness statements

8.127 As noted above, the IIMM has taken statements from witnesses and provided them to the parties.¹²²¹ Those relating to Chut Pyin were taken between October 2022 and October 2023, some five or more years after the events in question. Some of the

¹²¹⁶ Sworn Statement of Maw Go Lar Mauk, confirming his account given on 2 November 2017 (24 February 2023) (corrected translation), RM, Vol. III, Annex 106; Witness Statement of Maw Go Lar Mauk, 2 November 2017, p. 1, RM, Vol. III, Annex 100.

¹²¹⁷ Contrary to what is claimed in RG, para. 7.87.

¹²¹⁸ Witness Statement of U Baw Shee Ullah, 2 November 2017, RM, Vol. III, Annex 99.

¹²¹⁹ *Ibid.*, p. 1.

¹²²⁰ *Ibid.*, p. 1.

¹²²¹ Letter from the Agent of The Gambia to the Registrar, 1 July 2024, RM, Vol. V, Annex 215.

witnesses giving statements acknowledge that they had been interviewed on one or more previous occasions by other organisations.¹²²²

8.128 Of the seven IIMM witness statements made available to the parties in 2024 that relate to Chut Pyin, The Gambia has chosen to rely on only four. Of those statements, some concede (contrary to The Gambia’s case) that the primary concern of the Myanmar Defence Services in the period leading up to events in August 2017 was preparing to defend themselves from imminent attack and searching out terrorists based in the village. One witness says: “I have seen and heard them [military] using a mobile phone... ‘The message was The Bengali are about to attack our forces’, and also that ‘there are members of Al Yakin’”.¹²²³ Another witness states: “I heard soldiers saying things like, ‘there are bad guys in the village’ and ‘we are looking for the bad guys and we are going to kill them.’”¹²²⁴

8.129 Another IIMM witness statement not relied upon by The Gambia includes amongst other matters the following:

The Military also planted mines around the village and along the road... they would tell us that we had a mine planted next to our village... No individual died by these mines. Because of the warnings villagers stayed away; only one cow died.¹²²⁵

One month prior to the August 2017 conflict, a Myanmar military commander met with villagers and warned them: “do not do bad things, do not allow other people to do bad things, go and spread this message”.¹²²⁶

*Militaries don’t attack ladies; they only shoot and kill the guys... women who died got shot when they were running, but they were not specifically targeted... many ladies told us that during the attack they were shown their way...*¹²²⁷

¹²²² See paragraphs 7.18-7.20 and 7.24-7.32 above.

¹²²³ IIMM, Witness Statement No. IIMM0019922097, para. 41, RG, Vol. IV, Annex 49.

¹²²⁴ IIMM, Witness Statement No. IIMM0027971404, 20 February 2023, para. 96, RG, Vol. IV, Annex 55.

¹²²⁵ IIMM, Witness Statement No. IIMM0019925304, paras. 82-83, RM, Vol. IV, Annex 127.

¹²²⁶ *Ibid.*, para. 93.

¹²²⁷ *Ibid.*, para. 129 (emphasis added).

I didn't see wounds caused by burning because when the fire was set everybody started fleeing, so no one stayed in the burning houses.¹²²⁸

They let go everyone who wanted to go to Bangladesh. That was the only direction where people were allowed to move.¹²²⁹

- 8.130 The Gambia has obviously been selective in its use of the available evidence, and has ignored the evidence that does not fit with, or flatly contradicts, its narrative. This is evident across the breadth of its case, including in relation to Chut Pyin.

4. Alleged sexual violence

- 8.131 The Gambia alleges that there was “deliberate and massive ... raping of innocent Rohingya civilians” in Chut Pyin.¹²³⁰ However, paragraphs 7.90, 7.91, 7.94 and 7.95 of its Reply simply restate evidence previously discussed in its Memorial,¹²³¹ all of which has already been comprehensively addressed by Myanmar in its Counter-Memorial.¹²³² For the reasons there given, this evidence can be accorded no evidential weight.¹²³³
- 8.132 The Counter-Memorial of Myanmar points out that The Gambia presents no direct evidence in the form of signed witness statements in relation to its allegations of sexual violence in Chut Pyin, and that it rests its case largely on secondary sources.¹²³⁴ In an apparent attempt to address this criticism, The Gambia refers in its Reply to two new statements, of P2499 and P1461 respectively, that have been provided by the IIMM.¹²³⁵ However, neither of these statements can be considered as reliable evidence of all that happened in Chut Pyin in relation to the treatment of women.

¹²²⁸ *Ibid.*, para. 131.

¹²²⁹ *Ibid.*, para. 151.

¹²³⁰ RG, para. 7.79.

¹²³¹ RG, para. 7.90 refers to the 2018 FFM Detailed Findings, para. 790, which is referred to at MG, para. 9.58. RG, para. 7.91 refers to information taken from two NGO reports and “collated information” obtained by Legal Action Worldwide, all of which are referred to at MG, paras. 9.59, 9.60, 9.62, 9.64, and 9.65. RG, paras. 7.94-7.95 refer to an NGO report which is referred to at MG, para. 9.66 and footnote 1113.

¹²³² Contrary to what is claimed in RG, paras. 7.91 and 7.96.

¹²³³ CMM, paras. 8.74-8.85. See also CMM, Chapter 7.

¹²³⁴ CMM, para. 8.76.

¹²³⁵ RG, paras. 7.93-7.94, referring to IIMM, Witness Statement No. IIMM0027999848, paras. 83-84, RG, Vol. IV, Annex 59, and IIMM, Witness Statement No. IIMM0019922097, para. 50, RG, Vol. IV, Annex 49.

8.133 The statements of P2499 and P1461 were given to the IIMM more than 5 years after the events of August 2017 in Chut Pyin. The passage of time makes it difficult for witnesses to recall events accurately, and also provides opportunities for witnesses to be subjected to influence (both deliberate and inadvertent). This is all the more problematic when it appears that there are significant discrepancies in the witness' accounts.¹²³⁶

8.134 The Gambia's allegation is that systematic sexual violence was committed in Chut Pyin. However, these two IIMM witnesses, P2334 and P2252 (who are not mentioned by The Gambia in relation to the claims of sexual violence in Chut Pyin, but who are relied upon elsewhere by The Gambia in its Reply), both contradict the assertion that any such violence was part of the Tatmadaw's *modus operandi* at this location.¹²³⁷

8.135 P2334, a former resident of Chut Pyin, told IIMM investigators that:

On the way, I met the wife of my brother-in-law, together with other women and girls. They asked me what to do. I said the military soldiers are not shooting at the women and girls, so they should go to where the soldiers had gathered all the women and girls. I could see a gathering of the women and girls from a distance ... I think there were about 80 to a hundred women and children under that tree ... I also later heard that there were another gathering of women in the east side of the village ... I didn't see what happened to those women and girls under the tree, but I believe later they all were allowed to come to U-oror Fara (Ah Htet Nan Yar) ... the military did not enter U-oror Fara.¹²³⁸

8.136 P2252, a woman who lived in Chut Pyin, gives a similar account contradicting The Gambia's narrative. She states that, at a paddy field, men and women were separated into two groups.¹²³⁹ At one point the women were made to bend over, on their knees

¹²³⁶ IIMM, Witness Statement No. IIMM0019922097, paras. 46 and 48, RG, Vol. IV, Annex 49. P1461 provides no credible answer for stark inconsistencies between the account that she gave to the IIMM and a previous statement, regarding her alleged escape route and her initial description of 50 soldiers having been in her home whereas she now claims there were only 10.

¹²³⁷ RG, para. 7.90. See also RG, para. 7.79 and the reference to rape being perpetrated on a "massive" scale.

¹²³⁸ IIMM, Witness Statement No. IIMM0027971404, paras. 111-113 and 127, RG, Vol. IV, Annex 55.

¹²³⁹ IIMM, Witness Statement No. IIMM0027992301, para. 39, RG, Vol. IV, Annex 57.

with their faces on the ground.¹²⁴⁰ Eventually, the women were told by the soldiers to leave the field and they ran to U-oror Fara.¹²⁴¹

8.137 More specifically, this witness states:

In the paddy field, the military head made a gesture with his hand, indicating to us to go away. I could not hear what he was saying, only see the gesture. The people around me told me that the order was to go to U-Oror Fara, which was less than one hour walk from the field.¹²⁴²

8.138 The fact that, according to this witness, the women were told to leave by the “military head” at Chut Pyin, is clearly at odds with The Gambia’s assertion that pervasive sexual violence formed part of the Tatmadaw’s *modus operandi*.

8.139 In terms of what happened in the field, there is no direct evidence that any form of sexual violence was perpetrated there. The witness states that, “[w]hile my head was lying down, I did not hear any woman scream and none from my group was taken away.”¹²⁴³

8.140 The evidence of P2334 and P2252 clearly undermines any assertion that women were deliberately targeted in Chut Pyin and that sexual violence formed part of the Tatmadaw’s *modus operandi*. However, rather than address this evidence which poses significant problems for its case, The Gambia simply ignores it.

5. The material provided by LAW

8.141 In relation to Chut Pyin, the Reply of The Gambia relies, *inter alia*, on both the “Collated Information” document provided by Legal Action Worldwide (LAW),¹²⁴⁴ as well as on signed witness statements provided by LAW.¹²⁴⁵

¹²⁴⁰ *Ibid.*, para. 43.

¹²⁴¹ *Ibid.*, para. 46.

¹²⁴² *Ibid.*, para. 50.

¹²⁴³ *Ibid.*, para. 46.

¹²⁴⁴ RG, footnotes 761, 768, 780, 782 and 787-791.

¹²⁴⁵ RG, footnote 768.

- 8.142 The evidential deficiencies of the “Collated Information” document have already been dealt with elsewhere in Myanmar’s pleadings,¹²⁴⁶ as have those of the signed witness statements provided by LAW.¹²⁴⁷
- 8.143 In addition to the other reasons why no evidential weight can be given to these documents, the following is of particular relevance in relation to Chut Pyin. It is now known that the account in the “Collated Information” document of the person identified as CK0526, and LAW witness statement No. 39, were both given by the same person. This person’s account related to events in Chut Pyin. The inconsistencies between the two accounts given by the same person in these two documents are so significant and stark that no evidential weight can be given to the account of this person.¹²⁴⁸
- 8.144 It is not possible to know how many of the other signed witness statements provided by LAW were given by people whose accounts were previously included in the “Collated Information” document. This is because the identities of those giving the accounts in the “Collated Information” document are unknown. It seems that even The Gambia does not know their identities. In the case of the generality of the signed witness statements provided by LAW, it is therefore not possible to check whether the information in the witness statement is consistent with any earlier account that the person concerned may have given to LAW. It is only due to exceptional circumstances that it was possible to make such a comparison in the case of CK0526.
- 8.145 The following conclusion must be drawn. In the one case where it was possible to make such a comparison for a witness in relation to Chut Pyin, it revealed such fundamental inconsistencies between the signed witness statement and the earlier account that no evidential weight can be given to either the signed witness statement or the earlier account. Overall, there are only three instances in which Myanmar has been able to compare a statement of a witness with a previous statement of the same witness, and in *all three* of these instances there have been fundamental

¹²⁴⁶ CMM, paras. 7.48-7.65; and this Rejoinder, paragraphs 7.64-7.71 above.

¹²⁴⁷ CMM, paras. 7.66-7.81; and this Rejoinder, paragraphs 7.72-7.83 above.

¹²⁴⁸ See paragraphs 7.22(3), 7.29(3) and 7.67 above.

inconsistencies between the two statements of the same witness.¹²⁴⁹ It must be assumed that such inconsistencies may exist in the accounts given by others who spoke to LAW. Because it is not possible to check, evidential weight cannot be given to any of the witness statements provided by LAW, or any of the accounts included in the “Collated Information” document.

6. Abdul Karim

- 8.146 The final piece of evidence relevant to events in Chut Pyin is the Shoah Foundation interview with Abdul Karim.¹²⁵⁰
- 8.147 Predictably, Mr Karim’s account given to the Shoah Foundation bears many of the flaws addressed above with respect to the interview of Hansu Mala.¹²⁵¹ Most starkly, it omits any mention of violent clashes with ARSA, and indeed, omits any mention of ARSA at all. Mr Karim’s motivation for providing his account is a barely disguised demand for the “kings and all the other leaders of the world ... [to] recognize us as Rohingya”.¹²⁵² He is not dispassionate and objective.
- 8.148 More critically, his account is an implausible *ad hominem* attack on the village Chairman. Despite having run away and hidden in a pond “covered in the bubbles” and stating that “I stayed covered by the jungle”,¹²⁵³ Mr. Karim claims to have heard the Chairman issue specific orders for the military to kill. Mr Karim also claims to have seen the Chairman carry out multiple rapes in public view, an allegation uncorroborated by anyone else (“Aung San Myint himself went ahead to rape the women. He was raping them till their deaths... even I saw that”).¹²⁵⁴ He also claims he was shot by the military (“*they* shot me from the back”).¹²⁵⁵ The last of these

¹²⁴⁹ See paragraphs 7.21-7.32 above.

¹²⁵⁰ University of Southern California Shoah Foundation, interview of Abdul Karim (11 March 2018), MG, Vol. V, Annex 137.

¹²⁵¹ See paragraphs 8.89-8.95 above. It is noteworthy that the Shoah Foundation interviews do not include an introductory section where the interviewees are reminded to tell the truth and only speak from their own knowledge rather than based on what they might have been told.

¹²⁵² University of Southern California Shoah Foundation, interview of Abdul Karim (11 March 2018), paras. 775–776, MG, Vol. V, Annex 137.

¹²⁵³ *Ibid.*, paras. 278 and 327.

¹²⁵⁴ *Ibid.*, para. 392.

¹²⁵⁵ *Ibid.*, para. 345.

allegations is the most revealing in that Mr Karim spends the first part of the interview describing how *soldiers* were responsible for shooting him. But, following a break, the second part of his interview concludes with his allegation that it was the village Chairman himself who shot him.¹²⁵⁶ The inconsistencies in this allegation are clear and undeniably undermine this person's credibility and reliability.

F. Maung Nu

1. General

- 8.149 In relation to the third and final of the three main locations, Maung Nu in Buthidaung Township,¹²⁵⁷ the Reply of The Gambia does not in fact *reply* to, or contradict, the evidence presented by Myanmar in its Counter-Memorial.¹²⁵⁸ The Gambia does not deny or dispute *at all* that there were “high intensity confrontations ... in and around the area of Maung Nu in the days prior to, during, and after 27 August, between ARSA and its supporters and the Myanmar Defence Services.”¹²⁵⁹ This is therefore a fact that is not in dispute between the parties in these proceedings.
- 8.150 Although this is an undisputed fact, it is striking that not one of the witnesses relied upon by The Gambia was apparently willing even to acknowledge this fact, let alone prepared to describe the clashes between ARSA and the Myanmar Defence Services. This undermines the credibility of claimed eyewitnesses upon whose statements The Gambia relies.
- 8.151 Instead of responding substantively to the evidence presented by Myanmar, the Reply of The Gambia simply repeats the same evidence that it relies upon in its Memorial. Indeed, the bulk of the section of the Reply dealing with Maung Nu contains little more than quotations of the same passages of the same the material relied on by The

¹²⁵⁶ *Ibid.*, para. 922 (“Aung San Myint is the one who shot me... the village chairman”).

¹²⁵⁷ RG, paras. 7.103–7.112.

¹²⁵⁸ CMM, paras. 8.87–8.107.

¹²⁵⁹ RG, para. 7.103, citing CMM, para. 8.88.

Gambia in its Memorial. Mere repetition does not enhance the evidential value of the quoted passages.¹²⁶⁰

- 8.152 There is a single instance where The Gambia purports to be able to offer additional evidence, in the form of a witness statement of “[a]nother witness”¹²⁶¹ provided by the IIMM, which is said to “corroborate” the evidence in a witness statement taken by LAW.¹²⁶² However, The Gambia has subsequently admitted, six weeks after filing its Reply, that the “new” witness in question (P1244) is in fact the same person who gave the witness statement to LAW.¹²⁶³ As has been noted above, The Gambia made the same mistake with another witness relating to Min Gyi.¹²⁶⁴
- 8.153 The fact that The Gambia itself was not initially able to detect that two items of its *own evidence* originated from the same person is a clear practical example of the risks of relying on pervasive anonymous evidence.¹²⁶⁵ The fact that the witness evidence relied upon by The Gambia is overwhelmingly anonymous inherently undermines its evidential weight. It also undermines any claims by The Gambia that statements of anonymous witnesses are said to be “corroborated” by “other” anonymous witnesses.
- 8.154 The Gambia claims that Myanmar is wrong to label The Gambia’s evidence in relation to Maung Nu as being *hearsay* and *untested*, pointing out that some of its evidence consists of signed witness statements.¹²⁶⁶ However, the bulk of The Gambia’s evidence in respect of Maung Nu *is* indeed overwhelmingly *hearsay* evidence in that it consists of second-hand accounts given in reports of organisations of what claimed witnesses are said to have said to those organizations. The information in those second-hand accounts may itself be third-hand or even more remote in nature. Some

¹²⁶⁰ MG, para. 8.135 and RG, para. 7.105, both citing Legal Action Worldwide, Witness Statement No. 006, paras. 30-31, MG, Vol. X, Annex 343. MG, para. 8.134 and RG, para. 7.107, both citing 2018 FFM Detailed Findings, para. 809, MG, Vol. II, Annex 40. MG, para. 8.128 and RG, para. 7.106, both citing Fortify Rights, Witness Statement of Mohammadul Hassan, MG, Vol. X, Annex 337. MG, para. 10.62 and RG, para. 7.104, both citing 2018 FFM Detailed Findings, para. 808, MG, Vol. II, Annex 40.

¹²⁶¹ RG, para. 7.109, citing IIMM, Witness Statement No. IIMM0019915116, paras. 103, 105, 107, RG, Vol. IV, Annex 54.

¹²⁶² RG, para. 7.108, citing Legal Action Worldwide, Witness Statement No. 005, para. 31, MG, Vol. X, Annex 342.

¹²⁶³ Letter from the Agent of The Gambia to the Registrar, 1 July 2024, RM, Vol. V, Annex 215.

¹²⁶⁴ See paragraph 8.75 above.

¹²⁶⁵ CMM, paras. 7.53-7.54.

¹²⁶⁶ RG, para. 7.112.

of the “evidence” relied on by The Gambia is not evidence at all, but mere expressions of opinion in the reports of those organizations.

8.155 Furthermore, the claims made in the witness statements relied upon by The Gambia are untested. The suggestion by The Gambia that its evidence is not “untested”¹²⁶⁷ is absurd. The Gambia cannot point to any way in which *any* of its evidence has been “tested” in any meaningful sense.

8.156 Although the IIMM provided The Gambia with four new signed witness statements that deal with the events in Maung Nu, the only one of these that The Gambia has elected to annex to its Reply is that of Witness P1244. As will be demonstrated in paragraphs 8.157 to 8.160 below, P1244 is not a truthful witness. As will be furthermore demonstrated in paragraphs 8.161 to 8.171 below, the other three witness statements provided to The Gambia by the IIMM flatly undermine its case.

2. Witness P1244

8.157 The evidence demonstrates that P1244, a 54-year-old Bengali man from Maung Nu, is an untruthful witness.

8.158 When giving his 2020 witness statement to LAW about events in Maung Nu, this person claimed not to “have a clue” about who might have been responsible for “very heavy shooting” in the neighbouring village of Hpaung Taw Pyin (also known as Pondo Para / Fundu Parang), apart from the fact that he was told by fleeing villagers that “the military [were] firing at people”.¹²⁶⁸ When expressly asked about this by the interviewers, P1244 replied, “[i]n our areas ARSA don’t exist. I never saw or heard about them in our place”.¹²⁶⁹ This was patently untrue, and a deliberate lie.

8.159 When interviewed two years later by the IIMM, the account of this witness had evolved. In the face of incontrovertible evidence, P1244 now accepts in the witness statement that he gave to the IIMM as follows. At “around 1am” on 25 August, he heard the sound of shooting coming from the direction of the “Na Sa Ka sub-camp in Fundu Parang” and “other sounds” coming from the direction of the “No. 551 military

¹²⁶⁷ RG, para. 7.112.

¹²⁶⁸ Legal Action Worldwide, Witness Statement No. 005, para. 12, MG, Vol. X, Annex 342.

¹²⁶⁹ *Ibid.*, para. 36.

base”. This shooting emanated from both locations and was “continuous”, “until the morning”. Alongside the “*ta-ta-ta* sounds. Every once in a while, I also heard a *boom* sound...”.¹²⁷⁰ Predictably, not one witness relied upon by The Gambia accepts having attended either the sub-camp or the military base to carry out ARSA’s attacks, nor do they claim to have been harmed or shot at in those locations.

- 8.160 Despite previously claiming not to “have a clue” about what had been taking place, P1244 now concedes that he had been told “*that day... that there was some fighting near Fundu Parang*”.¹²⁷¹ It would have been impossible for anyone present in Maung Nu and the surrounding area not to have known what was taking place at that time. This is particularly so in light of the other witness statements provided by the IIMM concerning events in Maung Nu, which are considered below.

3. Witness P1496

- 8.161 The witness statement provided by the IIMM of P1496, a 48-year-old Bengali man from Maung Nu, gives a lengthy and important description of ARSA’s presence and activities in and around Maung Nu in 2017, and the fears of speaking openly about ARSA. He states, *inter alia*:

I believe that people who are *members of ARSA may come to speak with your organisation and will share false information with you.*

Back in 2017, there were three people in Maung Nu who were in charge of ARSA: Molluvi Nurul Hakim, whose father’s name was Kobir Ahmad, a second man also named Nurul Hakim whose father’s name was Amir Hamza and Molluvi Zahed Hussein, whose father’s name was Sadek Ahmed. They were misguiding the youth of our village ... Four to five months before the main event in August 2017, ARSA began to assemble these youths in our village mosques after the Isha prayer each evening when the mosques were empty and people in the village had gone to sleep. They used to brief the youths, talk with them about their vision and conduct trainings with them. The number of youths at these gatherings varied between 20 and 60 people and they were between the ages of 17 and 20 years old. I knew most

¹²⁷⁰ IIMM, Witness Statement No. IIMM0019915116, para. 73, RG, Vol. IV, Annex 54.

¹²⁷¹ *Ibid.*, para. 76. See Witness Statement of Police Sergeant San xxxx, 21 October 2017, p. 1, RM, Vol. III, Annex 89, wherein the witness describes Myanmar Defence Services being confronted by armed terrorists in Maung Nu; issuing warnings for the terrorists to withdraw; and the use of proportionate defensive force.

of these youths but *I do not wish to share their names with you during this interview.*¹²⁷²

On one occasion about two to three months before the attacks in August 2017, at the time of the Isha jamat prayer, which is conducted in congregation with many people at once, I arrived at the Monu Fara Mazor Mosque rather late. I saw the people inside were wearing all black clothing and appeared to be following instructions. Whistles were being blown and I saw that some of these people carried with them long swords (“dha”), long knives and long bamboo sticks.¹²⁷³

Approximately 2-3 days before the attack on the *Nay Khra Zound* sub-camp, ARSA members from Maung Nu detained two men in Chin Tha Mar village. There two men were [Redacted] and Rofiq... ARSA believed they were informants for the military at No.564 base... ARSA Molluvi Zahed Hossein, and the two Nurul Hakims took the men during daytime in front of their families and neighbours. Other ARSA youths were helping to take the two men but *I do not want to disclose their names...* After being taken away, Rofiq had his throat cut. His body was placed in a sack and thrown down a hill on the eastern side of Maung Nu ... Villagers who found the sack saw that dogs and other animals had tugged at the sack trying to gain access to the body. The villagers opened the sack and found Rofiq’s body inside. This was not a surprise to anyone as everyone assumed that he would be dead once ARSA had taken him.¹²⁷⁴

I later heard from people in the village and members of ARSA from Maung Nu who had participated and survived attacks in various places that night, that ARSA members from outside of Maung Nu had gone to the *Nay Khra Zound* sub-camp in Hpaung Taw Pyin ... and found three people sleeping and slaughtered the two men in their beds, while also attacking the medical assistant who had survived.¹²⁷⁵

[On 25 August, I saw] Mojib Ullah, whom everyone called Mojia, who was the ARSA leader for the entire village tract... and Molluvi Nurul Hakim (f/Kobir Ahmad) in the front yard making “bombs” with their own hands. I saw they were working with wires and batteries. I continued watching as the two men assembled two bombs ... ARSA members Molluvi Nurul Hakim (f/Kobir Ahmad) and Molluvi Zahed Hussein proudly carried the bombs and told a crowd of people watching them that they were going to test these weapons ... Before the attacks that previous night, ARSA members were very secretive about their activities

¹²⁷² IIMM, Witness Statement No. IIMM0019628625, paras. 52-53, RM, Vol. IV, Annex 131.

¹²⁷³ *Ibid.*, para. 54.

¹²⁷⁴ *Ibid.*, paras. 66-68.

¹²⁷⁵ *Ibid.*, para. 75.

but now they had the courage to show what they were doing publicly.¹²⁷⁶

4. Witness P2892

- 8.162 The witness statement provided by the IIMM of P2892,¹²⁷⁷ a 43-year-old Bengali woman, describes events in Maung Nu and her subsequent journey to Bangladesh. This witness statement contradicts The Gambia’s claims that violence at, and in the vicinity of, Maung Nu was inflicted unilaterally by the Myanmar Defence Services, and that there was a genocidal intent.
- 8.163 Amongst other matters, P2892 states that a few days prior to the counter-terrorism operations in Maung Nu, “the sound of gunshots going *back and forth*” could be heard from the location of the military outpost in Hpaung Taw Pyin (Fundu Parang), which continued until 3 a.m.¹²⁷⁸ This was plainly the well-documented ARSA attack upon the outpost, a short distance from Maung Nu. P2892 says that those coming from Hpaung Taw Pyin informed her that “there was fighting” taking place.¹²⁷⁹
- 8.164 P2892 is one of the few who is also able to provide an indication of what took place in Maung Nu *after* many of its residents had already departed. P2892 reveals that a number of her friends and family chose to remain in the area and that “no one is doing anything bad to them ... part of [nearby] Chin Tha Mar village was burnt and other parts left alone ... only some houses in the middle of the village of Monu Fara (Maung Nu) were burned down but that many remain in Monu Fara, Fundu Parang and Pale Taung”.¹²⁸⁰ This evidence is consistent with the 2017 statement of Muhammad Soli, a 45-year-old Bengali man, who describes his return to his home in Maung Nu in mid-September 2017 *after* the counter-terrorism operations. He similarly noted that only 26 out of 286 houses had been damaged by fire, and said that “more and more villagers” who had left the village were now returning. Following his return, military

¹²⁷⁶ *Ibid.*, paras. 80-81.

¹²⁷⁷ IIMM, Witness Statement No. IIMM0028048879, RM, Vol. IV, Annex 141.

¹²⁷⁸ *Ibid.*, para. 30.

¹²⁷⁹ *Ibid.*, paras. 31-32.

¹²⁸⁰ *Ibid.*, para. 92.

personnel from No. (564) Light Infantry Regiment had then come to the village and provided the villagers with rice, oil and peas.¹²⁸¹

8.165 These IIMM witness statements, viewed in conjunction with mutually consistent evidence supplied by Myanmar, provide a very different picture to that alleged by The Gambia of what took place in and around Maung Nu prior to, during, and immediately after the conduct of the counter-terrorism operations. It is indisputable that clashes took place in and around Maung Nu between ARSA and the Myanmar Defence Services. It is clear that those who fail to refer to ARSA are knowingly presenting a false impression of what occurred.¹²⁸²

5. Allegations of sexual violence

8.166 In its Reply, The Gambia claims that “the Counter-Memorial [does not] credibly dispute the body of evidence describing the Tatmadaw’s ... sexual violence in [Maung Nu]”.¹²⁸³

8.167 In fact, no allegations were made in the Memorial of The Gambia of sexual violence in Maung Nu. Chapter 9, Section III of its Memorial is the part that focuses on allegations of sexual violence. It conspicuously does not include Maung Nu as one of the main locations, where it was claimed that sexual violence took place. For this reason, the Counter-Memorial of Myanmar did not need to counter any such allegations in relation to Maung Nu.

8.168 The Reply of The Gambia now belatedly makes such an allegation in relation to Maung Nu for the first time. However, this consists of nothing more than a reference to two paragraphs of the 2018 FFM Detailed Findings.¹²⁸⁴ No other source is cited for this claim.

8.169 One cited paragraph of the 2018 FFM Detailed Findings¹²⁸⁵ gives details of only three alleged victims. It says that one interviewee said that she saw two women raped by

¹²⁸¹ Statement of Muhammad Soli, 28 October 2017, p. 1, RM, Vol. III, Annex 95.

¹²⁸² See CMM, para. 8.104.

¹²⁸³ RG, para. 7.103.

¹²⁸⁴ RG, para. 7.111, citing 2018 FFM Detailed Findings, paras. 810-811, MG, Vol. II, Annex 40.

¹²⁸⁵ 2018 FFM Detailed Findings, para. 810.

two to three soldiers and that these women were then heard to scream, which led her to infer that the two women were killed. The 2018 FFM Detailed Findings says that another interviewee “described” a woman being killed by being knifed in her vagina, but does not state that the interviewee claims to have in fact personally witnessed this.

8.170 The other cited paragraph of the 2018 FFM Detailed Findings¹²⁸⁶ says that one interviewee said that when she fled Maung Nu she was raped and witnessed 10-20 other women “from my village” being raped.¹²⁸⁷ It is noted that this account is uncorroborated and the location of the claimed events is not Maung Nu, but some other unidentified location “in the hills”.

8.171 The evidential deficiencies of the 2018 FFM Detailed Findings have been dealt with in Chapter 6 of the Counter-Memorial of Myanmar, and Chapter 6 above of this Rejoinder. It cannot be given evidential weight. No other evidence is provided by The Gambia in relation to claimed sexual violence in Maung Nu. While some sources claim that soldiers searched women for items hidden in their underwear,¹²⁸⁸ a witness statement of one villager that was provided by the IIMM states that although “all the women” were detained by soldiers in a nearby house, the soldiers “did not do anything to the women”.¹²⁸⁹

G. Conclusion

8.172 The Gambia is incorrect in stating that there is an “overwhelming weight” of evidence which shows that the Tatmadaw “followed different ‘rules of engagement’” and executed the “‘clearance operations’ ... in a manner characterized by extreme brutality directed at the civilian population”, involving the “massive killing of innocent and unarmed Rohingya civilians ... and pervasive sexual violence”.¹²⁹⁰ None of The

¹²⁸⁶ 2018 FFM Detailed Findings, para. 811.

¹²⁸⁷ RG, para. 7.111, referring to 2018 FFM Detailed Findings, para. 811.

¹²⁸⁸ IIMM, Witness Statement No. IIMM0028048879, para. 52, RM, Vol. IV, Annex 141; IIMM, Witness Statement No. IIMM0019915116, paras. 100 and 102, RG, Vol. IV, Annex 54; Legal Action Worldwide, Witness Statement No. 002, para. 9, MG, Vol. X, Annex 339.

¹²⁸⁹ IIMM, Witness Statement No. IIMM0019915116, para. 102, RG, Vol. IV, Annex 54 (“...no soldiers entered the house and *did not do anything to the women*”).

¹²⁹⁰ RG, para. 7.12.

Gambia's allegations are supported by evidence that is sufficiently credible and reliable to discharge the very high burden of proof which applies in this case.

CHAPTER 9

THE OTHER LOCATIONS

A. Introduction

9.1 This Chapter of this Rejoinder responds to Section III of Chapter 7 of The Gambia's Reply, in so far as it makes allegations of mistreatment of the civilian population by the Myanmar Defence Services during the counter-terrorism operations of 2016 and 2017 in locations other than the three main locations of Min Gyi, Chut Pyin and Maung Nu.

9.2 As has been noted in paragraph 8.14 above, as of August 2017 there were 932 locations in northern Rakhine State, of which 509 locations were entirely or partially inhabited by Bengalis. However, the evidence relied on by The Gambia in its Memorial in fact only alleges acts of violence by the Myanmar Defence Services in 40 locations (about 8% of all Bengali settlements), and most of this evidence relates to the three main locations of Min Gyi, Chut Pyin and Maung Nu (around 0.6% of all Bengali settlements). In relation to the remaining *hundreds* of Bengali villages across northern Rakhine State, The Gambia presents no evidence whatsoever of mistreatment by members of the Myanmar Defence Services of any member of the civilian population.

9.3 The three main locations of Min Gyi, Chut Pyin and Maung Nu are dealt with in Chapter 8 of the Counter-Memorial of Myanmar and in Chapter 8 above of this Rejoinder. The 37 other locations in which acts of violence are alleged in the Memorial of The Gambia to have been committed are dealt with in Chapter 9 of the Counter-Memorial of Myanmar and in this Chapter of this Rejoinder. After undertaking a location-by-location examination of the evidence in relation to these 37 other locations, Chapter 9 of the Counter-Memorial of Myanmar concludes that:

There is no evidence that the Myanmar Defence Services precipitated attacks where there had been no prior ARSA engagement. The analysis demonstrates that the counter-terrorism operations took place in locations proximate to the activities, and the attacks on the state security apparatus and its personnel and civilians, by ARSA and its supporters. While the

loss of life is alleged to be relatively large in the three main locations, Min Gyi, Chut Pyin and Maung Nu, in other villages the death toll was significantly lower or non-existent. The Gambia has made no attempt to quantify how many of those killed were ARSA members or mobilised local supporters involved in the attacks; how many were legitimate collateral casualties of the counter-terrorism operations, and how many are claimed to be unjustified or unlawful killings of innocent civilians.¹²⁹¹

- 9.4 As is demonstrated in the Counter-Memorial of Myanmar, in relation to some of the 37 other locations, the evidence consists solely of an allegation of a single incident involving a single victim. For instance, in relation to Du Oh The Ma, the only evidence concerns the alleged kicking of an elderly woman who subsequently died.¹²⁹² Furthermore, in relation to some of these 37 other locations, the evidence relied on by The Gambia clearly cannot be given any evidential weight. For instance, in relation to La Ba Daung, the only evidence in respect of claimed mass killings is a bare statement in a *health report* by Médecins Sans Frontières that an unnamed female had informed that organization that she had seen “the military [take] the men aside and kill[] them all”.¹²⁹³
- 9.5 In short, the location-by-location analysis in the Counter-Memorial shows that the Memorial of The Gambia does not present reliable evidence of mass killings, mass infliction of bodily harm, or pervasive sexual violence, by the Myanmar Defence Services in each of these 37 other locations. Indeed, the evidence of The Gambia does not even *suggest* that this occurred in all of the 37 other locations.

¹²⁹¹ CMM, para. 9.306. In addition to its allegations in relation to locations where counter-terrorism operations took place, The Gambia alleges that “188 out of approximately 329, *i.e.* over half, of the villages where Myanmar admits to not conducting counter-terrorism operations were completely, mostly, or partially destroyed”: see RG, para. 9.52. The Gambia does not seek to dispute that no counter-terrorism operations occurred in any locations other than the 43 dealt with in the pleadings of the parties, since it specifically asserts in RG, para. 9.52 that there are “329 villages that Myanmar labelled with green dots (meaning they admit that there were no counter-terrorism operations there)”. Furthermore, The Gambia presents no evidence that there were counter-terrorism operations in those other locations. The Gambia, however, leaps to the conclusion that any fire damage in any of the other locations must have been caused by the Myanmar Defence Services. That is not the only inference that can be drawn from the evidence. Another reasonable inference, indeed, the more probable inference, is that if no counter-terrorism operations were conducted in these locations, any fire damage would have been caused by someone other than the military.

¹²⁹² CMM, para. 9.301, and see paragraphs 9.190-9.191 below.

¹²⁹³ MG, para. 8.42, referring to a report by Médecins Sans Frontières (MSF) which merely sets out short quotes said to be taken from interviews conducted by MSF’s humanitarian affairs team in Bangladesh with “patients”, “caretakers” and “refugees”: see CMM, paras. 7.177-7.183. In relation to this location, see CMM, paras. 9.278-9.280, and paragraphs 9.178-9.179 below.

- 9.6 As has already been noted,¹²⁹⁴ although the Reply of The Gambia agrees that the Court should examine the evidence on a “village-by-village” basis,¹²⁹⁵ and itself purports to undertake such an examination, the Reply in fact fails even to *mention* 18 of the 40 locations.¹²⁹⁶ The only proper conclusion to be drawn is that The Gambia has no answer to what is stated in the Counter-Memorial of Myanmar in relation to these locations. The Reply of The Gambia also presents nothing of substance in relation to a further 10 of the other locations.¹²⁹⁷
- 9.7 In relation to the locations that are addressed in the Reply of The Gambia, nothing in the Reply alters the position in Chapter 9 of the Counter-Memorial in relation to those locations.
- 9.8 In relation to The Gambia’s allegations of sexual violence in the locations dealt with in this Chapter, the following is also noted at the outset. The Memorial of The Gambia makes no specific allegations of sexual violence in *any* of these locations, other than Koe Tan Kauk.¹²⁹⁸ Even in relation to the three main locations of Min Gyi, Chut Pyin and Maung Nu, the Memorial of The Gambia only contains allegations of sexual violence in two of these (Min Gyi and Chut Pyin). Specific allegations of sexual violence in some of the other locations are now made by The Gambia for the first time

¹²⁹⁴ See paragraph 8.12 above.

¹²⁹⁵ RG, para. 7.48.

¹²⁹⁶ There is no mention in the Reply of The Gambia of the following 18 of these locations: Nga Khu Ya, Ngar Sar Kyu, Ngar Chaung, Pwint Hpyu Chaung, U Shey Kya, Myaw Taung, Dar Gyi Zar, Wa Peik, Hpaung Taw Pyin, Chin Tha Mar, Maung Gyi Taung, Kun Taing, Yin Ma Kyaung Taung, Dar Paing Sa Yar, Hpet Leik, La Ba Daung, Hang Cha Ma Gulang, and Du Oh The Ma.

¹²⁹⁷ In respect of two of the other locations, the Reply of The Gambia contains only cursory references to evidence previously referred to in its Memorial: Kyet Yoe Pyin, and Yae Khat Chaung Gwa Son. In respect of five of the other locations, the Reply of The Gambia says nothing other than to make a bare statement that the village was “completely destroyed”: Doe Tan, Hpar Wut Chaung, Zin Pai Nyar, Laung Don, and Naung Dar Khar Li. In respect of three of the other locations, the Reply of The Gambia says nothing other than to quote a passage from a statement in the 2018 FFM Detailed Findings that there were “verified additional ‘clearance operations’, which saw serious human rights violations” in the location in question, without specifying what “human rights violations” are alleged to have occurred, and without giving details of the circumstances of the alleged “human rights violations”, or of the alleged perpetrators, or of the alleged victims: Kyein Chaung, Khun Thi Pyin, and Ta Man Thar.

¹²⁹⁸ This village is contiguous to Chein Khar Li.

in its Reply,¹²⁹⁹ including in relation to Maung Nu.¹³⁰⁰ Generally, in relation to such allegations, the Reply of The Gambia relies heavily on the 2018 FFM Detailed Findings. However, no evidential weight can be given to that document, for the reasons given in Chapter 6 of the Counter-Memorial of Myanmar and in Chapter 6 above of this Rejoinder.

- 9.9 It thus remains the case that the evidence relating to these other locations does *not* support The Gambia’s claim that during the counter-terrorism operations of 2016 and 2017, there was a “consistent pattern of conduct” involving the commission of killing, bodily harm, and sexual violence against innocent members of the civilian population on a massive scale in large numbers of locations across northern Rakhine State.
- 9.10 Furthermore, and in any event, the evidence of The Gambia relates to only 43 out of *hundreds* of Bengali villages in northern Rakhine State.¹³⁰¹ The Gambia has presented no evidence at all of any killings, bodily harm, or sexual violence, in the *hundreds* of other Bengali villages that are not dealt with in the pleadings of the parties. The allegation of The Gambia that the claimed “consistent pattern of conduct” was directed against *the entire Bengali Muslim population of northern Rakhine State as a whole* simply has no basis whatsoever.

¹²⁹⁹ Although the Memorial of The Gambia itself does not refer to any allegation of sexual violence in Kyauk Pan Du, the Counter-Memorial of Myanmar notes that the FFM, in a single paragraph, makes a generalised allegation of “mass gang rapes” in this location, although it is impossible to discern whether this suggestion derives from the evidence of a single witness. See CMM, paras. 9.41-9.42 and RG, para. 7.72, both referring to 2018 FFM Detailed Findings, para. 854, MG, Vol. II, Annex 40. See further paragraphs 9.60-9.68 below.

¹³⁰⁰ As to which, see paragraphs 8.166-8.171 above.

¹³⁰¹ That is to say, the three main locations (Min Gyi, Chut Pyin and Maung Nu), the 37 other locations dealt with in Chapter 9 of the Counter-Memorial of Myanmar and in this Chapter of this Rejoinder, and the three new locations now identified in the Reply of The Gambia which are dealt with in this Rejoinder at paragraphs 8.34-8.64 above.

B. Location-by-location analysis

1. Gu Dar Pyin

- 9.11 This location is dealt with in paragraphs 8.15, 8.16 and 8.63 of the Memorial of The Gambia, paragraphs 9.11 to 9.22 of the Counter-Memorial of Myanmar, and paragraphs 7.118 to 7.130 of the Reply of The Gambia.¹³⁰²
- 9.12 Although the Reply of The Gambia initially refers merely to an “*alleged* engagement” between the Myanmar Defence Services and ARSA in this location,¹³⁰³ in reality The Gambia has no sensible response to the clear evidence presented in the Counter-Memorial of Myanmar that a large number of ARSA terrorists and supporters were violently active in the area by 27 August 2017.¹³⁰⁴ The Reply of The Gambia itself ultimately *concedes* that ARSA was present in Gu Dar Pyin, but claims that the Myanmar Defence Services conducted brutal acts against the civilian population there after ARSA “had already left the village”.¹³⁰⁵
- 9.13 The Gambia bases this claim on the assumption that there was only one “alleged engagement” by the Myanmar Defence Services with ARSA at Gu Dar Pyin, which took place on 28 August 2017, and on the contention that “the evidence overwhelming [*sic*] establishes that.... a large number of Rohingya villagers were shot and killed or injured” “*the day after* this alleged engagement with ARSA” (The Gambia’s emphasis).¹³⁰⁶
- 9.14 The Gambia thereby misunderstands the course of events. This misunderstanding results from a misreading of the 2018 FFM Detailed Findings, *and* from a failure by The Gambia to consider properly the evidence of Myanmar’s military records.

¹³⁰² These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in MG, paras. 1.23, 11.23, 11.26, 11.43 and 12.98.

¹³⁰³ RG, para. 7.120.

¹³⁰⁴ See CMM, paras. 9.11–9.18.

¹³⁰⁵ RG, para. 7.130.

¹³⁰⁶ RG, para. 7.120.

- (1) The FFM indicated that there was an “initial operation” by the Myanmar Defence Services “on *around* 28 August 2017”¹³⁰⁷ (emphasis added) and that the “main ‘clearance operation’ took place the following day”.¹³⁰⁸
- (2) Myanmar’s *contemporaneous* military records document *two consecutive days* of counter-terrorism operations. These military records indicate as follows. No. (541) Frontline Light Infantry Regiment responded to an attack by a large armed group of ARSA terrorists shortly before midnight on 26 August 2017, and the terrorists dispersed at around 1 a.m. on 27 August 2017.¹³⁰⁹ Further clashes between ARSA and the Myanmar Defence Services then took place on 28 August 2017, as described in the Counter-Memorial.¹³¹⁰

The Gambia has not provided any evidence in support of its claim that all ARSA terrorists had already left Gu Dar Pyin by the time that the Myanmar Defence Services conducted its operations there.

- 9.15 Furthermore, The Gambia now files only 2 out of the 5 witness statements provided by the IIMM relating to events at Gu Dar Pyin.¹³¹¹ The Gambia withholds, for example, the statement of Witness P1547,¹³¹² who recounts her journey from Gu Dar Pyin, through Maungdaw Township, to Bangladesh. She describes being stopped by military who separated her group into men and women. She says:

[The military] started asking our group questions. They spoke to the educated men in our group who could speak their language. The soldiers said to our men, “Don’t go. You won’t be killed. There will be no harm to you” ... The soldiers did not take

¹³⁰⁷ 2018 FFM Detailed Findings, para. 820, MG, Vol. II, Annex 40.

¹³⁰⁸ 2018 FFM Detailed Findings, para. 821, MG, Vol. II, Annex 40.

¹³⁰⁹ Myanmar Defence Services, Western Command Headquarters, Aung Yan Naing Operation Report No. (239/2017), 27 August 2017, p. 5(6), CMM Vol. IV, Annex 119.

¹³¹⁰ See CMM, para. 9.17; Ministry of Home Affairs, Terrorists Attacks, para. 11(iii), CMM, Vol. IV, Annex 148; Ministry of Defence, Table of the Clash of the Police Outposts, the Military Columns and the Bengali Terrorists in Buthidaung-Maungdaw Region, 26 June 2020 (“**Ministry of Defence, Table of the Clash**”), p. 16, Item no. 6, CMM, Vol. IV, Annex 149; Myanmar Defence Services, Western Command Headquarters, Aung Yan Naing Operation Report No. (241/2017), 29 August 2017, p. 9(6) and 10(F), CMM, Vol. IV, Annex 123.

¹³¹¹ IIMM, Witness Statement No. IIMM0019629265, RG, Vol. IV, Annex 53; IIMM, Witness Statement No. IIMM0027997604, RG, Vol. IV, Annex 60; IIMM, Witness Statement No. IIMM0019629302, RM, Vol. IV, Annex 134; IIMM, Witness Statement No. IIMM0019922094, RM, Vol. IV, Annex 128; IIMM, Witness Statement No. IIMM0019627993, RM, Vol. IV, Annex 129.

¹³¹² IIMM, Witness Statement No. IIMM0019629302, RM, Vol. IV, Annex 134.

anything from us and did not search us. Soon after, the military left. I did not see the direction in which the military left. Then we continued walking.¹³¹³

Captain Phyo xxxxx also states that:

The combined force led me undertook area security starting from the southern part of Gu Dar Pyin Village, but did not find anyone in the village and then we found elder people, women and children at the bank of the creek in the eastern side of the village and they were fleeing to other side of the creek by boats and motor-boats and thus, I told the security forces not to shoot them.¹³¹⁴

- 9.16 The Gambia likewise avoids any reference to IIMM Witness P0806, who describes the arrest of “[s]even Rohingya from Gu Dar Pyin” suspected of involvement in ARSA’s “9 October [2016] Tanashook attack”,¹³¹⁵ and admits to having observed an IED attack on soldiers on motorbikes who arrived at a bridge in the village during the counter-terrorism operations in August 2017.¹³¹⁶ A few days later he also observed that a “handful” of villagers did appear to be armed.¹³¹⁷ This witness confirms that he neither saw nor heard any accounts of the abduction or rape of women by the “authorities”.¹³¹⁸
- 9.17 Importantly, this witness, P0806, specifically provides “all the names of the people [who] died” at Gu Dar Pyin in August 2017. He names 53 persons, overwhelmingly males. It is significantly fewer than the FFM’s “estimate” of 243 fatalities, as reported by unknown “Rohingya community volunteers”.¹³¹⁹ All or some of the 53 people listed by P0806 may have been legitimate casualties of the armed clashes between

¹³¹³ *Ibid.*, paras. 80–82.

¹³¹⁴ Witness Statement of Captain Phyo xxxxx, 19 October, 2017, p. 2, RM, Vol. III, Annex 88.

¹³¹⁵ IIMM, Witness Statement No. IIMM0019627993, para. 35, RM, Vol. IV, Annex 129.

¹³¹⁶ *Ibid.*, para. 43. See also Witness Statement U Yaw Shee, 15 May 2019, p. 1, RM, Vol. III, Annex 103 similarly describes the attack upon motorbikes as military personnel crossed the bridge in the village.

¹³¹⁷ *Ibid.*, para. 48. This witness states coyly that some villagers were armed “with sticks”, and adds that “I don’t know why, maybe to protect themselves”. Given the other evidence in relation to Gu Dar Pyin, his claim that he did not know why the villagers were being armed is not credible, and his claim that they were being armed “with sticks” is evidently a deliberate attempt to understate what ARSA were doing. See also Witness Statement of Marmmad Armain, 15 May 2019, p. 1, RM, Vol. III, Annex 102 which similarly describes a group of ARSA members present in the village and intent on attacking the police outpost and killing the former administrator of the village.

¹³¹⁸ *Ibid.*, para. 75.

¹³¹⁹ 2018 FFM Detailed Findings, para. 833, MG, Vol II, Annex 40.

ARSA and the Myanmar Defence Services, and all or some may have been killed by acts of ARSA. Other witness evidence records that approximately 15 people died during the armed engagements in Gu Dar Pyin.¹³²⁰

- 9.18 Of the two IIMM witness statements relied upon by The Gambia in relation to Gu Dar Pyin, one is from a witness, P1548, who admits that he was untruthful in a previous statement. This witness admits that he had stated in a previous witness interview that he personally “saw Kabir’s wife being raped”, and now says that “this was not true”. This witness *now* accepts that he “personally did not witness any incidents of rape... nor did I learn of any such incidents in Gudam Para [Gu Dar Pyin] after the attack.”¹³²¹
- 9.19 P1548 does not seek to suggest that his earlier untrue statement was some kind of innocent error. He states openly to the IIMM that the interview in which he gave his earlier untrue statement “happened a long time ago”, and that he made the untrue statement “because I wanted the world to know about all the atrocities.”¹³²² P1548 thus acknowledges that the “atrocities” that he wanted the world to know about were atrocities that he himself had invented to advance the agenda of the cause that he was supporting. This totally undermines the reliability of any testimony from this witness to the effect that the Myanmar Defence Services committed acts of brutality towards civilians. It also demonstrates the obvious reality that alleged eyewitnesses to events are not necessarily truthful, and that the correctness of what they state cannot be assumed.
- 9.20 Witness P1548 now reveals that villagers from a neighbouring village, Hpoe Khaung Chaung, who were detained by military personnel as part of a search for residents of Gu Dar Pyin, “were checked and then released ... [and] not mistreated” but were warned against providing shelter to any outsiders.¹³²³ This witness says that “The military did not do anything to the Rohingya of Hpoe Khaung Chaung, and there were many other Rohingya villages that were not harmed.”¹³²⁴

¹³²⁰ Witness Statement of Marmmad Aru, 15 May 2019, p. 1, RM, Vol. III, Annex 104.

¹³²¹ IIMM, Witness Statement No. IIMM0027997604, para. 108, RG, Vol. IV, Annex 60.

¹³²² *Ibid.*, para. 108.

¹³²³ *Ibid.*, para. 116.

¹³²⁴ *Ibid.*, para. 117.

- 9.21 Witness P1548 now also states that he and a large group of men, women and children from Gu Dar Pyin encountered approximately 100 armed soldiers and police personnel *en route* to Bangladesh. He says as follows. The military “told us we could not go further”, and that they would be transported “back to our village”. Having recorded the names of all the adult males, and taken photographs of all the men, women and children (in groups), “the military and police left”.¹³²⁵ None of the villagers were mistreated. Such evidence is starkly at odds with The Gambia’s case.
- 9.22 The Gambia has chosen to rely on witness statements that LAW has made newly available to The Gambia. Again, however, The Gambia’s use of these witness statements is selective. One of these witness statements says that during the operation in Gu Dar Pyin, the Myanmar Defence Services “were hiding” themselves in coconut trees and other places.¹³²⁶ If, as The Gambia claims, the Myanmar Defence Services were inflicting brutal violence upon an “unarmed and defenceless Rohingya civilian population”,¹³²⁷ why would they feel the need to be “hiding”, or to enter the village “by crawling”?¹³²⁸ The Gambia provides no answer. The obvious implication of this evidence, ignored by The Gambia, is that the Myanmar Defence Services were taking cover because they were being fired upon.
- 9.23 This is confirmed by other evidence provided by the IIMM which The Gambia does not mention. The witness Andrew Riley says of the Myanmar Defence Services’ conduct of its operations as follows: “[t]roops got out of the truck and formed a sort of perimeter, crouching down and pointing their guns down the street. They were not messing around they looked like they expected to be attacked any minute.”¹³²⁹
- 9.24 *All* of The Gambia’s witness evidence fails to mention directly any of the violent activities of ARSA and its supporters (or even their presence) in Gu Dar Pyin.¹³³⁰ However, it is apparent from other evidence that the presence and activities of ARSA would have been widely observed and obvious and well-known to anyone who had

¹³²⁵ *Ibid.*, paras. 121-126.

¹³²⁶ Legal Action Worldwide, Witness Statement No. 035, para. 20, RG, Vol. IV, Annex 45.

¹³²⁷ RG, para. 7.130.

¹³²⁸ IIMM, Witness Statement No. IIMM0027997604, para. 102, RG, Vol. IV, Annex 60.

¹³²⁹ IIMM, Witness Statement No. IIMM0001557475 (Andrew Riley), p. 28, RG, Vol. IV, Annex 48.

¹³³⁰ CMM, paras. 9.14–9.18.

been present in that village in August 2017. The obvious implication is that the witnesses relied on by The Gambia who do not mention ARSA have *deliberately* omitted any reference to ARSA and its activities in their witness statements, thereby giving a distorted account of what occurred. This deliberate silence speaks volumes. It plainly undermines the credibility of the witnesses in question.

- 9.25 The testimony of Captain Phyo of the No. (541) Light Infantry Regiment, who was involved in events at this location, demonstrates the false pretence adopted by The Gambia's witnesses that events in Gu Dar Pyin were the product of unilateral and indiscriminate military violence. Consistent with the approach described by P1547 above, Captain Phyo and security forces made no attempt to harm civilians.¹³³¹ He further describes confrontations on the afternoon of 28 August 2017,¹³³² when a group of some 200 armed terrorists (that eventually swelled to 500) "encircled and blocked the police forces and security forces". Despite warning shots having been fired, the "terrorists started to attack with handmade grenades and small guns", resulting in "mutual firing". The clashes he describes ended when the "terrorists burned down their houses and withdrew to the Mayu Mountain located in the west and our forces chased them."¹³³³
- 9.26 In relation to The Gambia's allegations of sexual violence in Gu Dar Pyin,¹³³⁴ Myanmar responds as follows.
- 9.27 The Memorial of The Gambia makes no allegations of sexual violence in Gu Dar Pyin,¹³³⁵ and such allegations are now being made for the first time in the Reply of The Gambia.
- 9.28 These allegations now made by The Gambia are not supported by credible and reliable evidence sufficient to discharge its high burden of proof.

¹³³¹ Witness Statement of Captain Phyo XXXXX, 19 October 2017, p. 1, RM, Vol. III, Annex 88.

¹³³² See CMM, para. 9.17.

¹³³³ Witness Statement of Captain Phyo XXXXX, 19 October 2017, p. 2, RM, Vol. III, Annex 88.

¹³³⁴ RG, paras. 7.125-7.130.

¹³³⁵ CMM, para. 9.21 ("The Gambia's Memorial makes no reference to sexual violence at Gu Dar Pyin, notwithstanding its contention that the counter-terrorism operations were characterised by 'pervasive sexual violence'").

- 9.29 In support of these claims of sexual violence, The Gambia relies in the first place on the 2018 FFM Detailed Findings and a report prepared by Amnesty International.¹³³⁶ No evidential weight can be given to these sources, for the reasons given at length in the Counter-Memorial of Myanmar.¹³³⁷ While The Gambia may wish to brush aside the evidential deficiencies of these documents,¹³³⁸ the fact is that these reports “are almost exclusively derived from accounts of untested anonymous Bengali Muslim sources.”¹³³⁹ Contrary to The Gambia’s assertion,¹³⁴⁰ this *does* fundamentally compromise their evidential value.
- 9.30 For example, the statement in the 2018 FFM Detailed Findings, that “during the attacks in Gu Dar Pyin, Tatmadaw soldiers subjected women and girls to rape and gang rape”, is based on four anonymous sources: EI-078, EI-079, EI-080 and K-151.¹³⁴¹ No information is given about what these individuals say actually happened, or to whom it happened. Nor is any information given about the basis of their knowledge, such as whether they are describing events that they witnessed first-hand, or whether they are simply repeating hearsay or gossip. It is apparent from the wide range of events, issues and locations for which Witness K-151 is cited in support,¹³⁴² that this individual almost certainly is not a direct witness to any alleged events but may have acted in some capacity as an NGO / aid worker or similar, and has simply relayed hearsay accounts received in that role.
- 9.31 In the 2018 FFM Detailed Findings, following the statement that rape and gang rape took place at Gu Dar Pyin, the FFM discusses the abduction of women and girls.¹³⁴³ The evidential basis for this discussion consists of the same four anonymous

¹³³⁶ RG, paras. 7.125 and 7.127, referring to 2018 FFM Detailed Findings, paras. 826, 931 and 935, MG, Vol. II, Annex 40; and Amnesty International, “*We Will Destroy Everything*”: *Military responsibility for crimes against humanity in Rakhine State*, 27 June 2018 (“**Amnesty International, Destroy Everything**”), p. 92, MG, Vol. IV, Annex 112.

¹³³⁷ CMM, Chapters 6 and 7, and this Rejoinder, Chapters 6 and 7 above.

¹³³⁸ RG, para. 7.128.

¹³³⁹ CMM, para. 9.20. The 2018 FFM Detailed Findings refer to four anonymous sources (EI-078, EI-079, EI-080, K-151) and the Amnesty International Report refers to two anonymous sources (C.R. and M.J.).

¹³⁴⁰ RG, para. 7.128.

¹³⁴¹ 2018 FFM Detailed Findings, para. 826 footnote 1825, MG, Vol. II, Annex 40.

¹³⁴² *Ibid.*, footnotes 1671, 1703, 1729, 1825, 2058, 2070, 2104, 2116 and 2129.

¹³⁴³ *Ibid.*, para. 826.

individuals mentioned in the previous paragraph above.¹³⁴⁴ The FFM goes on to state that “[b]ased on credible reports received and in light of similar patterns established in other locations, *it is likely* that abducted women and girls were raped or gang raped” (emphasis added).¹³⁴⁵ Therefore, the plain inference is that the FFM conclusion that rape or gang rape occurred is not actually based on any concrete evidence that such acts in fact occurred.

- 9.32 This conclusion is reinforced by the text which immediately follows, in which Witness EI-079 is recorded as having said that “[t]he soldiers came to my house and took my daughter away. *I do not know what happened to her*” (emphasis added).¹³⁴⁶ Later, in the FFM report, the same four anonymous sources are again relied upon in support of the statement that “[t]he abduction and gang rape of women and girls also took place at the military compound next to Gu Dar Pyin ... on the day of the ‘clearance operations’ in that village.”¹³⁴⁷ The FFM report then narrates that two of the witnesses – EI-078 and EI-079 – watched their daughters being taken away by soldiers.¹³⁴⁸ Given the absence of any further information, the conclusion that both girls were subjected to sexual violence, specifically gang rape, would appear to be based on little more than pure conjecture.
- 9.33 The Gambia has clearly not given any scrutiny to statements made in the FFM reports, and has instead simply accepted and repeated statements in the FFM reports which *superficially* appear to support its case. This is not an acceptable or responsible approach for a party in judicial proceedings, let alone in litigation involving allegations as serious as violations of the Genocide Convention.
- 9.34 It is clear that The Gambia is wrong to assert that “the witness accounts” provided in the 2018 FFM Detailed Findings and the Amnesty International report “are almost all first-hand testimonies of those who directly witnessed or were victims of the Tatmadaw’s sexual violence.”¹³⁴⁹ Neither the 2018 FFM Detailed Findings nor the

¹³⁴⁴ 2018 FFM Detailed Findings, footnote 1827.

¹³⁴⁵ *Ibid.*, para. 826.

¹³⁴⁶ *Ibid.*, para. 826.

¹³⁴⁷ *Ibid.*, para. 931 footnote 2104.

¹³⁴⁸ *Ibid.*, para. 931.

¹³⁴⁹ RG, para. 7.129.

Amnesty International report are themselves “first-hand testimonies” of witnesses; they are second-hand descriptions given by the FFM and Amnesty International of what interviewees are said to have said to those organizations. The reports give only the most scant information about the interviewees in question, and do not explain the basis of each interviewee’s purported knowledge. In particular, it is usually not apparent from a reading of those reports whether the interviewees in question were purporting to relate events that they had personally observed, or whether they were merely relaying information that may have been second-, third- or fourth-hand. The Gambia’s description of these reports as “first-hand testimonies” of witnesses does not withstand even a cursory analysis.

9.35 Nor does The Gambia’s claim that the FFM’s finding “is corroborated by witnesses interviewed by Amnesty International” survive scrutiny.¹³⁵⁰ The sources in both reports are anonymous. Therefore, it is impossible to know to what extent the sources respectively relied upon by the FFM and Amnesty International are different. To the extent that both organisations may have interviewed the same people, their reports cannot be said to corroborate each other. The FFM and Amnesty International reports do not provide independent factual evidence from the witness’ accounts such that the events would be capable of corroborating each other.

9.36 As discussed elsewhere in this Rejoinder, the dangers posed by anonymous sources are real and have already manifested in the present case.¹³⁵¹

9.37 The other sources relied upon by The Gambia in relation to its claim of sexual violence in Gu Dar Pyin are an anonymous statement taken by LAW and another such statement taken by the IIMM.¹³⁵² Neither supports The Gambia’s claim.

(1) Although the person who gave the witness statement to LAW came from Gu Dar Pyin, the alleged events to which The Gambia refers at paragraph 7.126 of

¹³⁵⁰ RG, para. 7.125. See also, RG, para. 7.128.

¹³⁵¹ See paragraphs 7.32-7.23 and 7.35-7.38 above.

¹³⁵² RG, paras. 7.126-7.127 referring to Legal Action Worldwide, Witness Statement No. 040, paras. 90-92, 114, RG, Vol. IV, Annex 64; and IIMM, Witness Statement No. IIMM0019629265, paras. 32, 41, RG, Vol. IV, Annex 53.

its Reply did not take place there but at a location nearly 12 hours' walk away.¹³⁵³

- (2) The person who gave the witness statement to the IIMM (P1550) speaks about two alleged incidents of sexual violence before the “main event”. One of these incidents is said to have occurred “one night in the same year as the ‘main event’ during the winter rice season” (which would have been several months before the counter-terrorism operation in August 2017). The other is said to have occurred “one week before the ‘main event’”.¹³⁵⁴ The Gambia appears to suggest that these two incidents are evidence of what it claims was the similar “pattern of conduct” or *modus operandi* of the counter-terrorism operations.¹³⁵⁵ However, The Gambia does not explain how either incident can be properly and fairly linked to the counter-terrorism operations.

Despite P1550 speaking to events which happened before the “clearance operations”, in some cases months before,¹³⁵⁶ in paragraph 7.127 of the Reply, The Gambia tries to use her evidence to support the FFM’s findings about soldiers allegedly taking women and girls to a military compound next to Gu Dar Pyin “on the day of the “clearance operations””.¹³⁵⁷ This mixing of evidence relating to different time-frames misrepresents the evidence, and demonstrates a careless approach to the presentation of its case by The Gambia.

- 9.38 It is furthermore recalled that another IIMM witness, P1548, stated to the IIMM that he personally did not witness or learn of any incidents of rape in Gu Dar Pyin during the events of August 2017, and that he was untruthful when he said in an earlier interview that he had personally seen someone being raped.¹³⁵⁸

¹³⁵³ Legal Action Worldwide, Witness Statement No. 040, paras. 84-119, RG, Vol. IV, Annex 64.

¹³⁵⁴ IIMM, Witness Statement No. IIMM0019629265, paras. 42, 44, RG, Vol. IV, Annex 53.

¹³⁵⁵ See RG, para. 7.127.

¹³⁵⁶ IIMM, Witness Statement No. IIMM001962965, paras. 31-32, RG, Vol. IV, Annex 53.

¹³⁵⁷ 2018 FFM Detailed Findings, para. 931, MG, Vol. II, Annex 40.

¹³⁵⁸ See paragraph 9.18 above.

9.39 In summary, contrary to what The Gambia claims,¹³⁵⁹ the evidence relied on by The Gambia does not come close to supporting a conclusion that “many women and girls” were raped in Gu Dar Pyin.

2. Ah Lel Than Kyaw

9.40 This location is not dealt with in the Memorial of The Gambia. It is dealt with in paragraphs 8.73(5), and 9.23 to 9.30, of the Counter-Memorial of Myanmar, and paragraphs 7.113 to 7.117 of the Reply of The Gambia.¹³⁶⁰

9.41 The Reply of The Gambia provides no further evidence to challenge any of the evidence or arguments in the Counter-Memorial. The Gambia relies on the 2018 FFM Detailed Findings, and on a solitary signed witness statement, both of which were already annexed to its Memorial.¹³⁶¹ This witness claims that he saw as many as 1,000 dead bodies in a “water reservoir near Lama Para”,¹³⁶² which is unquestionably a wild fabrication that is unsupported by any other evidence.

9.42 Given the uncontradicted evidence,¹³⁶³ and witness testimony,¹³⁶⁴ that ARSA mounted deadly armed attacks upon Police and Border Guard posts at Al Lel Than Kyaw, involving “hundreds of terrorists”, during which the “Deputy Township Immigration Officer was killed”,¹³⁶⁵ it is remarkable that The Gambia appears to

¹³⁵⁹ RG, para. 7.125.

¹³⁶⁰ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in MG, para. 10.28.

¹³⁶¹ Legal Action Worldwide, Witness Statement No. 016, MG, Vol. XI, Annex 353. See CMM, para. 9.27.

¹³⁶² Legal Action Worldwide, Witness Statement No. 016, para. 33, MG, Vol. XI, Annex 353.

¹³⁶³ See CMM, paras. 9.23-9.24.

¹³⁶⁴ See Witness Statement of U Aung Thu Win, 25 October 2017, p. 1, RM, Vol. III, Annex 93. This witness is a Junior Immigration Officer who describes taking shelter at the Al Lel Than Kyaw police post with 150 ethnic Rakhines, when it was attacked with guns, sticks and swords by approximately 700 ARSA terrorists in the early hours of 25 August 2017. In addition to witnessing the destruction of the buildings, U Aung Thu Win testifies that once the terrorists had withdrawn, he “found the dead body of U Zar Maung [his colleague] with the knife wounds”. See also Witness Statement of Captain Naing XXX, 24 October 2017, RM, Vol. III, Annex 90. This witness describes being among 23 officers from the No. 993 Tactical Operational Command and 12 police officers who heeded a call to attend the Al Lel Than Kyaw Police post which was under armed attack from approximately 700 ARSA terrorists in the early hours of 25 August 2027. Despite repeated warnings, the “Bengali terrorists continued to move forward and attack by using rifles, handmade guns, swords, catapults and jinkalis, rallying battle cries.” Five soldiers were finally directed to fire shots “targeting the legs under the knees” of the attackers.

¹³⁶⁵ CMM, paras. 9.23-9.24.

suggest that this was not really an “immediate security threat”,¹³⁶⁶ and that the Myanmar Defence Services should not have carried out any counter-terrorism operation in this location, but should instead have assumed that the ARSA terrorists would quietly desist from further lethal violence, having been temporarily repelled.

- 9.43 The inescapable truth is that ARSA’s violent activities, commencing in the early hours of 25 August 2017, would have been widely known to, and indeed observed by, any villager present in Ah Lel Than Kyaw at the time. The part of the 2018 FFM Detailed Findings that deals with this location refers to 16 witnesses, of which only one is said to have made any mention of ARSA activity.¹³⁶⁷ This indicates that many of the anonymous persons interviewed by the FFM must have deliberately withheld information about the role of ARSA in the events, and thereby giving accounts to the FFM that were not full and truthful.
- 9.44 The 2018 FFM Detailed Findings, and the witness statement on which The Gambia relies, cannot be given evidential weight. These documents alone cannot establish that members of the Myanmar Defence Services “indiscriminately shot at and killed Rohingya civilians wherever they could be found”, as claimed by The Gambia.¹³⁶⁸
- 9.45 In relation to The Gambia’s allegations of sexual violence in Ah Lel Than Kyaw,¹³⁶⁹ Myanmar responds as follows.
- 9.46 In fact, for this location there is no evidence that any form of sexual violence took place during any of the events – a point already made by Myanmar in its Counter-Memorial.¹³⁷⁰
- 9.47 Despite this, The Gambia now categorically states in its Reply, by reference to the 2018 FFM Detailed Findings, that “[t]he same *modus operandi* of ... sexual violence,

¹³⁶⁶ RG, paras. 7.114–7.115.

¹³⁶⁷ CMM, para. 9.27.

¹³⁶⁸ RG, para. 7.115.

¹³⁶⁹ RG, paras. 7.113–7.117.

¹³⁷⁰ CMM, para. 9.29.

... characterized Myanmar’s ‘counter-terrorism’ operations that targeted the Rohingya civilian population of Ah Lel Than Kyaw” (emphasis added).¹³⁷¹

9.48 There is no evidential basis for this claim. Ah Lel Than Kyaw is discussed in paragraphs 865 to 870 of the 2018 FFM Detailed Findings. Nowhere in these six paragraphs is there any mention of any form of sexual violence being committed at this location. The Gambia points to no other evidence of sexual violence being committed in Ah Lel Than Kyaw. Accordingly, The Gambia’s allegation is baseless.

9.49 It is a matter of concern that The Gambia makes such a claim in the absence of any evidential basis whatsoever. It demonstrates The Gambia’s propensity for making bold and sweeping claims without undertaking any careful examination of the available evidence. The glaring absence of any evidence of sexual violence in this location also further erodes The Gambia’s broader argument about the purported “pervasive” nature of sexual violence during the counter-terrorism operations.

3. Myin Hlut

9.50 This location is dealt with in paragraph 8.66 of the Memorial of The Gambia, paragraphs 9.31 to 9.36 and 13.191 of the Counter-Memorial of Myanmar, and paragraphs 7.99 to 7.102 of the Reply of The Gambia.¹³⁷²

9.51 Given that Chapter 8 of the Memorial of The Gambia contains only a single fleeting mention of Myin Hlut,¹³⁷³ it is bizarre for The Gambia’s Reply to make the claim that “Myanmar does not dispute the [FFM]’s findings about the extreme brutality and sexual violence perpetrated by the Tatmadaw against the civilian Rohingya in Myin Hlut”.¹³⁷⁴ This statement is plainly incorrect. In relation to all of the locations dealt with in Chapter 9 of the Counter-Memorial of Myanmar, including Myin Hlut, Myanmar made clear that “the evidence does not establish that such fatalities and injuries that did occur ... were the result of any use of excessive and/or unlawful force

¹³⁷¹ RG, para. 7.113 referring to 2018 FFM Detailed Findings, para. 865, MG, Vol. II, Annex 40.

¹³⁷² These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in MG, para. 11.45, and RG, paras. 9.55 and 9.58.

¹³⁷³ MG, para. 8.66.

¹³⁷⁴ RG, para. 7.102.

by Myanmar’s security forces”.¹³⁷⁵ The paragraphs of the Counter-Memorial of Myanmar dealing specifically with Myin Hlut make the general point that there is no convincing evidence of the claims made by The Gambia in relation to this location.¹³⁷⁶ These paragraphs of the Counter-Memorial of Myanmar refer to the FFM’s finding in order to demonstrate the problems with it, and not in order to accept its correctness.¹³⁷⁷

9.52 In its Reply, The Gambia relies on the same single-line summary allegation found in the 2018 FFM Detailed Findings, for which no witness statement exists.¹³⁷⁸ The Reply then adds that “*one* witness from Myin Hlut” observed military and police firing at people.¹³⁷⁹ The Reply suggests that the testimony of this one witness is corroborated by “*other* villagers” who describe the same.¹³⁸⁰ The Gambia fails, however, to realise that the account from the “*one* witness from Myin Hlut” is cited as the source of the information about what the “*other* villagers” observed.¹³⁸¹ In other words, The Gambia unwittingly suggests that the evidence of one witness is corroborative of himself/herself.

9.53 The witness statement of the “one witness from Myin Hlut”,¹³⁸² which is annexed to the Reply of The Gambia, is the only signed witness statement provided by The Gambia for this location. It was signed on 2 May 2024, almost 7 years after the events in question. This witness appears to have lived in the camps in Bangladesh throughout this time, and acknowledges that “the situation in the refugee camp is not safe.”¹³⁸³ The witness suggests that the reason for this lack of safety is that “some active groups that are supporting the Myanmar authorities are kidnapping and killing Rohingya

¹³⁷⁵ CMM, para. 9.3.

¹³⁷⁶ CMM, paras. 9.31-9.36.

¹³⁷⁷ CMM, paras. 9.34-9.36. See also CMM, paras. 6.32-6.70, dealing more generally with the evidential value of the FFM reports.

¹³⁷⁸ 2018 FFM Detailed Findings, para. 910 second sentence, MG, Vol. II, Annex 40; RG, para. 7.101 second sentence, repeating MG, para. 8.66 last sentence.

¹³⁷⁹ RG, para. 7.101 first sentence (emphasis added).

¹³⁸⁰ RG, para. 7.101 third sentence.

¹³⁸¹ Legal Action Worldwide, Witness Statement No. 44, RG, Vol IV, Annex 69, cited in RG, both footnotes 808 and 810.

¹³⁸² Legal Action Worldwide, Witness Statement No. 44, RG, Vol IV, Annex 69.

¹³⁸³ *Ibid.*, p. 12.

leaders.”¹³⁸⁴ This is of course untrue: the witness must be referring to ARSA and its supporters who have long been engaged in intimidatory violence with a view to controlling the narrative of events emanating from the camps concerning the events of August 2017.¹³⁸⁵ Not a single other person suggests that “groups that are supporting the Myanmar authorities” are operating inside the camps in Bangladesh.

9.54 Having sought to blame “groups that are supporting the Myanmar authorities” for the insecurity in the camps in Bangladesh, this witness then seeks to exculpate ARSA, saying: “I do not think that ARSA was involved in the August attack against the government military. I heard of the ARSA group but I do not know anything about its operations and activities”.¹³⁸⁶ The witness thereby concedes that there was indeed an “August attack against the government military”, but is not prepared to tell the interviewers who might have been responsible for it. The attack in Myin Hlut involved a very large number of terrorists and supporters.¹³⁸⁷ It is implausible that this witness did not know that the attackers were ARSA. The claim of ignorance about ARSA undermines the credibility and reliability of this witness. The arrival of the Myanmar Defence Services in Myin Hlut was a direct result of ARSA’s attack upon Myin Hlut and having been requested to attend to protect the local civilian population from violence.¹³⁸⁸

9.55 In relation to The Gambia’s allegations of sexual violence in Myin Hlut, Myanmar responds as follows.

9.56 The Memorial of The Gambia makes no mention of sexual violence at this location.¹³⁸⁹ In its Reply, The Gambia simply quotes the very broad statement in the 2018 FFM Detailed Findings that “women and girls were subjected to sexual violence, including by members of the Tatmadaw and the police both in their homes and in the

¹³⁸⁴ *Ibid.*, p. 10.

¹³⁸⁵ CMM, paras. 3.120-3.145 and 3.108-3.115; and see this Rejoinder, Section D of Chapter 3 above.

¹³⁸⁶ Legal Action Worldwide, Witness Statement No. 44, p. 6, RG, Vol IV, Annex 69.

¹³⁸⁷ CMM, para. 9.32.

¹³⁸⁸ See Witness Statement of Ma Soe Soe, 24 October 2017, p. 1, RM, Vol. III, Annex 91.

¹³⁸⁹ CMM, para. 9.34.

forest while trying to escape.”¹³⁹⁰ This statement of the FFM is dealt with by Myanmar in its Counter-Memorial.¹³⁹¹

- 9.57 The 2018 FFM Detailed Findings indicates that the evidential basis for this statement consists of what the FFM was told by four anonymous individuals, referred to by the FFM as BI-002, WI-020, V-085 and V-127.¹³⁹² The 2018 FFM Detailed Findings sets out an extract of what the FFM was told by WI-020.¹³⁹³ Apart from this, no information is given about what these individuals say happened, or about the identity of the alleged victims. This is important. For example, are they all speaking about the same incident? Nor is any information given about the basis of their knowledge. This too is important. Are they speaking from first-hand experience or providing secondary, or tertiary hearsay? The person referred to as V-085 is almost certainly some kind of medical professional, and not a direct victim or eye-witness.¹³⁹⁴
- 9.58 The statement in the 2018 FFM Detailed Findings on which The Gambia relies refers to “sexual violence, including rape”. The extract given by the FFM of what the FFM was told by WI-020 (see previous paragraph) refers to one incident of rape.¹³⁹⁵ No information is provided in the 2018 FFM Detailed Findings to suggest that any of the four witnesses spoke of any other incident of rape. The statement in the FFM report therefore does not suggest that there was anything more than one alleged incident of rape in Myin Hlut, for which the only evidence is the uncorroborated claim of a single witness, WI-020.
- 9.59 Apart from one specific alleged incident of rape, the FFM gives no details at all of the other forms of sexual violence to which it apparently refers. This might have been a reference, for instance, to claims that soldiers searched women for items hidden in their underwear, which is categorised elsewhere in the 2018 FFM Detailed Findings

¹³⁹⁰ RG, para. 7.101 referring to 2018 FFM Detailed Findings, para. 862, MG, Vol. II, Annex 40.

¹³⁹¹ CMM, para. 9.34.

¹³⁹² 2018 FFM Detailed Findings, footnote 1929, MG, Vol. II, Annex 40.

¹³⁹³ 2018 FFM Detailed Findings, para. 862, MG, Vol. II, Annex 40.

¹³⁹⁴ The 2018 FFM Detailed Findings, footnote 2051 and accompanying text, MG, Vol. II, Annex 40, apparently describes this witness as a “medical professional who treated gunshot victims in Bangladesh”.

¹³⁹⁵ 2018 FFM Detailed Findings, para. 862, MG, Vol. II, Annex 40.

as sexual violence.¹³⁹⁶ The evidence relied on by the FFM is hardly evidence of a “pervasive pattern” of genocidal sexual violence of the kind alleged by The Gambia, or of the claim of The Gambia that the Myanmar Defence Services “carried out the massive ... raping of Rohingya civilians” at locations including Myin Hlut.¹³⁹⁷

4. Kyauk Pan Du

- 9.60 This location is dealt with in paragraphs 8.66, 8.67 and 8.75 of the Memorial of The Gambia, paragraphs 3.82, 3.83, 9.37 to 9.43, and 13.190 of the Counter-Memorial of Myanmar, and paragraphs 7.69 to 7.77 of the Reply of The Gambia.¹³⁹⁸
- 9.61 The Counter-Memorial of Myanmar demonstrates that Kyauk Pan Du village tract, in southern Maungdaw Township, was a “principal focal point of ARSA’s campaign of violence”,¹³⁹⁹ that ARSA destroyed a bridge in this location, and that the Myanmar Defence Services were confronted by ARSA terrorists when they went there.¹⁴⁰⁰ In its Reply, The Gambia presents no evidence to contradict these facts.¹⁴⁰¹
- 9.62 The Gambia has not provided even a single signed statement from any witness in relation to this location. The *only* evidential source relied on by The Gambia is the 2018 FFM Detailed Findings, which contains only summary hearsay accounts from anonymous individuals. Even The Gambia does not know the identities of those who spoke to the FFM.¹⁴⁰²
- 9.63 The Gambia claims that the 2018 FFM Detailed Findings are “compelling” due to their “consistency”,¹⁴⁰³ and that they are “entitled to significant evidential weight”.¹⁴⁰⁴ In fact, contrary to what The Gambia claims, the 2018 FFM Detailed Findings cannot

¹³⁹⁶ See paragraph 8.171 above.

¹³⁹⁷ RG, para. 7.102.

¹³⁹⁸ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in RG, para. 9.58.

¹³⁹⁹ CMM, para. 9.37.

¹⁴⁰⁰ CMM, para. 9.40.

¹⁴⁰¹ CMM, paras. 9.37–9.43.

¹⁴⁰² 2018 FFM Detailed Findings, paras. 846-855, MG, Vol. II, Annex 40.

¹⁴⁰³ RG, para. 7.77.

¹⁴⁰⁴ RG, para. 7.77.

be given any meaningful evidential weight at all, for the detailed reasons set out elsewhere in Myanmar’s pleadings.¹⁴⁰⁵ Furthermore, the most impressive “consistency” in this part of the 2018 FFM Detailed Findings is the fact that not one of the 16 anonymous persons to whom the FFM spoke¹⁴⁰⁶ is said to have mentioned the violent activities of ARSA at Kyauk Pan Du, or indeed, even to have *mentioned* the presence of ARSA in the area. Such a fundamental omission cannot be explained away as mere coincidence. If all 16 of these people failed to mention ARSA at all when interviewed by the FFM, the obvious inference is that there has been a deliberate decision on the part of large numbers of Bengali witnesses not to speak about the role of ARSA in the events. The deliberate omission by interviewees of such important information, which obviously results in a fundamental distortion of their narrative of events, would obviously undermine their credibility and reliability. On the other hand, if these interviewees did all speak about the role of ARSA, and this information was then omitted by the FFM from its report, this would undermine the credibility and reliability of the FFM itself.

- 9.64 The Reply of The Gambia claims to identify an “unwitting admission” by Myanmar in a military Daily Operation Report annexed to its Counter-Memorial.¹⁴⁰⁷ The Gambia says that the Daily Operation Report indicates that it was only on 28 August 2017, two days after the counter-terrorism operations in Kyauk Pan Du, that the No. (536) Frontline Light Infantry Regiment came to Kyauk Pan Du to inspect whether the bridge was “damaged or not”. The Gambia says that this somehow demonstrates that the bombing of the bridge by ARSA was merely “a pretext for the ‘clearance operation’ that resulted in the [alleged acts of brutality]”.¹⁴⁰⁸
- 9.65 The argument made by The Gambia is curious. It is undisputed that there was a terrorist bombing of the bridge at Kyauk Pan Du by ARSA in the early hours of 25 August 2017. Furthermore, even the 2018 FFM Detailed Findings on which The Gambia relies states expressly that “ARSA attacked the BGP [Border Guard Police]

¹⁴⁰⁵ CMM, Chapter 6; and this Rejoinder, Chapter 6 above.

¹⁴⁰⁶ LI-130, LI-039, LI-120, LI-028, LI-020, LI-005, CI-138, CI-014, WI-016, QI-013, YI-010, RI-012, ZI-001, K-153.3, EI-007 and EI-072.

¹⁴⁰⁷ RG, para. 7.76.

¹⁴⁰⁸ RG, para. 7.76.

camp in Kyauk Pan Du on 25 August”.¹⁴⁰⁹ It is obvious that this justified a military response, given that ARSA attacks were taking place at the time not only in southern Maungdaw but also in numerous other places throughout northern Rakhine State. The Gambia elects not to reproduce the very next sentence from the passage of the Report *it* cites which reveals that when the Light Infantry Regiment approached Kyauk Pan Du bridge, they discovered *another* explosive device planted there. The Daily Operation Report then goes on to state as follows:

While the mine was being disarmed by military engineers, at about 11:45, about 40 Bengali terrorists who had dug a trench and took position on a hill near Kyauk Pan Du bridge... detonated a buried IED by short circuit and they attacked with sticks, swords, jinkalis, homemade guns and automatic rifles.¹⁴¹⁰

9.66 It is clear from the evidence why counter-terrorism operations were entirely necessary and justified. The Gambia’s suggestion that the destruction of the bridge by ARSA was just a “pretext” for Myanmar to attack civilians in Kyauk Pan Du is merely empty rhetoric.

9.67 In relation to The Gambia’s allegations of sexual violence in Kyauk Pan Du, Myanmar responds as follows.

9.68 The only evidential basis relied on by The Gambia in relation to the allegations of sexual violence in Kyauk Pan Du is the 2018 FFM Detailed Findings.¹⁴¹¹ The evidential deficiencies of this document are dealt with elsewhere.¹⁴¹²

5. Koe Tan Kauk / Chein Khar Li

9.69 This location is dealt with in paragraphs 8.36, 8.49, 8.52, 8.62, 8.73, 8.76 and 9.26 of the Memorial of The Gambia, paragraphs 9.44 to 9.61 of the Counter-Memorial of Myanmar, and paragraphs 7.140 to 7.147 of the Reply of The Gambia.¹⁴¹³

¹⁴⁰⁹ 2018 FFM Detailed Findings, para. 846, MG, Vol. II, Annex 40.

¹⁴¹⁰ Myanmar Defence Services, No. (15) Mobile Operation Command Headquarters, Zwe Man Hone Operation, Daily Operation Report No. (241/2017), 28 August 2017, p. 5, CMM, Vol. IV, Annex 121.

¹⁴¹¹ CMM, paras. 9.41-9.42, and RG, para. 7.72, referring to 2018 FFM Detailed Findings, para. 854, MG, Vol. II, Annex 40.

¹⁴¹² CMM, Chapter 6, and see Chapter 6 above of this Rejoinder, and paragraph 9.8 above.

¹⁴¹³ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during

- 9.70 In its Memorial, The Gambia makes no mention at all of the repeated violent attacks in Koe Tan Kauk that were perpetrated by ARSA throughout 25, 26 and 28 August 2017, involving “hundreds of armed mobilised local supporters” acting in concert with ARSA terrorists.¹⁴¹⁴ In its Reply,¹⁴¹⁵ The Gambia presents no evidence or argument to contradict these facts.
- 9.71 The evidence relied on by The Gambia in its Memorial consists of untested, hearsay summary allegations from anonymous individuals whose identities are not even known to The Gambia.
- 9.72 The Reply of The Gambia now annexes *one* witness statement, signed on the eve of the filing of its Reply, nearly 7 years after the events in question.¹⁴¹⁶ This solitary anonymous witness statement confirms the fears that those living in camps in Bangladesh have of ARSA.¹⁴¹⁷ The witness states: “There is no security in the camps, and no one is safe there. I am concerned that something might happen in the camps...”¹⁴¹⁸ The witness statement then provides no adverse information about ARSA, and even refuses to mention ARSA by name.¹⁴¹⁹ Thus, apparently consistently with every one of the 36 people who were interviewed by the FFM in relation to events in this location, this witness predictably makes no mention of ARSA’s violence or that of hundreds of its armed mobilised local supporters.¹⁴²⁰ The unavoidable conclusion is that this must be a deliberate decision by this new witness to tailor the accounts of events to fit a particular narrative.¹⁴²¹
- 9.73 The Gambia’s Reply begins its argument regarding Koe Tan Kauk with the extraordinary suggestion that ARSA’s October 2016 attacks lack any relevance to the August 2017 counter-terrorism operations by dint of the passage of “*ten months*” (The

the counter-terrorism operations of 2016 and 2017. This location is also mentioned in RG, paras. 9.55 and 9.58.

¹⁴¹⁴ CMM, para. 9.47.

¹⁴¹⁵ RG, paras. 7.140-7.147.

¹⁴¹⁶ Legal Action Worldwide, Witness Statement No. 043, 2 May 2024, para. 25, RG, Vol. IV, Annex 68.

¹⁴¹⁷ See in particular CMM, paras. 3.108-3.145, and this Rejoinder, Section D of Chapter 3 above.

¹⁴¹⁸ Legal Action Worldwide, Witness Statement No. 043, para. 3, RG, Vol. IV, Annex 68.

¹⁴¹⁹ *Ibid.*, paras. 21-22.

¹⁴²⁰ CMM, para. 9.47.

¹⁴²¹ CMM, para. 9.47.

Gambia’s emphasis).¹⁴²² ARSA’s October 2016 attacks involved some 400 ARSA terrorists and mobilised supporters armed with knives, swords and firearms, and resulted in the killing of nine police officers.¹⁴²³ These October 2016 attacks provide a very obvious explanation of why the Myanmar Defence Services had genuine concerns about this particular area of northern Rakhine State, and considered that there was a need for an “increased military presence”.¹⁴²⁴ This was all the more so, given how interwoven ARSA terrorists had become in the life of the village tract, with religious leaders (*mawlawis*) sending ARSA recruits from throughout northern Rakhine State to attend a “terrorist training course in Koe Tan Kauk village”.¹⁴²⁵

9.74 Relying upon the anonymous accounts as described in the 2018 FFM Detailed Findings, The Gambia alleges that the counter-terrorism operations in the contiguous settlement of Chein Khar Li were commenced by “indiscriminately shooting Rohingya, including those fleeing towards the forested hills”.¹⁴²⁶ Given that not one of the 36 people from whom the FFM obtained accounts in relation to events in this location makes any mention of the violent confrontations between ARSA and its supporters and the Myanmar Defence Services,¹⁴²⁷ or indeed, even of ARSA’s *existence*, the descriptions by these people of how events commenced and unfolded is patently unreliable.

9.75 Myanmar does *not* “hypothesize[.]”¹⁴²⁸ when it says that some of those Bengalis who were allegedly shot “when fleeing” Koe Tan Kauk were “*likely* to have been, only a short time earlier, engaged in violent armed attack upon state security services”.¹⁴²⁹ This is an obvious and reasonable inference to be drawn from the available

¹⁴²² RG, para. 7.141.

¹⁴²³ CMM, para. 9.44.

¹⁴²⁴ 2018 FFM Detailed Findings, para. 835, MG, Vol. II, Annex 40.

¹⁴²⁵ CMM, para. 9.45; Witness statement of Maw Go Lar Mauk, 24 February 2023, confirming his account given on 2 November 2017, p. 1, CMM, Vol. V, Annex 160; Witness Statement of Maw Go Lar Mauk, 2 November 2017, RM, Vol. III, Annex 100.

¹⁴²⁶ RG, para. 7.142, citing 2018 FFM Detailed Findings, para. 837, MG, Vol. II, Annex 40.

¹⁴²⁷ See CMM, para. 9.47. Those persons were QI-113, K-158.3, K-158.4, RI-002, RI-003, CI-116, CI-137, LI-100, YI-007, CI-118, CI-119, CI-181, CI-182, LI-045, LI-053, LI-118, CI-183, LM-014, V-067, LI-052, LI-100, CI-014, CI-030, CI-031, QI-003, YI-006, WI-029, WI-030, QI-002, K-076.22, QI-33, XI-001, K-076.21, QI-034, K-153.2, and K153.3.

¹⁴²⁸ RG, para. 7.143.

¹⁴²⁹ CMM, para. 9.54.

uncontradicted evidence. This evidence shows that a group of hundreds of Bengali terrorists used an explosive device and opened gunfire, to which the Myanmar Defence Services responded, following which the terrorists “fled to the northeast of Koe Tan Kauk”.¹⁴³⁰ The Gambia itself quotes an Amnesty International report to the effect that the Myanmar Defence Services “*appear[ed]*” to fail to discriminate between legitimate targets and unarmed non-combatants, thereby simultaneously conceding that there *was* an ARSA attack upon the Myanmar Defence Services, and that, according to Amnesty International, “it is conceivable that soldiers [were] pursu[ing] attackers there”.¹⁴³¹

- 9.76 Despite this, The Gambia attempts to leave open the possibility that there were in fact no ARSA attacks in Koe Tan Kauk, by stating that the FFM “*only notes*” (emphasis added) that “the *Tatmadaw alleged* [The Gambia’s emphasis] that two attacks took place...”¹⁴³²
- 9.77 There were (of course), as the evidence shows, attacks by ARSA upon security posts in Koe Tan Kauk and Chein Khar Li. This is described in the Counter-Memorial at paragraphs 9.50 to 9.57. This is further corroborated by the witness testimony of Police Major Wai XXXX, who describes having sought help from the No. 12 Light Infantry Regiment to defend against ARSA’s attack on a security post in the early hours of 25 August 2017. He describes initially ordering warning shots to be fired in the air in an attempt to disperse the terrorists, before then ordering shots to be fired “at the lower part of the enemies’ bodies as an act of self-defence” when the terrorists continued to “attack[] us with handmade mines, jinkalis and harpoons”.¹⁴³³
- 9.78 Myanmar denies perpetrating any of the unlawful violence and killing, as alleged in The Gambia’s Reply in respect of this location, for which not one witness account is subject to any specific corroborative evidence of any kind.

¹⁴³⁰ Myanmar Defence Services, Western Command Headquarters, Aung Yan Naing Operation Report No. (241/2017), 29 August 2017, p. 5(4), CMM, Vol. IV, Annex 123.

¹⁴³¹ Amnesty International, *Destroy Everything*, p. 77, MG, Vol. IV, Annex 112.

¹⁴³² RG, para. 7.141 footnote 898.

¹⁴³³ Witness Statement of Police Major Wai XXXXX, 24 October 2017, pp. 1 and 2, RM, Vol. III, Annex 92.

- 9.79 While evidence gathered by Amnesty International suggested at least 29 and 37 people died in Koe Tan Kauk and Chein Khar Li respectively, there is no evidence whether any of this number were people who were not legitimate targets.¹⁴³⁴ In its Reply, The Gambia states “[a]lmost every person interviewed by the Mission [FFM] reported losing at least one family member in the ‘clearance operation’”.¹⁴³⁵ This is worthless evidence in seeking to gauge how many people may have been *killed*, legitimately or otherwise. It is unknown how broadly “family member” was defined. The fact that a “family member” died does not exclude the possibility that the “family member” was a member of ARSA or was one of its supporters who was actively participating in the clash with the Myanmar Defence Services. It is unknown how many of those interviewed were in fact related to people who were killed. There is no indication as to how many such persons died. Several different people stating that a “family member” was killed may have all been talking about the same person who died. The identities of the persons upon whose information the Amnesty International report was based are unknown to both of the parties to these proceedings.
- 9.80 In relation to The Gambia’s allegations of sexual violence in Koe Tan Kauk / Chein Khar Li, Myanmar responds as follows.
- 9.81 The FFM’s findings about alleged sexual violence are “the product of multiple anonymous hearsay”¹⁴³⁶ from persons whose identities are not known even to The Gambia. Paragraph 841 of the 2018 FFM Detailed Findings refers to a man who was told by “a young girl” that “she had been raped by the military.”¹⁴³⁷ Both the man and the girl are not named, and the report by the girl to the man is very clearly hearsay. Moreover, the summary of the man’s evidence as recorded by the individual who wrote the FFM report is secondary hearsay. The Gambia argues incorrectly to the contrary.
- 9.82 The only other evidence of sexual violence referred to in paragraph 841 of the 2018 FFM Detailed Findings is the “report of a man from Chein Khar Li who saw

¹⁴³⁴ See CMM, para. 9.61.

¹⁴³⁵ RG, para. 7.142.

¹⁴³⁶ RG, para. 7.146, referring to CMM, para. 9.58.

¹⁴³⁷ 2018 FFM Detailed Findings, para. 841, MG, Vol. II, Annex 40.

Tatmadaw soldiers rape... his wife”. The person who is said to have provided the report is not named. The man who is said to have witnessed the event (who is not necessarily the same person who provided the report to the FFM) is also not named. The statement about this event in the FFM Detailed Findings it itself therefore hearsay, and possibly multiple hearsay.

- 9.83 Even if this evidence could be accepted at face value without question (*quod non*), it is evidence of two rapes in this location. It does not support The Gambia’s claim of “pervasive” sexual violence during the counter-terrorism operations.

6. Inn Din

- 9.84 This location is dealt with in paragraph 9.39 of the Memorial of The Gambia, paragraphs 9.62 to 9.79, and 12.66 to 12.67, of the Counter-Memorial of Myanmar, and paragraphs 7.131 to 7.139 of the Reply of The Gambia.¹⁴³⁸
- 9.85 Contrary to what The Gambia claims,¹⁴³⁹ there is no “uncontroverted evidence” that the counter-terrorism operation at Inn Din was launched “using alleged ARSA attacks as a pretext”. This is simply a baseless assertion. By contrast, there is a wealth of genuinely uncontroverted and inconvertible evidence that deadly ARSA attacks were being carried out across northern Rakhine State, and specifically in the vicinity of Inn Din,¹⁴⁴⁰ which amply justified the conduct of counter-terrorism operations at Inn Din. This is ignored by The Gambia in its Memorial. Now that The Gambia cannot deny this, The Gambia shifts its case in an attempt to minimise the significance of the ARSA attacks.
- 9.86 Equally without foundation, The Gambia claims that the Myanmar Defence Services were responsible for “mass, indiscriminate killings” of the “Rohingya civilian

¹⁴³⁸ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in MG, paras. 10.28, 10.66, 10.74, 11.18, 11.19, 11.21, 11.23, 11.24, 11.45, 11.86, 12.97, 12.136 and 12.141, and RG, paras. 4.51, 7.21, 8.6, 8.34 and 9.58.

¹⁴³⁹ RG, para. 7.133.

¹⁴⁴⁰ See CMM, paras. 9.67–9.70. See also 2018 FFM Detailed Findings, para. 875, MG, Vol. II, Annex 40: “there appears to have been an attempt by a large group of Rohingya men to offer some resistance in one of the hamlets known to the Rohingya residents as Bor Para. Men gathered with the aim of preventing the soldiers and ethnic Rakhine from entering the hamlet. The soldiers opened fire on the group ... at least one man was killed”.

population at Inn Din”.¹⁴⁴¹ However, The Gambia’s Reply does not dispute the evidence of Amnesty International¹⁴⁴² that only 17 people, out of a population of 6,300 Bengalis, were killed at Inn Din during the events in question. Both Amnesty International and Reuters identified that the “clear motive behind the killing” of ten men, who were part of this overall figure of 17 deaths, was “revenge and/or retribution for the murder” of a local Rakhine man by Bengalis.¹⁴⁴³ Amnesty International do not indicate how many of the remaining 7 people were killed *illegitimately*.

9.87 Notwithstanding the above, The Gambia selectively cites anonymous accounts to the effect that “they [the military] tried to kill the entire village”.¹⁴⁴⁴ This is not merely groundless hyperbole; it is blatantly untrue. In the section of the Reply dealing with Inn Din, The Gambia relies selectively on the account given to LAW by the person identified as CK0301.¹⁴⁴⁵ However, The Gambia fails to mention that this person also speaks of sitting on a beach for approximately two hours with “about 1000 people in this group, including children and men from neighbouring hamlets”, and says that “[w]ithin this time the military would often walk past ... Military personnel gestured for them to walk toward Merullah [Myin Hlut]”.¹⁴⁴⁶ There is no evidence that any of this group was harmed in any way.

9.88 The Gambia also appears not to have realised that the summary account given to LAW by the person identified as CK0301¹⁴⁴⁷ is a verbatim copy of the account said to have been given to LAW by “another” person identified as TS0200 with the addition of two sentences at the beginning and one at the end.¹⁴⁴⁸ It appears that LAW has in fact provided two versions of the same account given by the same person, and attached a different pseudonym to each. It is troubling that The Gambia appears not to have noticed this. It is even more disconcerting that LAW itself appears not to have noticed

¹⁴⁴¹ RG, para. 7.134.

¹⁴⁴² See CMM, para. 9.78.

¹⁴⁴³ CMM, para. 9.72.

¹⁴⁴⁴ RG, para. 7.135, citing Legal Action Worldwide, “Collated Information from Victims/Witnesses” (“**Legal Action Worldwide, Collated Information**”), p. 47 (CK0522), MG, Vol. X, Annex 336.

¹⁴⁴⁵ RG, para. 7.135 footnote 886 and accompanying text, citing Legal Action Worldwide, Collated Information, p. 47 (CK0522), MG, Vol. X, Annex 336.

¹⁴⁴⁶ Legal Action Worldwide, Collated Information, p. 59 (CK0301), MG, Vol. X, Annex 336.

¹⁴⁴⁷ Legal Action Worldwide, Collated Information, pp. 57-59 (CK0301), MG, Vol. X, Annex 336.

¹⁴⁴⁸ Legal Action Worldwide, Collated Information pp. 100-102 (TS0200), MG, Vol. X, Annex 336.

this. As discussed elsewhere, this highlights the grave dangers of such pervasive anonymity in this case.¹⁴⁴⁹

- 9.89 The Reply of The Gambia contends that “Other than acknowledging the summary execution of ten men, as was authoritatively documented by Reuters, Myanmar says nothing about the killings of men, women, children and the elderly during these operations”.¹⁴⁵⁰ However, The Gambia makes no such allegations in its Memorial, such that there was nothing in this respect for the Counter-Memorial to address. As previously noted,¹⁴⁵¹ and for obvious reasons, Myanmar need not respond to an allegation that has not been made in The Gambia’s pleadings.
- 9.90 To the extent that it is now necessary, Myanmar responds to the allegations raised for the first time by The Gambia, which are categorically denied.
- 9.91 First, notwithstanding that events at Inn Din have been the “focus of particular international attention”,¹⁴⁵² and that The Gambia has now had a period of some 7 years in which to obtain credible and reliable evidence, The Gambia continues to rely on snippets of overwhelmingly anonymous summary hearsay accounts from unnamed people, the identities of many, or all, of whom not even The Gambia appears to know. These hearsay accounts are taken from reports of the FFM, LAW and Amnesty International, and cannot be accorded any meaningful evidential weight.¹⁴⁵³
- 9.92 Second, of the 16 anonymous hearsay accounts on which the FFM bases its findings, not one is reported to have made any mention of ARSA’s presence and activities, or its armed confrontations with the Myanmar Defence Services.¹⁴⁵⁴ The omission by these people of any references to ARSA indicates that their accounts are not objective and impartial. This undermines the evidential value of their accounts even further still.

¹⁴⁴⁹ See specifically paragraphs 7.16-7.23 above.

¹⁴⁵⁰ RG, para. 7.132.

¹⁴⁵¹ CMM, paras. 1.31-1.32.

¹⁴⁵² CMM, para. 9.62.

¹⁴⁵³ See CMM, Chapters 6 and 7, and see this Rejoinder, Chapters 6 and 7 above.

¹⁴⁵⁴ 2018 FFM Detailed Findings, paras. 871-879, MG, Vol. II, Annex 40.

- 9.93 In exactly the same way, not one of the “18 Rohingya men and women”¹⁴⁵⁵ interviewed by Amnesty International is recorded as having made any mention of ARSA and its activities, notwithstanding the fact of the ARSA attacks on 25 August 2017 and the fact that Inn Din was well-known to international aid workers as a place of ARSA activity in the months prior to the events in question.¹⁴⁵⁶
- 9.94 The Gambia specifically references three incidents involving six *apparent* murders alleged to have been committed by “soldiers, supported by ethnic Rakhine”.¹⁴⁵⁷ The available evidence, however, does not establish that such murders were ever committed. None of these anonymous witnesses *in fact* testifies to how their family members are said to have been killed or by whom. Likewise, the allegation that a “Rakhine man was seen chopping down an 80-year-old woman”¹⁴⁵⁸ refers to an isolated incident that took place away from events in Inn Din on “the other side of the river... toward the forest”. This allegation does not connect the claimed killing to the military or to events in Inn Din.¹⁴⁵⁹
- 9.95 The Gambia claims that, according to an Amnesty International report, an unnamed “Myanmar military officer” was heard to say “we got an order to burn down the entire village.... [w]e will destroy everything.”¹⁴⁶⁰ The full quote, as allegedly recorded, in fact includes the following words: “Ok, ok. I wanted to know if your village is peaceful [free of terrorists]. We got an order to burn down the entire village if there is any disturbance. If you villagers aren’t living peacefully, we will destroy everything ... We are starting the operation ... If you just stay quiet, there will be no problems. If not, you will all be in danger.”¹⁴⁶¹
- 9.96 Myanmar denies that there was any such order given to soldiers to burn down Inn Din. Notwithstanding this, even if what is stated in the Amnesty International report could

¹⁴⁵⁵ Amnesty International, *Destroy Everything*, p. 82, MG, Vol. IV, Annex 112.

¹⁴⁵⁶ CMM, para. 9.68.

¹⁴⁵⁷ RG, para. 7.136, citing Legal Action Worldwide, Collated Information, p. 59 (CK0301), MG, Vol. X, Annex 336; 2018 FFM Detailed Findings, para. 874, MG, Vol. II, Annex 40.

¹⁴⁵⁸ RG, para. 7.138.

¹⁴⁵⁹ Legal Action Worldwide, Collated Information, p. 45 (TS0045), MG, Vol. X, Annex 336.

¹⁴⁶⁰ RG, para. 7.135, citing Amnesty International, *Destroy Everything*, p. 82, MG, Vol. IV, Annex 112.

¹⁴⁶¹ RG, para. 7.135, citing Amnesty International, *Destroy Everything*, p. 82, MG, Vol. IV, Annex 112.

be accepted without question to be true in its entirety (*quod non*), this would not be evidence of any prior intent to destroy the village. The concern expressed in the statement relates solely to the activities of terrorists in the area.

- 9.97 In relation to The Gambia's allegations of sexual violence in Inn Din, Myanmar responds as follows.
- 9.98 Nothing in paragraph 7.139 of The Gambia's Reply undermines Myanmar's observation in its Counter-Memorial that, in relation to Inn Din, "[t]here is little evidence of any sexual violence, and certainly not of a pervasive nature."¹⁴⁶² The Gambia repeats the single alleged incident of rape, as recorded by the FFM,¹⁴⁶³ and adds two new accounts of alleged sexual violence from two anonymous witness statements taken by LAW.¹⁴⁶⁴ These two witness statements in fact relate to allegations of rape near Bor Para in Thin Baw Kwae village tract, and not to the conduct of the counter-terrorism operations in Inn Din.¹⁴⁶⁵
- 9.99 In addition, and as discussed above, the serious problems with the anonymous witness statements procured by LAW are now compounded by the recent revelations concerning Witness P1299, who provided signed witness statements both to LAW and to the IIMM, and who then admitted to the IIMM that he had lied in the witness statement that he had given to LAW.¹⁴⁶⁶ The fact that this witness's statements were anonymised meant that The Gambia did not even realise that it had been provided with two different statements from this same witness.
- 9.100 Furthermore, one of the two LAW statements relied on by The Gambia in support of its claims of sexual violence in Inn Din (but which, as noted above, in fact relate to Thin Baw Kwae) was provided by a witness who is now known to have provided two separate accounts to LAW.¹⁴⁶⁷ The major inconsistencies between these two accounts

¹⁴⁶² CMM, para. 9.79.

¹⁴⁶³ RG, para. 7.139, referring to 2018 FFM Detailed Findings, para. 928, MG, Vol. II, Annex 40.

¹⁴⁶⁴ RG, para. 7.139.

¹⁴⁶⁵ One of the two witnesses claims to have travelled south to the river that forms the edge of Inn Din village tract and, from a distance, to have seen the detention of fishermen on the beach and soldiers kicking the men: Legal Action Worldwide, Witness Statement No. 038, paras. 48-60, RG, Vol. IV, Annex 61.

¹⁴⁶⁶ See paragraphs 8.75-8.80 above.

¹⁴⁶⁷ Legal Action Worldwide, Witness Statement No. 039, RG, Vol. IV, Annex 62, and Legal Action Worldwide, Collated Information, pp. 2-5 (CK0526), MG, Vol. X, Annex 336.

are analysed elsewhere in this Rejoinder.¹⁴⁶⁸ These inconsistencies establish that there are fatal problems with the reliability and credibility of this witness. No reliance can safely be placed on the evidence of this witness.

7. Doe Tan

9.101 This location is dealt with in paragraph 8.14 of the Memorial of The Gambia, and paragraphs 9.88 to 9.93 of the Counter-Memorial of Myanmar.¹⁴⁶⁹

9.102 The Gambia's only mention of this location in its Reply is a bare reference to it being a village that was "completely destroyed".¹⁴⁷⁰ Despite the burden of proof that it bears, The Gambia does not present any evidence about when this destruction is said to have taken place or who was responsible.

9.103 The Gambia thus has no answer to, and does not dispute, what is stated in paragraphs 9.88 to 9.93 of the Counter-Memorial of Myanmar.

8. Nga Khu Ya

9.104 This location is dealt with in paragraph 8.71 of the Memorial of The Gambia, and paragraphs 9.94 to 9.98 of the Counter-Memorial of Myanmar.¹⁴⁷¹

9.105 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

¹⁴⁶⁸ See paragraphs 7.22(3), 7.29(3) and 8.143-8.145 above.

¹⁴⁶⁹ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁴⁷⁰ RG, para. 9.57 footnote 1109.

¹⁴⁷¹ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in CMM, paras. 3.28 and 9.91.

9. Ngar Sar Kyu

- 9.106 This location is dealt with in paragraph 8.38 of the Memorial of The Gambia, and paragraphs 9.99 to 9.102 of the Counter-Memorial of Myanmar.¹⁴⁷²
- 9.107 The Gambia's Reply contains no mention of this location. The Gambia has thus no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

10. Kyet Yoe Pyin

- 9.108 This location is dealt with in paragraphs 8.49, 8.68, 8.77, 9.20 and 9.33 of the Memorial of The Gambia, and paragraphs 9.103 to 9.117 of the Counter-Memorial of Myanmar.¹⁴⁷³
- 9.109 The Gambia's Reply does not provide any answer to these paragraphs of the Counter-Memorial. Instead, the Reply of The Gambia simply repeats (twice) a two-sentence quote from an unknown anonymous uncorroborated witness account¹⁴⁷⁴ that already appears in its Memorial.¹⁴⁷⁵ The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

11. Ngan Chaung

- 9.110 This location is dealt with in paragraphs 8.10 and 8.65 of the Memorial of The Gambia, and paragraphs 9.118 to 9.124 of the Counter-Memorial of Myanmar.¹⁴⁷⁶

¹⁴⁷² These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in CMM, paras. 7.153, 9.188 and 9.191.

¹⁴⁷³ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in CMM, paras. 9.132, 9.188 and 9.191.

¹⁴⁷⁴ RG, para. 7.46 footnote 685, and para. 9.64, both citing UN Office of the High Commissioner for Human Rights, Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT, 3 February 2017, p. 18, MG, Vol. II, Annex 30.

¹⁴⁷⁵ MG, para. 9.33.

¹⁴⁷⁶ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

9.111 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

12. Pwint Hpyu Chaung

9.112 This location is dealt with in paragraphs 8.64, 8.67, 9.19 and 9.26 of the Memorial of The Gambia, and paragraphs 9.125 to 9.134 of the Counter-Memorial of Myanmar.¹⁴⁷⁷

9.113 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

13. U Shey Kya

9.114 This location is dealt with in paragraphs 8.72 and 8.76 of the Memorial of The Gambia, and paragraphs 9.135 to 9.144 of the Counter-Memorial of Myanmar.¹⁴⁷⁸

9.115 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

14. Myaw Taung

9.116 This location is dealt with in paragraphs 9.38 and 9.39 of the Memorial of The Gambia, and paragraphs 9.145 to 9.151 of the Counter-Memorial of Myanmar.¹⁴⁷⁹

¹⁴⁷⁷ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in MG, para. 8.58, and CMM, paras. 9.188 and 13.194.

¹⁴⁷⁸ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. It is not mentioned in any other chapters of those pleadings.

¹⁴⁷⁹ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. It is not mentioned in any other chapters of those pleadings.

9.117 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

15. Yae Khat Chaung Gwa Son

9.118 This location is dealt with in paragraphs 8.22, 8.28, 8.68, 8.73, 8.74, 9.28 and 9.33 of the Memorial of The Gambia, and paragraphs 3.32, 9.152 to 9.163 and 9.188 of the Counter-Memorial of Myanmar.¹⁴⁸⁰

9.119 There is only one mention of this location in the Reply of The Gambia, which is a direct repetition of what is already stated in its Memorial.¹⁴⁸¹ The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

16. Dar Gyi Zar

9.120 This location is dealt with in paragraphs 8.18, 8.23, 8.48, 8.60, 9.16 and 9.22 of the Memorial of The Gambia, and paragraphs 9.164 to 9.175 of the Counter-Memorial of Myanmar.¹⁴⁸²

9.121 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

¹⁴⁸⁰ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁴⁸¹ MG, para. 9.33.

¹⁴⁸² These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in CMM, paras. 9.188 and 13.194.

17. Hpar Wut Chaung

- 9.122 This location is dealt with in paragraphs 8.71 and 9.36 of the Memorial of The Gambia, and paragraphs 9.176 to 9.183 of the Counter-Memorial of Myanmar.¹⁴⁸³
- 9.123 The Reply of The Gambia does not dispute that, at most, “some five (5) people out of a population of 6,000 *may* have been killed unlawfully” in this location.¹⁴⁸⁴
- 9.124 The Gambia’s only further mention of this location in its Reply is a bare reference to it being a village that was “completely destroyed”.¹⁴⁸⁵ Despite the burden of proof that it bears, The Gambia does not present any evidence about when this destruction is said to have taken place or who was responsible.
- 9.125 The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

18. Wa Peik

- 9.126 This location is dealt with in paragraph 8.13 of the Memorial of The Gambia, and paragraphs 9.184 to 9.193 of the Counter-Memorial of Myanmar.¹⁴⁸⁶
- 9.127 The Gambia’s Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

¹⁴⁸³ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁴⁸⁴ CMM, para. 9.183.

¹⁴⁸⁵ RG, para. 9.57 footnote 1109.

¹⁴⁸⁶ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in CMM, paras. 9.188 and 9.191.

19. Zin Pai Nyar

- 9.128 This location is mentioned in paragraph 8.10 of the Memorial of The Gambia, and is dealt with in paragraphs 9.194 to 9.200 of the Counter-Memorial of Myanmar.¹⁴⁸⁷
- 9.129 The Gambia’s only further mention of this location in its Reply is a bare reference to it being a village that was “completely destroyed”.¹⁴⁸⁸ Despite the burden of proof that it bears, The Gambia does not present any evidence about when this destruction is said to have taken place or who was responsible.
- 9.130 The Reply does not deny the fact that not a single Bengali villager, out of a population of 8,229, is said to have been harmed during the counter-terrorism operations.
- 9.131 The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

20. Kyein Chaung

- 9.132 This location is dealt with in paragraphs 8.17, 8.59 and 9.36 of the Memorial of The Gambia, and in paragraphs 9.201 to 9.216 of the Counter-Memorial of Myanmar.¹⁴⁸⁹
- 9.133 The Gambia’s only mention of this location in its Reply is in a quote from the 2018 FFM Detailed Findings to the effect that the FFM “verified additional ‘clearance operations’, which saw serious human rights violations against Rohingya” in various locations including Kyein Chaung.¹⁴⁹⁰ The Gambia fails to specify what specific “human rights violations” are alleged to have occurred at Kyein Chaung. Nor does The Gambia give details of the circumstances of the alleged “human rights violations”, or of the alleged perpetrators, or of the alleged victims. Without more, it is impossible

¹⁴⁸⁷ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁴⁸⁸ RG, para. 9.57 footnote 1109.

¹⁴⁸⁹ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in MG, paras. 1.28 and 10.28.

¹⁴⁹⁰ RG, para. 9.55, citing 2018 FFM Detailed Findings, para. 881, MG, Vol. II, Annex 40.

to know whether what is said to be encompassed by these words in the FFM report is simply a repetition of allegations already stated elsewhere.

- 9.134 The Gambia thus has not answered, or disputed, what is stated in these paragraphs of the Counter-Memorial of Myanmar. The position remains that there is no evidence, and certainly no credible or reliable evidence, of the commission of killing, bodily harm, and sexual violence against innocent members of the civilian population on a massive scale in Kyein Chaung.

21. Laung Don

- 9.135 This location is dealt with in paragraphs 8.71 and 9.16 of the Memorial of The Gambia, and in paragraphs 9.217 to 9.221 of the Counter-Memorial of Myanmar.¹⁴⁹¹
- 9.136 The Gambia's only further mention of this location in its Reply is a bare reference to it being a village that was "completely destroyed".¹⁴⁹² Despite the burden of proof that it bears, The Gambia does not present any evidence about when this destruction is said to have taken place or who was responsible.
- 9.137 The Reply of The Gambia provides no further evidence, and does not dispute that, out of a population of 11,916, the number of Bengali villagers alleged to have been killed unlawfully *may* be one person: namely an elderly villager who is alleged to have been kicked and punched, some time prior to February 2017, and who *may* have died as a result of this alleged assault.¹⁴⁹³
- 9.138 The Gambia thus has not answered, or disputed, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

¹⁴⁹¹ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁴⁹² RG, para. 9.57 footnote 1109.

¹⁴⁹³ CMM, para. 9.219.

22. Naung Dar Khar Li

- 9.139 This location is dealt with in paragraph 9.29 of the Memorial of The Gambia, and in paragraphs 9.222 to 9.224 of the Counter-Memorial of Myanmar.¹⁴⁹⁴
- 9.140 In its Reply, The Gambia suggests that this was a location in which there was no ARSA activity.¹⁴⁹⁵ This erroneous claim by The Gambia has already been dealt with above.¹⁴⁹⁶
- 9.141 The Gambia's only further mention of this location in its Reply is a bare reference to it being a village that was "completely destroyed".¹⁴⁹⁷ Despite the burden of proof that it bears, The Gambia does not present any evidence about when this destruction is said to have taken place or who was responsible.
- 9.142 Nothing in The Gambia's Reply alters the position that the only evidence of violence against a person in this village is a single incident of alleged rape, and that even this allegation is not supported by evidence to which evidential weight can be attached.
- 9.143 The Gambia has thus not answered, or disputed, what is stated in paragraphs 9.222 to 9.224 of the Counter-Memorial of Myanmar.

23. Hpaung Taw Pyin

- 9.144 This location is dealt with in paragraphs 8.45 and 8.121 of the Memorial of The Gambia, and in paragraphs 9.225 to 9.231 of the Counter-Memorial of Myanmar.¹⁴⁹⁸
- 9.145 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

¹⁴⁹⁴ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁴⁹⁵ RG, paras. 7.50-7.51.

¹⁴⁹⁶ See paragraphs 8.39-8.46 above.

¹⁴⁹⁷ RG, para. 9.57 footnote 1109.

¹⁴⁹⁸ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

24. Chin Tha Mar

9.146 This location is dealt with in paragraph 9.23 of the Memorial of The Gambia, and in paragraphs 9.232 to 9.236 of the Counter-Memorial of Myanmar.¹⁴⁹⁹

9.147 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

25. Maung Gyi Taung

9.148 This location is dealt with in paragraphs 8.69 and 9.16 of the Memorial of The Gambia, and in paragraphs 9.237 to 9.244 of the Counter-Memorial of Myanmar.¹⁵⁰⁰

9.149 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

26. Kun Taing / Kwan Dine

9.150 This location is dealt with in paragraph 8.49 the Memorial of The Gambia. It is dealt with in paragraphs 9.245 to 9.250 of the Counter-Memorial of Myanmar.¹⁵⁰¹

9.151 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

¹⁴⁹⁹ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in MG, para. 8.55.

¹⁵⁰⁰ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁵⁰¹ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

27. Yin Ma Kyaung Taung

- 9.152 This location is dealt with in paragraph 8.78 of the Memorial of The Gambia, and in paragraphs 9.251 to 9.257 of the Counter-Memorial of Myanmar.¹⁵⁰²
- 9.153 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

28. Taung Bazar

- 9.154 This location is dealt with in paragraphs 8.11, 8.12 and 9.15 of the Memorial of The Gambia, and in paragraphs 9.258 to 9.264 of the Counter-Memorial of Myanmar.¹⁵⁰³
- 9.155 The solitary reference to this location in the Reply of The Gambia relates to an allegation in the summary hearsay account provided by LAW of an account given by the anonymous person identified as CK0320.¹⁵⁰⁴ It is said in that summary account that in January 2017, soldiers beat him and burned him with a candle while he was being questioned by police about his support for ARSA. There is no evidence to corroborate or support any aspect of his reported account. In any event, this allegation is not one of acts committed during the counter-terrorism operations, and therefore cannot be cited as an act that is part of the alleged "consistent pattern of conduct" during those operations.
- 9.156 The Gambia thus has not answered, or disputed, what is stated in paragraphs 9.258 to 9.264 of the Counter-Memorial of Myanmar.

¹⁵⁰² These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017. This location is also mentioned in MG, para. 10.38.

¹⁵⁰³ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁵⁰⁴ Legal Action Worldwide, Collated Information, p. 86 (CK0320), MG, Vol. X, Annex 336.

29. Thin Baw Kway

- 9.157 This location is dealt with in paragraph 9.21 of the Memorial of The Gambia, and in paragraphs 9.265 to 9.268 of the Counter-Memorial of Myanmar.¹⁵⁰⁵
- 9.158 The Gambia's Memorial makes only a single mention of events in Thin Baw Kway (Thin Baw Kwe).¹⁵⁰⁶ This concerns an allegation of rape of a woman after her husband had been shot and killed. As pointed out in the Counter-Memorial of Myanmar, this alleged incident appears in fact to have occurred in Chut Pyin (Rathedaung Township) rather than in Thin Baw Kway (Maungdaw Township).¹⁵⁰⁷
- 9.159 In the Reply of The Gambia, there are two further allegations of rape, which are said by The Gambia to have been committed at Inn Din,¹⁵⁰⁸ but which are in fact said by the alleged victims to have taken place in Thin Baw Kway.¹⁵⁰⁹
- 9.160 The first of these alleged victims is the person identified by LAW in its "Collated Information" document as CK0526,¹⁵¹⁰ who is the same person who gave LAW Witness Statement No. 39.¹⁵¹¹ For the detailed reasons already given above, this witness cannot be considered to be credible and reliable.¹⁵¹²
- 9.161 The second of these alleged victims is the person who gave LAW Witness Statement No. 38.¹⁵¹³ In support of the proposition that "[m]any Rohingya witnesses confirm that they were not even aware of the presence, if any, of ARSA members in their

¹⁵⁰⁵ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁵⁰⁶ MG, para. 9.21 (identifying this location as Thinn Baw Kway).

¹⁵⁰⁷ CMM, para. 9.266.

¹⁵⁰⁸ RG, para. 7.139, citing Legal Action Worldwide, Witness Statement No. 38, RG, Vol. IV Annex 61 and Legal Action Worldwide, Witness Statement No. 39, RG, Vol. IV, Annex 62.

¹⁵⁰⁹ Legal Action Worldwide, Witness Statement No. 38, p. 1 and paras. 9 and 12, RG, Vol. IV Annex 61; and Legal Action Worldwide, Witness Statement No. 39, p. 1 and para. 7, RG, Vol. IV, Annex 62.

¹⁵¹⁰ Legal Action Worldwide, Collated Information, p. 2 (CK0526), MG, Vol. X, Annex 336.

¹⁵¹¹ Legal Action Worldwide, Witness Statement No. 39, para. 5, RG, Vol. IV, Annex 62.

¹⁵¹² See paragraphs 7.22(3), 7.29(3), and 8.143-8.144 above.

¹⁵¹³ Legal Action Worldwide, Witness Statement No. 38, para. 24, RG, Vol. IV, Annex 61.

villages”,¹⁵¹⁴ The Gambia relies on this person’s statement that “[t]here were no ARSA groups operating in Kul Long [Thin Baw Kway] that I was aware of”.¹⁵¹⁵

9.162 However, the very next sentence of that witness statement (conspicuously not quoted by The Gambia) acknowledges that “there was an ARSA group staying in the jungle to the east of the village”, and that ARSA were known to be “camping in the jungle and that [friends of the witness] had seen them [ARSA] with weapons. I heard they had special uniforms and guns...”¹⁵¹⁶ This witness statement in fact indicates that ARSA *was* active in the area at the time.

9.163 The Gambia’s only further mention of this location in its Reply is a bare reference to it being a village that was “completely destroyed”.¹⁵¹⁷ Despite the burden of proof that it bears, The Gambia does not present any evidence about when this destruction is said to have taken place or who was responsible.

9.164 These misunderstandings of The Gambia as to the locations of alleged events demonstrates that The Gambia is confused about its own evidence. Nothing in the evidence relied on by The Gambia could possibly support a conclusion of mass killing and pervasive sexual violence in this locality during the counter terrorism operations. The Gambia does not otherwise answer, or dispute, what is stated in paragraphs 9.265 to 9.268 of the Counter-Memorial of Myanmar.

30. Dar Paing Sa Yar

9.165 This location is dealt with in paragraph 9.21 of the Memorial of The Gambia, and in paragraphs 9.269 to 9.270 of the Counter-Memorial of Myanmar.¹⁵¹⁸

¹⁵¹⁴ RG, para. 7.17.

¹⁵¹⁵ RG, para. 7.17 footnote 585, citing Legal Action Worldwide, Witness Statement No. 38, para. 24, RG, Vol. IV, Annex 61.

¹⁵¹⁶ Legal Action Worldwide, Witness Statement No. 38, para. 24, RG, Vol. IV, Annex 61.

¹⁵¹⁷ RG, para. 9.57 footnote 1109.

¹⁵¹⁸ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

- 9.166 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.
- 9.167 The totality of the evidence relating to Dar Paing Sar Yar (population 6,401) consists of a single allegation of rape committed sometime between October and December 2016. The Gambia declines to explain how this allegation, even if proven, could possibly constitute evidence of a "consistent pattern of conduct" involving the commission of killing, bodily harm, and sexual violence against innocent members of the civilian population on a massive scale.
- 9.168 The Gambia ignores the evidence of an IIMM witness who describes his journey with many people from Buthidaung Township, through Maungdaw Township and into Bangladesh from 28 August onwards. He describes having "passed by many villages", including through Dar Paing Sa Yar and states "I did not see any military or destruction."¹⁵¹⁹
- 9.169 The testimony of yet another IIMM witness is similarly ignored by The Gambia. This witness describes staying in Dar Paing Sa Yar for 3-4 days from 27 August onwards. He says:

ARSA member Molluvi [Mawlawi] Nurul Hakim had arrived in Ga Zi Ya Mura and was telling people that the ARSA members from Dar Paing Sa Yar had killed all of the military in Maung Nu and that the villagers needed to return back there to take the military's guns. It was an ARSA motto, "We will take their (the military) guns and defeat them with them.

While doubting whether this was true the witness nevertheless says as follows:

I had seen a group of about 30 people dressed in black clothing with *dha* [swords] and wire rod weapons. They had crossed the river from Dar Paing Sa Yar and I had assumed they were ARSA members.¹⁵²⁰

- 9.170 The Gambia does not otherwise answer, or dispute, what is stated in paragraphs 9.269 to 9.270 of the Counter-Memorial of Myanmar.

¹⁵¹⁹ IIMM, Witness Statement No. IIMM0019915116, paras. 132-134, RG, Vol. IV, Annex 54.

¹⁵²⁰ IIMM, Witness Statement No. IIMM0019628625, para. 108, RM, Vol. IV, Annex 131.

31. Hpet Leik (also known as Zoe Parang)

- 9.171 This location is dealt with in paragraph 9.27 of the Memorial of The Gambia. It is dealt with in paragraphs 9.271 to 9.272 of the Counter-Memorial of Myanmar.¹⁵²¹
- 9.172 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar. The Gambia does not show that *any* acts of brutality of any type occurred at any time in Hpet Leik.

32. Gaw Du Thar Ra

- 9.173 This location is dealt with in paragraph 8.37 of the Memorial of The Gambia, and in paragraphs 9.273 to 9.277 of the Counter-Memorial of Myanmar.¹⁵²²
- 9.174 The Reply of The Gambia contains no meaningful analysis of events at this location. Specifically, it provides no evidence, nor presents any argument, that contradicts Myanmar's case¹⁵²³ that on 26 August 2017, "some 200 ARSA terrorists and collaborators fired upon" 16 police officers near to the Thar Ra Bridge outpost and "set off three mines".¹⁵²⁴
- 9.175 The Gambia, however, reiterates its reliance on the "investigations" of journalist Jonathan Head, whose witness statement was already annexed to the Memorial of The Gambia and has already been addressed in the Counter-Memorial of Myanmar.¹⁵²⁵ The Gambia makes the dramatic claim that Mr Head has "uncovered evidence" indicating that neither ARSA "nor the Rohingya themselves, was behind the burning of Rohingya villages."¹⁵²⁶ Myanmar has already demonstrated that this claim is untrue

¹⁵²¹ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁵²² These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁵²³ CMM, paras. 9.273–9.277.

¹⁵²⁴ CMM, para. 9.275.

¹⁵²⁵ CMM, paras. 3.96–3.98 and 7.128–7.131. See also this Rejoinder, paragraphs 7.105–7.112 above.

¹⁵²⁶ RG, para. 4.50.

and unsupported by evidence, and that ARSA and its supporters were responsible for burning villages, including Bengali settlements.¹⁵²⁷

9.176 As has already been noted, the conclusions of Mr Head are mere expressions of opinion,¹⁵²⁸ based on supposition, and more than a hint of bias, claiming that it was “impossible” that anyone other than Rakhine community members could have been responsible for fire-damage in Gaw Du Thar Ra, and that they had been “supported or encouraged by the military”.¹⁵²⁹ Mr Head provides no evidence to substantiate this latter claim, which he only described as being “[m]y view”. Mr Head, and The Gambia, likewise feel at liberty to disregard the countervailing perspective from one of the other Burmese media groups then present with Mr Head in the village, whose view was that “[m]uslim militants ha[d] burned the village”.¹⁵³⁰ In forming *his* “view”, Mr Head instead elects to rely upon a different Burmese colleague who spoke to a boy (age unknown) who is said to have relayed a claim that Rakhine men “and the police”¹⁵³¹ had set the village alight, even though it is not clear at all that the boy had even witnessed who was responsible. At best this is remote hearsay of such flimsy quality as to be worthless.

9.177 The Gambia fails to mention Mr Head’s account of his interview of one witness (Abdul Majid), who describes how he and his family had already fled from Gaw Du Thar Ra, along “with the rest of the community”, “four days before” Mr Head witnessed the partial burning of the village.¹⁵³² While Mr Majid claimed to have heard “sustained gunfire...together with a great deal of shouting” on 3 September 2017,¹⁵³³ he does not suggest that the Myanmar Defence Services were involved. He is silent about the activities of ARSA militants.

¹⁵²⁷ See, for example, CMM paras. 8.73, 8.33-8.34, 8.37-8.38, 8.49-8.51, 9.187-9.198; and this Rejoinder, paragraphs 8.114 above and 13.165-13.167 below. See also CMM, paras. 3.79-3.81.

¹⁵²⁸ See paragraphs 7.108-7.109 and 7.111 above.

¹⁵²⁹ Witness Statement of Jonathan Head, para. 30, MG, Vol. XI, Annex 375.

¹⁵³⁰ *Ibid.*

¹⁵³¹ *Ibid.*, para. 29.

¹⁵³² *Ibid.*, paras. 29-37.

¹⁵³³ *Ibid.*, para. 37.

33. La Ba Daung

- 9.178 This location is dealt with in paragraph 8.42 of the Memorial of The Gambia, and in paragraphs 9.278 to 9.280 of the Counter-Memorial of Myanmar.¹⁵³⁴
- 9.179 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

34. Hang Cha Ma Gulang

- 9.180 This location is dealt with in paragraphs 8.42 and 8.46 of the Memorial of The Gambia, and in paragraphs 9.281 to 9.283 of the Counter-Memorial of Myanmar.¹⁵³⁵
- 9.181 The Gambia's Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

35. Khun Thi Pyin

- 9.182 This location is dealt with in paragraph 8.49 of the Memorial of The Gambia, and in paragraphs 9.284 to 9.288 of the Counter-Memorial of Myanmar.¹⁵³⁶
- 9.183 The Gambia's only mention of this location in its Reply is in a quote from the 2018 FFM Detailed Findings to the effect that the FFM "verified additional 'clearance operations', which saw serious human rights violations against Rohingya" in various locations including Kun Thee Pyin.¹⁵³⁷ The Gambia fails to specify what specific "human rights violations" are alleged to have occurred at Khun Thi Pyin. Nor does The Gambia give details of the circumstances of the alleged "human rights violations", or of the alleged perpetrators, or of the alleged victims. Without more, it is impossible

¹⁵³⁴ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁵³⁵ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁵³⁶ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁵³⁷ RG, para. 9.55, citing 2018 FFM Detailed Findings, para. 881, MG, Vol. II, Annex 40.

to know whether what is said to be encompassed by these words in the FFM report is simply a repetition of allegations already stated elsewhere.

9.184 The Gambia thus has not answered, or disputed, what is stated in paragraphs 9.284 to 9.288 of the Counter-Memorial of Myanmar.

9.185 The position remains that there is no evidence, and certainly no credible or reliable evidence, of the commission of killing, bodily harm, and sexual violence against innocent members of the civilian population on a massive scale in Khun Thi Pyin.

36. Ta Man Thar

9.186 This location is dealt with in paragraph 8.75 of the Memorial of The Gambia, and in paragraphs 9.289 to 9.300 of the Counter-Memorial of Myanmar.¹⁵³⁸

9.187 The Gambia ignores the statement in the witness statement of Andrew Riley, on which The Gambia relies, that Ta Man Thar was “an area with a strong ARSA presence”.¹⁵³⁹

9.188 The Gambia’s only mention of this location in its Reply is in a quote from the 2018 FFM Detailed Findings to the effect that the FFM “verified additional ‘clearance operations’, which saw serious human rights violations against Rohingya” in various locations including Ta Man Thar.¹⁵⁴⁰ The Gambia fails to specify what specific “human rights violations” are alleged to have occurred at Ta Man Thar. Nor does The Gambia give details of the circumstances of the alleged “human rights violations”, or of the alleged perpetrators, or of the alleged victims. Without more, it is impossible to know whether what is said to be encompassed by these words in the FFM report is simply a repetition of allegations already stated elsewhere.

9.189 The totality of the evidence relating to Ta Man Thar consists of a single allegation that three charred bodies were found in this location. The evidence of this is “uncorroborated, weak hearsay evidence”, which reveals nothing about the circumstances in which the three people died or about who might have been

¹⁵³⁸ These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁵³⁹ IIMM, Witness Statement No. IIMM0001557475 (Andrew Riley), para. 46, RG, Vol. IV, Annex 48.

¹⁵⁴⁰ RG, para. 9.55, citing 2018 FFM Detailed Findings, para. 881, MG, Vol. II, Annex 40.

responsible. The evidence certainly does not establish that the deaths were caused by the Myanmar Defence Services.¹⁵⁴¹ The Gambia declines to explain how this allegation, even if proven, could possibly constitute evidence of a “consistent pattern of conduct” involving the commission of killing, bodily harm, and sexual violence against innocent members of the civilian population on a massive scale.

37. Du Oh The Ma

9.190 This location is dealt with in paragraph 8.72 of the Memorial of The Gambia, and in paragraphs 9.301 to 9.304 of the Counter-Memorial of Myanmar.¹⁵⁴²

9.191 The Gambia’s Reply contains no mention of this location. The Gambia thus has no answer to, and does not dispute, what is stated in these paragraphs of the Counter-Memorial of Myanmar.

C. Conclusion

9.192 As of August 2017, there were some 509 villages and wards in northern Rakhine State that were either wholly or partially inhabited by Bengalis.¹⁵⁴³ The evidence relied on by The Gambia alleges acts of violence by the Myanmar Defence Services during the counter-terrorism operations of 2016 and 2017 in only 43 of these locations.¹⁵⁴⁴

9.193 Even if The Gambia could prove that killings, bodily harm, and sexual violence, were committed by the Myanmar Defence Services against innocent members of the civilian population on a massive scale in all 43 of these locations (*quod non*), this would not be a basis for inferring a genocidal intent. An attack against 43 out of 509

¹⁵⁴¹ CMM, paras. 9.290–9.292.

¹⁵⁴² These are the paragraphs in which this location is mentioned in MG, Chapters 8, 9 and 10, CMM, Chapters 8 and 9, and RG, Chapter 7, which deal with alleged acts of violence against the civilian population during the counter-terrorism operations of 2016 and 2017.

¹⁵⁴³ See paragraph 8.14 above; Ministry of Immigration and Population, List of population, CMM, Vol. IX, Annex 465.

¹⁵⁴⁴ That is to say, the three main locations dealt with in Chapter 8 of the Counter-Memorial of Myanmar and Chapter 8 of this Rejoinder (Min Gyi, Chut Pyin and Maung Nu), the 37 other locations dealt with in Chapter 9 of the Counter-Memorial of Myanmar and in this Chapter of this Rejoinder, and the three new locations now identified in the Reply of The Gambia which are dealt with in paragraphs 8.47-8.63 above.

locations inhabited by Bengalis (some 8% of such locations) would not be an attack against the Bengali population of northern Rakhine State as a whole, as such.

9.194 Furthermore, following a location-by-location analysis of the evidence relating to each of these 43 locations, it can be seen that The Gambia comes nowhere near establishing that killings, bodily harm, and sexual violence, were committed against innocent members of the civilian population on a massive scale even in these 43 locations. In relation to some of these locations, the evidence does not even allege anything more than a single incident involving a single victim, or a very small number of victims. In relation to these locations, the evidence of the alleged mistreatment is so weak and lacking in evidential weight that it clearly is incapable of proving that the alleged mistreatment occurred.

9.195 The evidence presented by The Gambia simply does not support its claim that during the counter-terrorism operations of 2016 and 2017, there was a “consistent pattern of conduct” or “*modus operandi*” involving the commission of killing, bodily harm, and sexual violence against innocent members of the civilian population on a massive scale in hundreds of villages across northern Rakhine State.

PART FOUR

CHAPTER 10

ALLEGED DISCRIMINATORY LAWS AND POLICIES

A. Introduction

- 10.1 Chapters 6 and 7 of the Memorial of The Gambia allege that in the decades preceding the counter-terrorism operations in 2016 and 2017, the authorities in Myanmar subjected the Bengali population in northern Rakhine State to various discriminatory laws and policies, and to an officially “sponsored” or officially “supported” campaign of hate speech. Myanmar’s response to these allegations is set out in Chapters 10 and 11 of its Counter-Memorial, which demonstrate that the claims of The Gambia contain factual inaccuracies, and that the matters alleged in The Gambia’s Memorial do not establish that the Government of Myanmar, or the Myanmar Defence Services or anyone else, had the intent physically or biologically to destroy Bengalis (or Bengali Muslims) in northern Rakhine State, as such.
- 10.2 The Gambia deals with these allegations again in Chapters 5 and 6 of its Reply. This Chapter and the next Chapter of this Rejoinder now respectively address these chapters of the Reply. This Chapter of this Rejoinder deals with the allegations concerning discriminatory laws and policies, while the next Chapter of this Rejoinder deals with the allegations concerning a campaign of hate speech. These Chapters of this Rejoinder will demonstrate that nothing in the Reply of The Gambia alters the conclusions in Chapters 10 and 11 of the Counter-Memorial of Myanmar.

B. Alleged “policy of denying the existence of the Rohingya”

- 10.3 This section of this Rejoinder responds to **paragraphs 5.5 to 5.9 (Chapter 5, Sub-section I.A)** of The Gambia’s Reply.
- 10.4 The Gambia claims that Myanmar has a policy of “denying the existence of the Rohingya” by refusing to refer to Bengalis in northern Rakhine State as the “Rohingya”.

- 10.5 The Gambia merely repeats claims made in its Memorial, without engaging with the responses to those claims already given in Myanmar’s Counter-Memorial. Facts stated in the Counter-Memorial that have not been contested by The Gambia include those set out in paragraph 2.2(1)-(9) above. The reasons why the authorities of Myanmar refer to those who speak the Chittagonian variant of Bengali as “Bengalis”, and decline to accept officially the name “Rohingya”, are set out in Chapter 2 of the Counter-Memorial of Myanmar and Chapter 2 of this Rejoinder.
- 10.6 As has already been noted, there is evidence that a significant majority of Bengalis in Rakhine State themselves do *not* self-identify with the name “Rohingya”,¹⁵⁴⁵ and a former Secretary-General of the United Nations was content not to use that term.¹⁵⁴⁶ The Gambia itself presents no evidence that the majority of Bengalis in northern Rakhine State *do* self-identify as “Rohingya”.
- 10.7 As has also been noted, the *International Encyclopaedia of Linguistics*, published in 2003 by Oxford University Press, states that a “Rohinga” is “An ethnic Bengali Muslim who speaks the Muslim variety of Chittagonian Bengali and was born in Arakan State”.¹⁵⁴⁷ It would be preposterous to suggest that this publication, by describing a “Rohingya” as an “ethnic Bengali” who speaks “Chittagonian Bengali”, is manifesting a genocidal intent and is directly and publicly inciting genocide.
- 10.8 The Gambia misleadingly states that “Myanmar argues ... that the Rohingya are actually ‘Bengali’ because ‘large numbers of Chittagonian Muslims then migrated to Arakan during the British colonial period’ (1824 to 1948) and thereafter”.¹⁵⁴⁸ In fact, as the Counter-Memorial points out:
- (1) Even the communities of Arakan-Mahomedans who were already in Arakan in pre-colonial times originated from migrations to Arakan from Bengal.¹⁵⁴⁹ In

¹⁵⁴⁵ CMM, paras. 2.155-2.158, 11.27, 12.91, and 13.6-13.7; and this Rejoinder, paragraphs 2.2(3), 2.4-2.5, 2.14(1) and 2.16-2.18 above.

¹⁵⁴⁶ CMM, para. 11.27.

¹⁵⁴⁷ B. Grimes, “East Indo-Aryan Languages”, in W. J. Frawley (ed.), *International Encyclopaedia of Linguistics* (Oxford University Press, online, 2nd edn. 2003), p. 482, CMM, Vol. III, Annex 79.

¹⁵⁴⁸ RG, para. 5.5.

¹⁵⁴⁹ CMM, para. 2.36.

1795, over 200 years ago, their language was described as “evidently the same with that of Bengal”.¹⁵⁵⁰

- (2) There was subsequently significant immigration into northern Arakan from Bengal during the British colonial period, and there was further significant irregular immigration from East Pakistan / Bangladesh following the independence of Pakistan and Burma.¹⁵⁵¹ The majority of the Bengali population in northern Rakhine State is the result of this immigration during the British colonial period, and of immigration from East Pakistan / Bangladesh in the post-colonial period.¹⁵⁵²
- (3) Muslims in northern Rakhine State speak the variant of the Chittagonian dialect of Bengali that is also spoken in the neighbouring Chittagong Division of Bangladesh.¹⁵⁵³
- (4) The evidence is that Muslims in northern Rakhine State share a common culture with those living in the neighbouring region of Bangladesh,¹⁵⁵⁴ which is part of the historic territory of Bengal.

10.9 The Gambia states that “Myanmar has employed the designation of the Rohingya as ‘Bengali’ both to deny their existence as a group and to spread the message that they do not belong in Myanmar”.¹⁵⁵⁵ However, The Gambia cites no evidence in support of this claim that this is the purpose of the use of the designation “Bengali”. The only source given by The Gambia for this claim are two paragraphs of the 2018 FFM Detailed Findings,¹⁵⁵⁶ neither of which states that this is the *purpose* of the use of that designation. Furthermore, these paragraphs of the 2018 FFM Detailed Findings should be given no evidential weight, given that they contain only expressions of opinions of

¹⁵⁵⁰ CMM, para. 2.113.

¹⁵⁵¹ CMM, paras. 2.37-2.49, 2.52-2.58, 2.65, and 2.118-2.137.

¹⁵⁵² By 1931, some 79% of the Bengali population in Arakan was the result of the colonial-era immigrations: see CMM, para. 2.132.

¹⁵⁵³ CMM, paras. 2.16-2.23.

¹⁵⁵⁴ CMM, paras. 2.18-2.22.

¹⁵⁵⁵ RG, para.5.6.

¹⁵⁵⁶ RG, para. 5.6, and MG, paras. 3.18 and 3.21, relying on 2018 FFM Detailed Findings, para. 460, MG, Vol. II, Annex 40; and MG, para. 12.41, relying on 2018 FFM Detailed Findings, para. 1420.

the FFM,¹⁵⁵⁷ or statements of fact for which no evidential source is cited.¹⁵⁵⁸ It is denied that the use of the term “Bengali” officially is intended to suggest that Bengalis have no right to exist or that none of them has a right to be in Myanmar.

- 10.10 As the Counter-Memorial of Myanmar points out, the Malaysian Government refers to some 22% of its population as “Chinese” and some 7% of its population as “Indian”, even though those referred to may be Malaysian citizens and may have been born in Malaysia.¹⁵⁵⁹ The German Government similarly refers to the small proportion of its population which speaks Danish as the “Danish minority” (“*Dänische Minderheit*”).¹⁵⁶⁰ The Romanian National Statistical Institute refers to over a million inhabitants of that country (some 7% of that country’s population) as “Hungarians”, and to other inhabitants as “Ukrainians”, “Germans”, and so forth.¹⁵⁶¹ The use of these terms hardly means that the Malaysian, German and Romanian Governments are seeking to deny the existence of these parts of their populations, or to spread the message that they do not belong in those countries or that they are illegal immigrants from other countries. The use of these terms certainly does not mean that the Malaysian, German and Romanian Governments have a genocidal intent in relation to those parts of their populations, or are directly and publicly inciting genocide against them.
- 10.11 As the Counter-Memorial of Myanmar makes clear, some Bengalis are citizens of Myanmar, and others may have the right to apply for citizenship, while others may have no right to citizenship. The Gambia presents no evidence to support the claim that the Government of Myanmar uses the term “Bengali” for the purpose of conveying the impression that Bengalis in northern Rakhine State simply do not exist, or that they are all illegal immigrants who have no right to be in Myanmar.

¹⁵⁵⁷ See CMM, paras. 5.31, 5.43-5.44, 5.57, 6.57, 6.68, 7.144-7.149, 12.19, and 16.18-16.19.

¹⁵⁵⁸ See CMM, paras. 5.46-5.54.

¹⁵⁵⁹ CMM, paras. 11.31-11.33.

¹⁵⁶⁰ Germany, Die Beauftragte der Bundesregierung für Aussiedlerfragen und nationale Minderheiten (Federal Government Commissioner for Matters Related to Ethnic German Resettlers and National Minorities), “Dänische Minderheit” (“Danish Minority”), RM, Vol. V, Annex 183 (German original, and English translation by Google Translate).

¹⁵⁶¹ Romania, Institutul Național de Statistică (National Statistical Institute), Press Release, First provisional data for the 2021 round of the Population and Housing Census, p. 12, RM, Vol. V, Annex 185 (Romanian original and automated English translation produced by DeepL).

10.12 The Gambia refers to a webpage of the U.S. Holocaust Memorial Museum (“USHMM”),¹⁵⁶² which should not be considered by the Court, due to The Gambia’s failure to comply with Article 50, paragraph 1, of the Rules of Court.¹⁵⁶³ In any event, this webpage does not establish The Gambia’s claim that “the Rohingya witnessed systematic erasure from their place in society following the first military takeover of Burma in 1962”.¹⁵⁶⁴ The reference on that webpage to the “gradual erasure” of the “Rohingya” is a mere expression of opinion of the USHMM.¹⁵⁶⁵

¹⁵⁶² RG, para. 5.7.

¹⁵⁶³ Article 50, paragraph 1, of the Rules of Court provides that “There shall be annexed to the original of every pleading certified copies of any relevant documents adduced in support of the contentions contained in the pleading”. The Gambia does not annex this document to its Reply, but merely gives a URL for it in a footnote. This does not amount to annexing that document to the pleading for purposes of this provision.

¹⁵⁶⁴ RG, para. 5.7. The Gambia says that the USHMM webpage indicates that “All Rohingya-language programming on Burma Broadcasting Service was cancelled and the Rohingya were no longer permitted to identify as such”. The facts are the following. A Bengali-language radio broadcast began during the time of the Japanese occupation during the Second World War, directed toward India as a foreign language broadcast, together with language broadcasts in the Hindustani and Tamil languages. At the time of Burma’s independence, Bengali Muslims in northern Arakan asked for the inclusion of northern Arakan into East Pakistan, or for the benefits of the Panglong Agreement, which provided for the autonomy of the Shan, Kachin and Chin ethnic groups in the frontier areas that they inhabited, to be extended also to Muslims in northern Arakan (see CMM, paras. 2.45 and 2.138). When their demands failed to be met, the Mujahid insurgency broke out (see CMM, paras. 2.47-2.50). In order to recognize the Mayu district as a minority area, the government established the Mayu Frontier Administration on 1 May 1960 (consisting of Maungdaw-Buthidaung subdivision and the western part of Rathedaung Township). The Mayu Frontier Areas were administered directly by the central government in Rangoon, rather than via the government of Arakan Division (see CMM, para. 2.51). Following the establishment of the Mayu Frontier Areas, the Mujahidin insurgents surrendered in 1961 (see CMM, paras. 2.50-2.51). Before the ceremony of returning into the legal fold, Mujahidin insurgents requested that the Government refer to them as “Rohingya.” In order to satisfy the demands of Mujahidin insurgents and enhance the government’s authority over the border areas, Brigadier General Aung Gyi agreed to their request and used the term “Rohingya” in his address at the ceremony on 4 July 1961 (see paragraph 13.46 below). Accordingly, the Bengali language programme was renamed the “Rohingya” language programme in 1961. The term “Rohingya” is a synonym for Bengali as stated in Brigadier General Aung Gyi’s address (see paragraph 13.46 below). Also, in this speech, he clearly stated that the Bengalis in Mayu District were merely a minority group, not an ethnic group in the Union (see paragraph 13.46 below). Therefore, the radio programmes for “ethnic groups” (*Tine Yin Thar*) and the radio programmes for “frontier areas” (*Nal Char Daetha Lumyosu*) were separately identified: see for instance “Burma Radio”, *Myanma Alinn*, 1 March 1962, p. 14, and “Burma Radio,” *Myanma Alinn*, 2 June 1962, p. 18, RM, Vol. V, Annex 189, referring on the one hand to “The News in the Mon Language”, “The News in the Kachin Language”, etc, but referring on the other hand to “Programme for Minority in Frontier Areas (Rohingya)”. After the Frontier Administration was dissolved in 1964 (see CMM, para. 2.51), the latter radio programme was terminated in October 1965, along with programmes in the Mon, Pa-O, Lahhu, and Hindustani languages. This usage of the term “Rohingya” did not imply recognition of the Rohingya as an ethnic group, as claimed in The Gambia’s Reply (see paragraph 13.46 below).

¹⁵⁶⁵ The USHMM in any event uses the expression “gradual erasure”, not the expression “systematic erasure” found in the text of The Gambia’s Reply.

- 10.13 Nor can evidential weight can be given to expressions of opinion by Professor Cheesman.¹⁵⁶⁶ Details of “Operation Dragon King” and of the concept of national races have already been given in the Counter-Memorial of Myanmar.¹⁵⁶⁷

C. The Citizenship Law, 1982

- 10.14 This Section of this Chapter responds to **paragraphs 5.10 to 5.15 (Chapter 5, Sub-section I.B) of the Reply** of The Gambia, dealing with The Gambia’s claim that the Citizenship Law enacted in Myanmar in 1982 “denationalized the Rohingya”.
- 10.15 This allegation is also dealt with in paragraphs 6.13 to 6.21 of the Memorial of The Gambia, and paragraphs 10.10 to 10.55 of the Counter-Memorial of Myanmar.
- 10.16 The Gambia complains that the 1982 Citizenship Law “upended” the existing citizenship regime.¹⁵⁶⁸ If The Gambia is thereby seeking to suggest that States are not entitled to legislate to make significant changes to their citizenship laws, then that suggestion must obviously be rejected. The Citizenship Law, 1982 (the “**1982 Law**”) has been dealt with in detail in the Counter-Memorial of Myanmar.¹⁵⁶⁹
- 10.17 The Counter-Memorial of Myanmar also deals with the 1982 speech of General Ne Win,¹⁵⁷⁰ which is again selectively quoted by The Gambia in its Reply.¹⁵⁷¹ In relation to those who do not belong to one of the ethnic national races of Myanmar, General Ne Win said in that speech that others “should not treat such persons arrogantly, saying they came from abroad or they are guests, but should realise that one day they will become one with us and all will be travelling in the same boat”.¹⁵⁷²
- 10.18 The Gambia has not sought to deny that the new 1982 Law applied not only to Bengalis but to all other minorities not included within the eight major ethnic national

¹⁵⁶⁶ See RG, para. 5.8.

¹⁵⁶⁷ As to “Operation Dragon King”, see CMM, paras. 2.59-2.65, and 10.56-10.73. As to the concept of national races, see CMM, paras. 1.38, 2.2, 2.5, 10.30, 10.40, 10.42, 10.79, and 11.30.

¹⁵⁶⁸ RG, para. 5.10.

¹⁵⁶⁹ CMM, paras. 10.10-10.55.

¹⁵⁷⁰ CMM, para. 10.43.

¹⁵⁷¹ RG, para. 5.10.

¹⁵⁷² CMM, para. 10.43.

racess, including communities of Chinese, Indians, Gurkhas (of Nepalese origin), and others,¹⁵⁷³ or that the British Embassy in Burma said at the time that the 1982 Law was adopted that it was possible to describe it as “a generous and far-sighted instrument” that was “almost amazingly restrained”.¹⁵⁷⁴

- 10.19 The Gambia has not sought to deny that section 6 of the 1982 Law provides that “A person who is already a citizen on the date this Law comes into force is a citizen”.¹⁵⁷⁵ Furthermore, The Gambia apparently now accepts that not all Bengalis had Burmese citizenship at the time that the 1982 Law came into force, and denies that it said otherwise in its Memorial.¹⁵⁷⁶ The Gambia therefore does not appear to contend that the 1982 Law revoked the citizenship of anyone who already had it. There is therefore no basis for The Gambia’s claim that the 1982 Law made Bengalis in northern Rakhine stateless.¹⁵⁷⁷ It is therefore impossible to understand why The Gambia persistently refers in its pleadings to “Denationalization of the Rohingya”.¹⁵⁷⁸
- 10.20 It appears now to be The Gambia’s claim that from the time of Burma’s independence until 1982, all Bengalis who were not Burmese citizens had the *right to apply* for Burmese citizenship “as members of an indigenous race”,¹⁵⁷⁹ and that the 1982 Law deprived them of this right.¹⁵⁸⁰

¹⁵⁷³ CMM, para. 10.42.

¹⁵⁷⁴ CMM, para. 10.44.

¹⁵⁷⁵ CMM, para. 10.25.

¹⁵⁷⁶ RG, para. 5.11 (stating merely that “the prior regime had enabled the Rohingya to enjoy *access to* citizenship” (emphasis added)) and footnote 318 (stating that “[t]he referenced paragraph 6.13 of The Gambia’s Memorial does not state [that all Bengali Muslims were Burmese citizens from the time of Burma’s independence]”). However, the contrary was previously stated in MG, para. 6.13 first and last sentences.

¹⁵⁷⁷ See RG, para. 5.14: “As The Gambia explained, and Myanmar does not refute, the result of the new citizenship regime was the creation of about one million stateless Rohingya”. Myanmar has certainly refuted the suggestion that all Bengalis in northern Rakhine State are stateless, or that any statelessness was the result of the 1982 Law. Any part of the Bengali population that is stateless would have already been stateless under the pre-1982 law, given that section 6 of the 1982 Law provides that “A person who is already a citizen on the date this Law comes into force is a citizen”: Citizenship Law, 1982, Section 6 first sentence, CMM, Vol. III, Annex 86.

¹⁵⁷⁸ MG, heading above para. 6.7, and paras. 6.11, 12.32 and 12.34.

¹⁵⁷⁹ See RG, para. 5.11, stating that the law prior to 1982 “had enabled the Rohingya to enjoy *access to* citizenship” (emphasis added).

¹⁵⁸⁰ *Ibid.*

10.21 In making this claim in its Reply, The Gambia again simply ignores much of what is stated in the Counter-Memorial on this subject, including the following facts which The Gambia has not sought to deny.

- (1) Under the Union Citizenship Act, 1948 and Union Citizenship (Election) Act, 1948, Bengalis did not have the right to apply for citizenship “as members of an indigenous race”. Even under the pre-1982 law, they were not included in the “indigenous races of Burma” who acquired citizenship automatically.¹⁵⁸¹ Exclusion of Bengalis from the eight major ethnic national races for purposes of the 1982 Law was therefore not a material change in the position that previously pertained under the pre-1982 law. It is therefore impossible to understand The Gambia’s reference to Myanmar “withdrawing recognition of the Rohingya as an indigenous ethnic group of Myanmar”.¹⁵⁸²
- (2) Under the pre-1982 law, the criteria that determined who was eligible to *elect* Burmese citizenship, or to *apply for naturalization*, were not based on race or ethnicity. The criteria that applied to Bengalis applied equally to all other minorities, including Chinese, Indians and Gurkhas. Indeed, if a national of any other State had applied for naturalisation as a Burmese citizen, the same criteria would have applied. To *elect* Burmese citizenship, a person had to have been born anywhere “within His Britannic Majesty’s dominions”, and to have resided in Burma for a period of not less than eight years in the ten years immediately preceding Burma’s independence or immediately preceding 1 January 1942, and, subject to possible exceptions, had to make the election by April 1954.¹⁵⁸³ To acquire Burmese citizenship by

¹⁵⁸¹ CMM, paras. 10.13-10.17.

¹⁵⁸² See RG, para. 5.32 final sentence. The Gambia appears also to assume that if the “Rohingya” were recognised as an ethnic group for purposes of Sections 3 and 5 of the Citizenship Law, 1982, then all “Rohingya” would be citizens of Myanmar by birth, pursuant to Section 5 of the 1982 Law. That is not correct. Section 3 states that “Nationals such as the Kachin, Kayah, Karen, Chin, Bamar, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period prior to ... 1823 are Myanmar citizens”. Section 5 states that “Every national and every person born of parents, both of whom are nationals are citizens by birth”. However, that does not mean that every person who is, say, a Mon, is a citizen of Myanmar. The Mon ethnic group exists in Thailand as well as in Myanmar. If a Mon couple from Thailand, who are not citizens of Myanmar, came to Myanmar and had a child in Myanmar, the child would not be a citizen of Myanmar by birth. Although both parents are Mon, they are not part of the Mon ethnic group settled in the territory of Myanmar prior to 1823.

¹⁵⁸³ CMM, para. 10.19(2).

naturalisation, a person had to have five years' continuous lawful residence in Burma or three years' continuous service in the armed forces of Burma.¹⁵⁸⁴ Some Bengalis living in Burma at the time of its independence would therefore not have had the right to elect Burmese citizenship, and at the time that the 1982 Law came into force, some would not have had the right to apply for naturalization (including those who migrated illegally after Burma's independence or were descended from such persons).¹⁵⁸⁵

- (3) Thus, some Bengalis who are ineligible to apply for citizenship under the 1982 Law would have been ineligible to apply under the pre-1982 law. Conversely, some who were eligible to apply under the pre-1982 law will be eligible to apply for a form of citizenship under the new 1982 Law.
- (4) By the time that the 1982 Law came into force, a period of some 34 years since independence had elapsed, during which time those who were eligible could have elected or applied for Burmese citizenship under the old law, if they were not already citizens.¹⁵⁸⁶ If they had done so, their children would have been born Burmese citizens, and those living at the time that the 1982 Law came into force would have become Citizens under the 1982 Law.
- (5) Bengalis living in northern Rakhine State at the time of Burma's independence who did not acquire Burmese citizenship might well have retained or obtained the citizenship of some other State.¹⁵⁸⁷ If they did, their descendants who remained in Burma thereafter may well have acquired that citizenship also. This is a matter that The Gambia conspicuously fails to address. The Gambia certainly presents no evidence to show that this was not the case.

The following is added to what is stated in the Counter-Memorial of Myanmar in this respect. In the period up until the independence of Burma in January 1948 and immediately thereafter, anyone "born within His

¹⁵⁸⁴ CMM, para. 10.20.

¹⁵⁸⁵ CMM, para. 10.20.

¹⁵⁸⁶ CMM, para. 10.48.

¹⁵⁸⁷ CMM, para. 10.47.

Majesty's dominions", that is to say, anyone born in any of the territories within the British Empire (including British India, as well as Great Britain itself) had the nationality status of "British subject".¹⁵⁸⁸ Thus, immediately prior to the independence of Burma, all Bengalis in northern Arakan, whether they were born in the present day territory of Myanmar, or the present-day territory of Bangladesh, India, Pakistan or any other place the territory of which was at the time of their birth part of the British Empire, were British subjects. Prior to the independence of Burma, the Parliament of the United Kingdom enacted the Burma Independence Act 1947. The effect of this Act was that a person who would otherwise cease to be a British subject upon the independence of Burma would remain a British subject if that person, or that person's father or paternal grandfather, was born outside Burma in a place "within His Majesty's dominions".¹⁵⁸⁹ Thus, a Bengali in Burma who was born, or whose father or paternal grandfather was born, in the present-day territory of Bangladesh, India, Pakistan or any other place the territory of which was at the time of their birth "within His Majesty's dominions", remained a British subject after the independence of Burma.¹⁵⁹⁰ Those who did not remain British subjects in this way would generally have become citizens of Burma.¹⁵⁹¹ The children born in Burma after independence of someone who had remained a British subject in this way were British subjects by descent.¹⁵⁹² It appears that it was expected, by the British Government at

¹⁵⁸⁸ L. Fransman and A. Berry, *Fransman's British Nationality Law* (4th edn. 2024) ("**Fransman**"), paras. 5.2, 5.3 and 6.2.1, RM, Vol. II, Annex 50. This was subject to certain exceptions, such as in the case of children of foreign diplomats and children of foreign, invading, armed forces.

¹⁵⁸⁹ United Kingdom, Burma Independence Act 1947, section 2(1) first sentence, and First Schedule, paragraphs 1 and 2, RM, Vol. V, Annex 178. This is a simplification of these provisions. Reference is made to the terms of these provisions themselves for their precise effect.

¹⁵⁹⁰ Fransman, *op. cit.*, para. 4.7, RM, Vol. II, Annex 50.

¹⁵⁹¹ A Bengali in Burma who was born in Burma, and whose father and paternal grandfather were both born in Burma, and who therefore did not remain a British subject, would generally have either satisfied the requirements for an automatic grant of Burmese citizenship under section 4(2) of the Union Citizenship Act, 1948, or the requirements for election of Burmese citizenship, or the requirements for naturalization as a Burmese citizen: see CMM, paras. 10.13-10.20.

¹⁵⁹² By virtue of the British Nationality and Status of Aliens Act 1922, section 1, amending the British Nationality and Status of Aliens Act 1914, section 1, RM, Vol. V, Annex 177, such that the latter provided that "The following persons shall be deemed to be natural-born British subjects, namely :— ... (b) Any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject, and who fulfils any of the following conditions, that is to say, if ... (i) his father was born within His Majesty's allegiance".

least, that Bengalis in Burma who remained British subjects after Burma's independence would ultimately become citizens of Pakistan once Pakistan enacted its own citizenship legislation, which Pakistan ultimately did in 1953.¹⁵⁹³ If such persons who remained British subjects or their descendants do not have British nationality today, that is a consequence of the nationality law of the United Kingdom, and not of the law of Myanmar. Similarly, if it ultimately transpired that any such person did acquire citizenship of Pakistan as apparently envisaged by the British Government at the time, then if they or their descendants do not have the nationality of Pakistan or Bangladesh today, that is a consequence of the nationality laws of Pakistan and Bangladesh, and not of the law of Myanmar. In any event, it appears that some Bengalis in northern Rakhine State even today may have (or be entitled to acquire) a form of British nationality.¹⁵⁹⁴

- (6) Myanmar is not the only country where citizenship laws make distinctions according to ethnicity,¹⁵⁹⁵ and would not be the only State in the world where

¹⁵⁹³ See CMM, para. 10.47 footnote 1732. The present-day territory of Bangladesh was part of Pakistan from the time of Pakistan's independence in 1947 until the independence of Bangladesh in 1971.

¹⁵⁹⁴ Fransman, *op. cit.*, para. 4.7, "Example 1", RM, Vol. II, Annex 50, giving the example of a person born in Burma after independence, whose father was born in Burma before independence, and whose paternal grandfather was born in Calcutta prior to Burma's independence, at a time when Calcutta was part of Bengal Province of British India. In the example given, the person would today be a British Overseas Citizen (one of the forms of British nationality that does not carry an entitlement to live and work in the United Kingdom (see CMM, para. 10.51(1))), and may be entitled to be registered as a British Citizen (the form of British nationality that *does* carry the entitlement to live and work in the United Kingdom). The abbreviations used in this example in this paragraph of Fransman refer to the British Nationality and Status of Aliens Act ("BNSAA"), the British Nationality Act 1948 ("BNA 1948"), the British Nationality Act 1981 ("BNA 1981"), the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"), and to the status of Citizen of the United Kingdom and Colonies ("CUKC"), and British Overseas Citizen ("BOC").

¹⁵⁹⁵ CMM, para. 10.52-10.53, giving the examples of Liberia and Sierra Leone. As to Sierra Leone, under its Citizenship Act, only a person whose father, mother or any grandparent was born in Sierra Leone and is or was a person of Negro African descent can acquire Sierra Leonean citizenship by birth in Sierra Leone (see Sierra Leone, The Citizenship Act of 1973 (as amended by The Sierra Leone Citizenship (Amendment) Act, 2006), RM, Vol. V, Annex 176, sections 1(1) (definition of "person of negro African descent"), 2 and 3. To become a citizen by naturalisation, 15 years' residence in Sierra Leone is required for a person "neither of whose parents is a person of negro African descent", or only 8 years' residence in the case of a person "either of whose parents is of negro African descent" (*ibid.*, section 8(2) and (3)). The Government of Sierra Leone's own guidance states that naturalisation is "a long drawn out process which requires the approval of State House through the President", and that "there have been even been cases where the government has suspended the process for naturalisation due to concerns around those applying to become Sierra Leoneans". See Sierra Leone, Immigration Department, Policy Guidance on Sierra Leone Citizenship Laws (accessed 15 November 2024), paras. 3.1, 5.1, 5.2(ii), 8.1, RM, Vol. V, Annex 186.

members of certain minorities, which have their origins in colonial-era migrations, became stateless after the end of colonialism.¹⁵⁹⁶

- 10.22 There is therefore no basis for The Gambia’s statement that “Myanmar’s subsequent stripping of the Rohingya’s right to citizenship is also consistent with recognized patterns of genocide” and that “Denationalization is central to many genocidal processes”.¹⁵⁹⁷ The Gambia has not established that Myanmar has taken citizenship away from anyone who previously had it.
- 10.23 The Gambia further claims that “most of the Rohingya [are unable] to acquire citizenship in practice”, and that a form of citizenship is “out of reach for the vast majority of Rohingya”.¹⁵⁹⁸ The Gambia contends that this is because an applicant for Naturalized Citizenship must provide documentary proof that they satisfy the relevant criteria,¹⁵⁹⁹ which may require proving continuous descent from persons born in Myanmar since before independence in 1948.¹⁶⁰⁰ The Gambia suggests that because of the difficulty of doing this, only about 1% of Bengalis in northern Rakhine State have been able to obtain even Naturalised Citizenship.¹⁶⁰¹ As claimed evidence of this, The Gambia relies on the report of the Advisory Commission on Rakhine State,¹⁶⁰² but that report does not state *the reasons why* by 2017 only some 4,000 Bengalis out of a population of some one million had received a form of citizenship. It is pure speculation on the part of The Gambia to suggest that there are many other Bengalis who are eligible to apply for citizenship and would do so if they could, but are unable to access the necessary documents. Many may not have applied because of political opposition to the 1982 Law.¹⁶⁰³ The Gambia inexplicably claims that it is irrelevant if some Bengalis have refused to engage with the citizenship verification

¹⁵⁹⁶ CMM, para. 10.54.

¹⁵⁹⁷ RG, para. 5.33.

¹⁵⁹⁸ See RG, paras. 5.13-5.14.

¹⁵⁹⁹ See MG, para. 6.17, referred to in RG, para. 5.14 footnote 325 and accompanying text.

¹⁶⁰⁰ *Ibid.*, and CMM, para. 10.34. However, there are also other ways of qualifying. For instance, it may suffice to prove that one parent is a Naturalised Citizen: see CMM, para. 10.35.

¹⁶⁰¹ MG, para. 6.17, referred to in RG, para. 5.14 footnote 325.

¹⁶⁰² MG, para. 6.17 footnote 372 and accompanying text, referring to Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State*, 24 August 2017, pp. 26, 29, MG, Vol. IV, Annex 103.

¹⁶⁰³ See CMM, paras. 10.86-10.88.

process as a result of threats from ARSA or community pressure,¹⁶⁰⁴ when The Gambia itself seeks to make a point of how few Bengalis have obtained citizenship.

- 10.24 Any person who has made an application for citizenship with the required evidence has been granted Citizenship, Associate Citizenship or Naturalised Citizenship. Children of Associate Citizens and Naturalised Citizens between the ages 10 and 18 years are issued with relevant citizenship cards.
- 10.25 The Gambia accepts that the 1982 Law applies equally to other minorities that do not belong to one of the major ethnic national races, such as the Chinese, Indians and Gurkas,¹⁶⁰⁵ but says merely that Myanmar does “not offer any evidence that other minorities were subjected to the same ... [treatment] as the Rohingya”.¹⁶⁰⁶ The Gambia overlooks the fact that it bears the burden of proving that other minorities were not affected by the 1982 Law in the same way as Bengalis, if that is what The Gambia asserts.
- 10.26 The Gambia therefore gives no reason for its claim that the 1982 Law led to “denationalisation” of Bengalis. It is noted that the Reply no longer uses the word “denaturalised”, which was used in the Memorial of The Gambia.¹⁶⁰⁷
- 10.27 Ultimately, even The Gambia accepts that the alleged “denationalisation” (if it could be proved) is not of itself evidence of a genocidal intent.¹⁶⁰⁸ Rather, The Gambia claims only that the totality of all of the alleged discriminatory measures merely “establish[] the presence of *one* of the factors that international tribunals have found to be *indicative* of genocidal intent”.¹⁶⁰⁹ However, for the reasons given above, there has been no “denationalization”, and The Gambia has therefore not established the relevance of the 1982 Law to any claimed genocidal risk factor.
- 10.28 In any event, even if a genocidal risk factor could be established (*quod non*), this of itself comes nowhere near proving the actual existence of a genocidal intent. As was

¹⁶⁰⁴ See RG, para. 5.29 footnote 360.

¹⁶⁰⁵ RG, para. 5.15.

¹⁶⁰⁶ RG, para. 5.15.

¹⁶⁰⁷ MG, paras. 6.18, 7.1, 12.31 and 12.46.

¹⁶⁰⁸ RG, para. 5.31.

¹⁶⁰⁹ *Ibid.* (emphasis added).

noted in the Counter-Memorial of Myanmar, one or more *indicators* of genocidal *risk factors* will in fact exist in virtually every country in the world.¹⁶¹⁰

D. Events of 1991-1992

- 10.29 This Section of this Chapter responds to **paragraphs 5.16, and 5.20 to 5.24 (Chapter 5, Sub-section I.C) of the Reply** of The Gambia, which relate to the events of 1991-1992.
- 10.30 The events of 1991-1992 are also dealt with in paragraphs 6.22 to 6.24 of the Memorial of The Gambia, and paragraphs 10.56 to 10.73 of the Counter-Memorial of Myanmar.
- 10.31 The Gambia claims that “Myanmar repeatedly carried out violent military operations against [the Rohingya] to reduce the size of the group”, and militarily effected “the forceful removal of the Rohingya through expulsion or death”.¹⁶¹¹ Myanmar denies this.
- 10.32 Although The Gambia alleges that such military operations were conducted “repeatedly”, in fact only two such operations are alleged by The Gambia. The first is said to consist of the events of 1991-1992.¹⁶¹² The second is said to consist of the counter-terrorism operations of 2016 and 2017 that are the subject-matter of this case.
- 10.33 As to the events of 1991-1992, The Gambia presents no evidence that these were armed military operations directed against the civilian population in northern Rakhine State as such, which is what is suggested by The Gambia’s use of the words “violent

¹⁶¹⁰ See CMM, para. 10.7.

¹⁶¹¹ See RG, para. 5.16.

¹⁶¹² See RG, paras. 5.20-5.24.

military operations against [the Rohingya]”.¹⁶¹³ The evidence on which The Gambia relies in support of this claim is incapable of proving this claim.

- (1) The Gambia relies on a 1993 report of Mr. Angelo Vidal d’Almeida Ribeiro, a UN Special Rapporteur,¹⁶¹⁴ which was already mentioned in the Memorial of The Gambia¹⁶¹⁵ and has already been addressed in the Counter-Memorial of Myanmar.¹⁶¹⁶ This report dealt with alleged incidents in 24 different countries. Only 15 of its 121 pages concerned Myanmar. Of those 15 pages, 14 set out details of allegations received by the Special Rapporteur,¹⁶¹⁷ and the response of the Government of Myanmar.¹⁶¹⁸ The Special Rapporteur’s own conclusion is contained in a *single 12-line paragraph*,¹⁶¹⁹ which states that the information received by the Special Rapporteur “merits an investigation”.¹⁶²⁰

The Counter-Memorial of Myanmar points out that the Memorial of The Gambia quotes passages from the section of this document that sets out the allegations received by the Special Rapporteur, and that the Memorial of The Gambia conveys the incorrect impression that these quoted passages are findings of fact made by the Special Rapporteur, which they are not. The Reply of The Gambia now again quotes passages from this document that set out

¹⁶¹³ Contrary to what The Gambia contends, there was no operation in Rakhine State called “Clean and Beautiful Nation” (“Pyi Thaya”) in or after 1991: see CMM, paras. 2.68-2.69. Between 1 January 1987 and 30 April 1992, localized operations were carried out in the areas of northern and western Paletwa (in Chin State), and Mrauk-U, Minbya, Myebon, Sittwe, Maungdaw, Buthidaung, Kyaukpyu and Ponnagyun (in Rakhine State), exclusively under the name “Min Aung Operation”. This operation had the purpose of maintaining territorial stability and security, by countering insurgent groups including the Communist Party of Burma (Rakhine State), Bengali insurgent groups who had fled to Bangladesh, the Arakan Independence Army, the Arakan National Liberation Party, and the Arakan Liberation Party. There were no military operations carried out specifically concerning Bengalis during this period.

¹⁶¹⁴ RG, para. 5.21, referring to UN Commission on Human Rights, Report submitted by Mr. Angelo Vidal d’Almeida Ribeiro, Special Rapporteur appointed in accordance with Commission on Human Rights resolution 1986/20 of 10 March 1986, UN Doc. E/CN.4/1993/62, 6 January 1993 (the “**1993 Special Rapporteur Report**”), MG, Vol. II, Annex 6.

¹⁶¹⁵ MG, para. 6.24.

¹⁶¹⁶ CMM, paras. 10.64 and 10.69.

¹⁶¹⁷ 1993 Special Rapporteur Report, pp. 64-75, para. 45, extract at MG, Vol. II, Annex 6.

¹⁶¹⁸ *Ibid.*, pp. 75-77, para. 46, extract at MG, Vol. II, Annex 6.

¹⁶¹⁹ *Ibid.*, pp. 77-78, para. 47, extract at RM, Vol. IV, Annex 112.

¹⁶²⁰ *Ibid.*

allegations received by the Special Rapporteur, which are *not* findings of the Special Rapporteur.¹⁶²¹

The pages of this report setting out the allegations received are obviously hearsay descriptions of what the Special Rapporteur had been told by others. These are untested and unproven allegations, and they are not evidence of facts to which any evidential weight could be given in judicial proceedings. The conclusion of the Special Rapporteur is merely an expression of opinion, not evidence of a fact, but in any event, the conclusion is only that an investigation should be undertaken. Thus, even the opinion of the Special Rapporteur was not to the effect that the alleged acts had occurred, but only that they should be investigated.

Furthermore, the allegations described in this report did not suggest that the military had mounted an armed military operation directed against the civilian population in northern Rakhine State. The allegations were of human rights abuses. There is also no suggestion that the purpose of the alleged acts was to forcibly expel the Bengali population from Myanmar.

There is certainly no indication in this report that the purpose of the alleged acts was “to reduce the size of the group”, or that the alleged acts were committed with genocidal intent.

- (2) The Gambia now also relies on a 1996 report of the United Nations Secretary-General.¹⁶²² This 20 page report similarly dealt with a variety of different matters, and only four paragraphs (less than one page) are devoted to Myanmar.¹⁶²³ These four paragraphs are in a section of the report entitled “Special Rapporteurs on the situation of human rights”, which has sub-sections dealing with seven different States in which there are Special Rapporteurs on the situation of human rights. It is evident that these paragraphs simply

¹⁶²¹ RG, para. 5.21.

¹⁶²² RG, para. 5.22, referring to UN Secretary-General, Report on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/1996/88, 26 January 1996, para. 45 (not annexed to the Reply of The Gambia). This document cannot be relied on by The Gambia, due to non-compliance with Article 50, paragraph 1, of the Rules of Court.

¹⁶²³ *Ibid.*, paras. 45-48.

summarize information from the reports of the Special Rapporteurs. This document is thus a mere secondary source of the contents of the reports of the Special Rapporteur, which The Gambia has not chosen to put in evidence.¹⁶²⁴ No evidential weight could be given to this document at all.

It is also noted that this document contains no suggestion of any armed military operation directed against the civilian population in northern Rakhine State. Instead it refers to human rights violations. Moreover, it speaks of human rights violations being “documented”. The fact that an alleged human rights violation is “documented” does not mean that it has been proved.

There is also no suggestion in this document that the purpose of the alleged acts was to forcibly expel the Bengali population from Myanmar. It says that the acts of the Army “resulted in over 250,000 Muslims fleeing to neighbouring Bangladesh”. However, it does not say that the purpose of the alleged acts was to bring about that result.

There is certainly no indication in this report that the purpose of the alleged acts was “to reduce the size of the group”, or that the alleged acts were committed with genocidal intent.

- 10.34 The Gambia thus presents no evidence to which evidential weight could be attached to prove that in 1991-1992 there were “violent operations against [the Rohingya]”, or that there was any intent “to reduce the size of the group”, or that there was any genocidal intent.

E. National Verification Cards (NVCs)

- 10.35 This Section of this Chapter responds to **paragraphs 5.16 to 5.19, and 5.25 (Chapter 5, Sub-section I.C) of the Reply** of The Gambia, relating to the implementation of the Citizenship Law, 1982, and in particular, to National Verification Cards (NVCs).

¹⁶²⁴ See CMM, paras. 1.50(4)(b), 5.49, 7.135 and 7.182, and this Rejoinder, paragraph 5.66 above, and para. 16.23(1) below.

10.36 These matters are also dealt with in paragraphs 6.25 to 6.35 of the Memorial of The Gambia, and paragraphs 10.74 to 10.108 of the Counter-Memorial of Myanmar.

10.37 The relevant facts are set out in the Counter-Memorial of Myanmar.¹⁶²⁵ The Gambia argues that some Bengalis who met the conditions for citizenship under the 1982 Law were nonetheless not issued with citizenship cards. The only evidence for this provided by The Gambia is the 2018 FFM Detailed Findings, an academic article by Professor Cheesman, and an oral update issued by the UN High Commissioner for Human Rights.¹⁶²⁶ This evidence does not establish what The Gambia says it does.

(1) The 2018 FFM Detailed Findings indicates that the source of the FFM’s information is the article by Professor Cheesman.¹⁶²⁷ The 2018 FFM Detailed Findings therefore has no evidential weight in relation to this matter. It is simply a secondary source, describing what is contained in another item of evidence that is also relied on by The Gambia. It can add no weight to the evidence it describes.

(2) The article by Professor Cheesman contains a bare statement that “registration officers apparently acting on orders from superiors refused to re-register people who were entitled to pink cards [Citizenship Scrutiny Cards]”.¹⁶²⁸ A reading of the paragraph of the article in which that sentence appears suggests that Professor Cheesman assumed that those who held a National Registration Card were entitled to be “re-registered” as citizens under the 1982 Law. That assumption is incorrect, as explained in the Counter-Memorial of Myanmar.¹⁶²⁹

¹⁶²⁵ See CMM, paras. 10.75-10.98.

¹⁶²⁶ RG, paras. 5.18-5.19.

¹⁶²⁷ 2018 FFM Detailed Findings, para. 479 footnotes 1062 and 1064 and accompanying text, MG, Vol. II, Annex 40.

¹⁶²⁸ N. Cheesman, “How in Myanmar ‘National Races’ Came to Surpass Citizenship and Exclude Rohingya”, *Journal of Contemporary Asia*, vol. 47 (2017), pp. 461-483, at p. 472, RG, Vol. III, Annex 32.

¹⁶²⁹ CMM, paras. 10.76-10.77.

- (3) The oral update of the UN Special Rapporteur also states merely that “the Rohingya handed over the National Registration Cards they had held since 1951 in exchange for Citizenship Scrutiny Cards that were never issued to them”.¹⁶³⁰

10.38 The evidence relied on by The Gambia thus establishes no more than that not all holders of National Registration Cards were provided with citizenship cards in exchange for their National Registration Card. This is not disputed. The fact that a person held a National Registration Card did not of itself entitle the person to citizenship, either under the pre-1982 law, or under the 1982 Law. This was already explained in the Counter-Memorial of Myanmar.¹⁶³¹ The National Registration Card was issued from 1952 not only to indigenous ethnic groups residing in Myanmar but also to people of other backgrounds. Individuals who obtained citizenship under the Union Citizenship (Election) Act, 1948 and Union Citizenship Act, 1948 were issued with Citizenship Certificates and Citizenship Identification Certificates. Those holding such certificates were recognized as Citizens under the Myanmar Citizenship Law, 1982. Those holding such certificates were able to apply for and receive a Citizenship Scrutiny Card directly at the Township offices without needing to submit an application to the Central Body. Those who had not applied for or been granted citizenship under the Union Citizenship (Election) Act, 1948 or Union Citizenship Act, 1948 could apply to the Central Body under Section 42 of the Citizenship Law, 1982. This provision states that “Persons who have entered and resided in the State prior to 4th January, 1948, and their children born within the State may, if they have not yet applied under the Union Citizenship Act, 1948, apply for naturalized citizenship to the Central Body, furnishing conclusive evidence”.¹⁶³² Those making such an application had to meet the relevant requirements and provide the required evidence.

¹⁶³⁰ UN Human Rights Council, Oral Update of the High Commissioner for Human Rights on Situation of Human Rights of Rohingya People, UN Doc. A/HRC/38/CRP.2, 3 July 2018, para. 34, MG, Vol. II, Annex 35.

¹⁶³¹ The Counter-Memorial of Myanmar also explained that a Temporary Identity Card (TIC or “white card”) could be issued to those who had previously held an NRC or were undocumented, but that all TICs expired on 31 March 2015 (see CMM, para. 10.82). Since 1 June 2015, persons who have surrendered their TICs have been issued an Identity Card for Nationality Verification (NVC), and will be required to apply for citizenship in accordance with the citizenship verification process. They will then be granted citizenship or associate or naturalized citizenship in accordance with the Citizenship Law, 1982.

¹⁶³² CMM, Vol. III, Annex 86.

- 10.39 The Gambia presents no evidence that anyone who could prove their entitlement to citizenship under the 1982 Law was found not to be a citizen.
- 10.40 As regards the new citizenship verification process, involving the issuing of National Verification Cards (NVCs), The Gambia does not dispute much of what is stated in the Counter-Memorial of Myanmar. The NVC process started at the same time for the whole of Myanmar, and applies to the whole of Myanmar, not just Rakhine State. Those applying for citizenship have to submit all the required documents and evidence. Members of national ethnic groups are also required to submit information about their parents and grandparents, as well as supporting documents and evidence, in order to get Citizenship Scrutiny Cards.
- 10.41 The Gambia continues to maintain that a Bengali applying for an NVC is required to “renounce” or “deny” their identity as “Rohingya”.¹⁶³³ However, apart from the fact that a majority of Bengalis apparently do not in fact self-identify as “Rohingya”, or see it as a political identity rather than an ethnic identity,¹⁶³⁴ since 2016, no ethnicity, nationality or religion is stated on the NVC when it is issued.¹⁶³⁵ Myanmar accepts that a Bengali must indicate their ethnicity as “Bengali” on the application form for an NVC. That was not a cause of concern for former United Nations Secretary-General Kofi Annan, or for the United Nations Special Envoy on Myanmar, Christine Schraner Burgener.¹⁶³⁶ That is hardly something that could be considered indicative of a genocidal intent.
- 10.42 The Gambia quotes the FFM, which stated that “A campaign to compel acceptance of the card was conducted”.¹⁶³⁷ That is denied. There is no law or directive forcing acceptance of an NVC. All actions are carried out strictly in accordance with legal procedures. The issuance of the relevant documents ensures that individuals are residing legally within Myanmar, as required by law, and as the first stage of the citizenship verification process, individuals undergoing citizenship verification must apply for and hold an NVC. In the lower rural townships, the purpose of educating the

¹⁶³³ RG, paras. 5.26 and 5.28.

¹⁶³⁴ CMM, para. 2.155-2.161. See also this Rejoinder, paragraphs 2.16-2.18 above.

¹⁶³⁵ CMM, paras. 10.91-10.93.

¹⁶³⁶ CMM, paras. 10.91-10.93.

¹⁶³⁷ RG, para. 5.26, quoting 2018 FFM Detailed Findings, para. 484, MG, Vol. II, Annex 40.

community is to gather evidence for citizenship verification. The Gambia says that the NVC process in Rakhine State was “infused with violence”¹⁶³⁸ because the counter-terrorism operations of 2016 and 2017 were not in fact aimed at crushing ARSA, but were “were a response to Rohingya villagers collectively refusing to accept NVCs”.¹⁶³⁹ That claim is obviously denied, and the evidence is clearly incapable of supporting it.

- (1) The only evidence cited by The Gambia in support of this claim consists of the 2019 FFM Detailed Findings, two reports by Fortify Rights, and a media article.¹⁶⁴⁰ None of these documents can be given evidential weight, for the reasons given in Chapters 6 and 7 of the Counter-Memorial of Myanmar, and in Chapters 6 and 7 above of this Rejoinder. Furthermore, and in any event, the two Fortify Rights reports appear to be based on the same information, and are based in part on 2019 FFM Detailed Findings. Furthermore, the media article is written by John Quinley III, “a Human Rights Specialist at Fortify Rights”, and is thus apparently based on the same information as the two Fortify Rights reports. The information in the 2019 FFM Detailed Findings is attributed by the FFM to persons interviewed by the FFM who are not identified and who are given pseudonyms. It is not known who they are, and it cannot be excluded that some or all of them may have been the same persons who gave the information upon which the Fortify Rights reports were based. Indeed, it cannot be excluded that some or all of them may have been personnel from Fortify Rights. The information in all of these documents therefore does not emanate from independent sources, and may in fact all emanate from the same source.
- (2) All that these documents ultimately say is this. There have been witnesses from about three villages who say that shortly before the counter-terrorism operations of 2016 and 2017, the military threatened the village with violence if the villagers did not accept NVC.¹⁶⁴¹ Myanmar denies this. The FFM report and the

¹⁶³⁸ RG, para. 5.27.

¹⁶³⁹ *Ibid.*, quoting 2019 FFM Detailed Findings, para. 90, RG, Vol. II, Annex 3.

¹⁶⁴⁰ RG, para. 5.27.

¹⁶⁴¹ The 2019 FFM Detailed Findings, paras. 91-92, MG, Vol. III, Annex 49; RG, Vol. II, Annex 3, says that this occurred in Chut Pyin and Min Gyi. Fortify Rights, *Tools of Genocide*, p. 62, MG, Vol. V, Annex 126, says that this also occurred in Doe Tan. This Fortify Rights report also quotes witnesses from two other

Fortify Rights reports are hearsay accounts of what anonymous persons are said to have said to those organisations in relation to what occurred in these three villages. This can hardly be sufficient to establish that the purpose of the counter-terrorism operations of 2016 and 2017 was to be “a response to Rohingya villagers collectively refusing to accept NVCs”. In the light of all of the evidence presented in Chapters 3, 8 and 9 of the Counter-Memorial of Myanmar, and in Chapters 3, 8 and 9 above of this Rejoinder, it is quite clear that the counter-terrorism operations were a response to ARSA attacks. The evidence of this is overwhelming. The suggestion that the military would conduct attacks directed against civilians in villages merely because villagers would not accept NVCs is not plausible. Furthermore, it is known that witnesses have been afraid to speak of the role of ARSA in the events of 2016-2017.¹⁶⁴² It is quite plausible that a claimed witness, either out of fear of ARSA, or loyalty to ARSA, might seek to advance a false alternative explanation for the counter-terrorism operations.

- 10.43 The Gambia refers to the “Pan Khin Project”.¹⁶⁴³ Under Pan Khin Project Stages 1, 2, and 3, all Myanmar residents were issued with household lists as well as relevant registration certificates. Those who meet the requirements for citizenship under the Citizenship Law, 1982 have been verified and issued Citizenship Scrutiny Cards, or Associate Citizenship Scrutiny Cards, or Naturalized Citizenship Scrutiny Cards. Nobody was compelled to apply for citizenship.
- 10.44 The Gambia’s claim that NVCs “are an administrative instrument serving to certify Rohingya’s lack of right to citizenship and identity”¹⁶⁴⁴ simply ignores what is stated in paragraphs 10.102 to 10.104 of the Counter-Memorial of Myanmar. The Gambia also relies on opinions expressed by a UN Special Rapporteur,¹⁶⁴⁵ but such an expression of opinion is not evidence of facts. Myanmar also denies The Gambia’s

locations where the military is said to have encouraged the acceptance of NVCs, but there is no suggestion that the military issued any threats. For instance, a person from San Go Daing is said to have said that the military “kept us in the town hall until 8 p.m., but soon they realized we were not going to accept the cards, and then they set us free” (*ibid.*).

¹⁶⁴² See especially CMM, paras. 3.108-3.145, and this Rejoinder, Section D of Chapter 3.

¹⁶⁴³ RG, para. 5.29.

¹⁶⁴⁴ RG, para. 5.29 footnote 360.

¹⁶⁴⁵ RG, para. 5.30.

allegation that Myanmar has “implemented a State policy ‘of encouraging Buddhists born and residing in Bangladesh to immigrate to Myanmar and facilitated their path to citizenship’”.¹⁶⁴⁶

F. Alleged restrictions on procreation

1. General

10.45 This Section of this Chapter of this Rejoinder responds to **paragraphs 5.34 to 5.52 (Chapter 5, Section II) of the Reply** of The Gambia.

10.46 Paragraphs 6.36 to 6.64 of the Memorial of The Gambia set out its initial allegations that in the years prior to the counter-terrorism operations of 2016 and 2017, Myanmar adopted policies and practices “to confront and reverse the growth of the Rohingya population, by reducing the capacity of the Rohingya to procreate”,¹⁶⁴⁷ through “marriage restrictions, obligatory birth control, the withholding of birth certificates and the refusal to register births”.¹⁶⁴⁸

10.47 The Reply of The Gambia says that Myanmar does not contest that “Myanmar repeatedly characterized the growth rate of the Rohingya as an existential threat to the survival of the State’s favoured national races”.¹⁶⁴⁹ That is incorrect. Myanmar certainly denies this accusation.

10.48 The Reply of The Gambia also says that Myanmar does not contest that “the State denied the existence of Rohingya children by refusing to certify their births”.¹⁶⁵⁰ Myanmar also certainly denies this accusation. The position of Myanmar with respect to birth registrations is set out in paragraphs 10.159 to 10.175 of its Counter-Memorial, and is dealt with in paragraphs 10.78 to 10.84 below.

¹⁶⁴⁶ RG, para. 5.30.

¹⁶⁴⁷ MG, para. 6.38.

¹⁶⁴⁸ MG, para. 6.38.

¹⁶⁴⁹ RG, para. 5.34.

¹⁶⁵⁰ RG, para. 5.34.

- 10.49 The Gambia furthermore claims that “Myanmar admits” that it adopted measures “with the intended effect of slowing the rate of growth” in specific townships where “the vast majority of its residents were Muslim”.¹⁶⁵¹ That statement is overly broad. Myanmar accepts that the stated purpose of Regional Order 1/2005,¹⁶⁵² a temporary regional order that was in force from 2005 to 2018, was “to slow the rate of population increase in Maungdaw Township, which was considered too high at the time”.¹⁶⁵³ Myanmar does not accept that this was the purpose of any measures other than Regional Order 1/2005.¹⁶⁵⁴ The concerns expressed in Regional Order 1/2005¹⁶⁵⁵ were that the rate of population increase in Maungdaw Township combined with the inability to expand the rate of crop cultivation would lead to food shortages, that children were not being adequately cared for which could potentially lead them to turn to crime, and that the procedures for marriages were not being correctly followed leading to unofficial marriages and divorces that were causing problems, polygamy and illegal immigration.¹⁶⁵⁶ The covering letter to that Regional Order stated that “This temporary regional order is not for Muslims only. People from other religions will be allowed to marry only after being registered at the office of the chief of the region and the office of the chief of station, and only after that will a household registration will be issued”.¹⁶⁵⁷
- 10.50 As to Regional Order 1/2005, The Gambia has not denied that the rate of population growth in Maungdaw District was the highest of all districts of Rakhine State.¹⁶⁵⁸ The Gambia does not argue that the high rate of population growth was incapable of justifying such a measure to reduce the rate of increase in the population. Furthermore, as the Counter-Memorial of Myanmar points out, the evidence relied on by The Gambia does not establish that the measures of which it complains ever led to a

¹⁶⁵¹ RG, para. 5.35.

¹⁶⁵² Regional Order 1/2005 issued by the Maungdaw Township Peace and Development Council, MG, Vol. VI, Annex 177. This Regional Order was in force from 2005 to 2018.

¹⁶⁵³ CMM, para. 10.121.

¹⁶⁵⁴ For instance, this was not the purpose of the four Laws adopted in 2005, referred to in MG, paras. 6.56-6.61; CMM, paras. 10.146-10.156.

¹⁶⁵⁵ Regional Order 1/2005, MG, Vol. VI, Annex 177.

¹⁶⁵⁶ *Ibid.* See further paragraph 10.65 below.

¹⁶⁵⁷ Border Region Immigration Control Headquarters, Maung Daw, Letter No. Na-Sa-Ka/ 56/ U, 31 January 1993, para. 1(e), MG, Vol. VI, Annex 177.

¹⁶⁵⁸ MG, para. 10.111; CMM, para. 10.111; RG, para. 5.37.

negative rate of growth of the Bengali Muslim population in Maungdaw Township, or were ever intended to do so, or that there was any intention to keep the measures in question in place until physical destruction of the group was achieved.¹⁶⁵⁹

- 10.51 Rather, The Gambia now apparently argues only that the measure was discriminatory, because similar measures were not imposed in Chin State, which had an even higher rate of population growth than Maungdaw District.¹⁶⁶⁰
- 10.52 However, Regional Order 1/2005 was issued by the Township Peace and Development Council of Maungdaw Township.¹⁶⁶¹ This was a local government body, that only had authority in Maungdaw Township. The order was issued pursuant to a temporary instruction of the Border and Immigration Control Command (Na Sa Ka), which only had jurisdiction in the Maungdaw Region of Rakhine State and certain contiguous areas.¹⁶⁶² Neither the Township Peace and Development Council of Maungdaw Township or the Na Sa Ka had jurisdiction throughout Myanmar as a whole. Regional Order 1/2005 was not enacted pursuant to any instruction from the capital.
- 10.53 In virtually every country in the world, there are authorities whose jurisdiction is limited to a particular local area. The fact that such authorities decide to adopt a measure in their local area does not mean that the measure is discriminatory, merely because the measure does not apply outside that local area, and because local authorities in other areas have not decided to adopt similar measures.
- 10.54 Furthermore, and in any event, The Gambia does not prove that conditions in Chin State were materially identical to those in Maungdaw Township. Even if it were to be accepted that Chin State had a higher population growth, the fact is that Chin State

¹⁶⁵⁹ CMM, para. 10.118.

¹⁶⁶⁰ RG, para. 5.37.

¹⁶⁶¹ CMM, para. 10.120.

¹⁶⁶² See CMM, para. 10.120.

had a far lower population density,¹⁶⁶³ and a lower poverty rate.¹⁶⁶⁴ Regional Order 1/2005 stated that Maungdaw Township had both a high population density and an extremely high rate of population growth, and that food shortages loomed in the future having regard to “the current population, space, production of regional goods, and the yield of rice”. Regional Order 1/2005 furthermore stated that “the area [Maungdaw Township] is not going to expand and the rate of crop cultivation is not likely to increase”.¹⁶⁶⁵ The Gambia does not establish that an identical situation pertained in Chin State.

- 10.55 Regional Order 1/2005 applied to the whole population of Maungdaw Township, both Muslim and non-Muslim.¹⁶⁶⁶ Furthermore, it did not apply to anyone living outside of Maungdaw Township. Thus, a Buddhist living in Maungdaw Township was subject to Regional Order 1/2005 during the time that it was in force, while a Bengali Muslim who lived in, say Sittwe, was not. Regional Order 1/2005 was therefore not directed against the Bengali Muslim population on a discriminatory basis.
- 10.56 Moreover, The Gambia does not establish how its claim of discrimination is even relevant to this case. Irrespective of whether or not a measure is discriminatory, it will *not* fall within Article II (d) of the Genocide Convention if it does not result in a lowering of the birth rate to such an extent that the population of the protected group will decline at a rate that threatens the very existence of the group.¹⁶⁶⁷ If the measure does not fall within Article II (d) of the Convention for this reason, then it is irrelevant whether or not it is discriminatory.

¹⁶⁶³ Myanmar’s 2014 Population and Housing Census indicates that the population density in Chin State was only 13 people per square kilometre, as opposed to 87 people per square kilometre in Rakhine State: Myanmar, Department of Population, Ministry of Labour, Immigration and Population, *The 2014 Population and Housing Census Thematic Report on Population Dynamics, Census Report*, Volume 4-E, December 2016, p. 6, RM, Vol. III, Annex 58.

¹⁶⁶⁴ World Bank Group, Myanmar: Ending poverty and boosting shared prosperity in a time of transition: A systematic country diagnosis (November 2014), p. 23, para. 33, RM, Vol. V, Annex 154 (“Rakhine ... and Chin ... are by far the poorest states, with poverty rates of 78 percent and 71.5 percent respectively ... Although Chin has the second highest poverty rate (71.5 percent) amongst all states and regions, it accounts for only 1.4 percent of the poor due to its small population. Rakhine and Ayeyarwaddy stand out in that they both have high poverty rates and account for large shares of the poor ...”).

¹⁶⁶⁵ Regional Order 1/2005, para. 1, MG, Vol. VI, Annex 177.

¹⁶⁶⁶ Subject to the one exception discussed in paragraph 10.61-10.68 below.

¹⁶⁶⁷ CMM, paras. 4.72-4.78, and this Rejoinder, paragraphs 4.95-4.102 above.

- 10.57 Furthermore, it is hardly possible to infer a *genocidal intent* from a measure that will allow the population to continue to grow, whether or not it is discriminatory. The Reply of The Gambia provides no answer to this point.¹⁶⁶⁸
- 10.58 The Gambia seeks to argue that Regional Order 1/2005 is distinguishable from China's one-child policy,¹⁶⁶⁹ arguing that China's policy applied to its whole population, and not to a targeted ethnical, racial, or religious group.¹⁶⁷⁰ However, quite apart from the fact that Regional Order 1/2005 applied to the whole population of Maungdaw Township, both Muslim and non-Muslim, The Gambia's argument misses the point. China's one-child policy demonstrates that a measure which limits the number of births in a population is not for that reason alone a measure intended to cause the *destruction* of that population.
- 10.59 The Gambia presents no argument directly addressing this point, thereby indicating that it has no answer to it.¹⁶⁷¹ The Gambia's only "answers" to this point are to say that "China's one child policy [was not] followed by violent 'clearance operations' aimed at such a group", and that "unlike China, Myanmar 'is one of the slowest growing countries in Southeast Asia'". The first of these "answers" is another example of the circular logic employed by The Gambia in this case. Effectively, The Gambia argues that the counter-terrorism operations prove that Regional Order 1/2005 had a genocidal intent, and then argues that the fact that Regional Order 1/2005 had a genocidal intent proves that the counter-terrorism operations had a genocidal intent. This argument is fallacious and should not be accepted. The second of these "answers" simply ignores the fact that *Maungdaw District* had a high population growth. The Gambia has not sought to dispute this.
- 10.60 The fact is that Regional Order 1/2005 was not intended to bring about any reduction in the size of the population of Bengali Muslims. It was not a measure that could fall

¹⁶⁶⁸ RG, para. 5.36. The Gambia's "answer" to this point is to say that "one way to assure a group's negative growth rate and ultimate destruction is by violent military attacks that target civilians". That has absolutely nothing to do with this particular point. There were in any event no "violent military attacks that target civilians", as is demonstrated elsewhere in Myanmar's pleadings. See also paragraphs 4.96-4.103 of this Rejoinder above.

¹⁶⁶⁹ The comparison with China's one child policy is made in CMM, para. 10.115.

¹⁶⁷⁰ RG, para. 5.38.

¹⁶⁷¹ RG, para. 5.38.

within Article II (*d*) of the Convention, and provides no basis for inferring genocidal intent. Nothing in paragraphs 5.34 to 5.52 of the Reply of The Gambia affects the conclusions in the Counter-Memorial in relation to these matters.

2. Alleged restrictions on marriage

- 10.61 This Sub-Section of this Chapter responds to **paragraphs 5.39 to 5.44 (Chapter 5, Sub-section II.B) of the Reply** of The Gambia, dealing with a provision in Regional Order 1/2005¹⁶⁷² that required the permission of the authorities to be given to those wanting to have an Islamic marriage. This was the only provision of Regional Order 1/2005 that applied exclusively to Muslims.¹⁶⁷³ However, as noted above, the covering letter to that Regional Order stated that “This temporary regional order is not for Muslims only. People from other religions will be allowed to marry only after being registered at the office of the chief of the region and the office of the chief of station, and only after that will a household registration will be issued”.¹⁶⁷⁴
- 10.62 This provision of Regional Order 1/2005 is also dealt with in paragraphs 6.39 to 6.47 of the Memorial of The Gambia, and paragraphs 10.119 to 10.131 of the Counter-Memorial of Myanmar.
- 10.63 The Reply of The Gambia refers to the 1948 judgment of the US Military Tribunal Nuremberg in the *Greifelt* case (also known as the *RuSHA* case).¹⁶⁷⁵ However, the relevance of this 1948 judgment, which predates the adoption of the Genocide Convention, is not apparent. In the *Greifelt* case, decrees “directed toward drastically curtailing marriages” were found by the Tribunal to be “aimed at one purpose—to greatly reduce the birth rate among enemy nationals and thereby gradually bring about the destruction of the entire national group”.¹⁶⁷⁶ For the reasons given in the Counter-Memorial of Myanmar and in paragraph 10.50 above, Regional Order 1/2005 was *not* aimed at the destruction of Bengali Muslims. It was intended to *slow* the rate of growth

¹⁶⁷² Regional Order 1/2005 issued by the Maungdaw Township Peace and Development Council, MG, Vol. VI, Annex 177. This Regional Order was in force from 2005 to 2018.

¹⁶⁷³ CMM, para. 10.122.

¹⁶⁷⁴ See paragraph 10.50 above.

¹⁶⁷⁵ RG, para. 5.38.

¹⁶⁷⁶ United States Military Tribunal Nuremberg, *Greifelt et. al*, Judgment (10 March 1948), p. 28, RG, Vol. III, Annex 37.

of the population in Maungdaw Township, such that it would still grow, but not as fast as it otherwise would.¹⁶⁷⁷ There is no analogy to be made with the *Greifelt* case.

10.64 The Gambia claims, relying on the 2018 FFM Detailed Findings, that “throughout the marriage application procedure Rohingya couples were subjected to frequent ‘harassment and humiliation’ and to ‘practices constitut[ing] cruel, inhuman or degrading treatment’”, and were required to wait up to two years and pay “exorbitant fees” in order to obtain permission to marry.¹⁶⁷⁸ Myanmar denies this allegation. The Gambia does not produce evidence of sufficient evidential weight to prove this.

- (1) The Gambia relies on the 2018 FFM Detailed Findings, which states that these claims are based on “credible reports”, but cites only anonymous interviewees.¹⁶⁷⁹ No meaningful evidential weight can be given to this document, for the reasons given in Chapter 6 of the Counter-Memorial of Myanmar and the Chapter 6 above of this Rejoinder. The 2018 FFM Detailed Findings cites only anonymous witnesses as the source of its information. It cannot be known if these anonymous witnesses were speaking about matters that they had experienced personally, or whether they were giving hearsay accounts. They may have all been speaking about the same few claimed isolated incidents.
- (2) The Gambia relies on one witness statement provided by the IIMM,¹⁶⁸⁰ which contains a bare reference to “restrictions on marriage”, but provides no details.¹⁶⁸¹ No evidential weight can be given to this.
- (3) The Gambia cites a progress report from 2010 by a UN Special Rapporteur, which cites *no sources* for the statements made in it.¹⁶⁸² Again, no evidential weight can be given to this.

¹⁶⁷⁷ See CMM, paras. 10.109-10.118 and 10.120-10.121.

¹⁶⁷⁸ RG, para. 5.41, citing 2018 FFM Detailed Findings, paras. 592-595, MG, Vol. II, Annex 40.

¹⁶⁷⁹ 2018 FFM Detailed Findings, paras. 592-594, MG, Vol. II, Annex 40.

¹⁶⁸⁰ RG, para. 5.42 footnote 394 and accompanying text.

¹⁶⁸¹ IIMM, Witness Statement No. IIMM0019629329, para. 47, RG, Vol. IV, Annex 58.

¹⁶⁸² RG, para. 5.41 footnote 392, referring to UN Human Rights Council, *Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc. A/HRC/13/48, 10 March 2010, para. 89, MG, Vol. II, Annex 23.

- (4) The Gambia also relies on three summaries of accounts given by interviewees contained in the LAW “Collated Information” document.¹⁶⁸³ No evidential weight can be given to this document.¹⁶⁸⁴ At least two of these three witness summaries suggest only that local officials demanded bribes or baksheesh in their individual cases, rather than that fees were officially required to be paid.

10.65 As is stated in the Counter-Memorial of Myanmar, no applications for Muslim marriages have been refused.¹⁶⁸⁵ No official fees or payments are required by law to obtain permission to marry. Any unauthorized collection of money or demands for payment made by individuals in relation to marriage permissions are unauthorized and may constitute acts of corruption. Where such cases of corruption occur at the local level, they should be addressed on an individual basis. Those found to be engaging in corrupt practices in this context will be held accountable and prosecuted under the Anti-corruption Law No. 23 of 2013, which provides for penalties for a range of corruption offenses, including bribery. Particularly, the penalty for bribery depends on the person's position of power. For example, if convicted of bribery, authorized persons face up to 10 years in prison and substantial fine. From 11 June 1992, until its dissolution on 12 July 2013, the Border and Immigration Control Command Headquarters in Maungdaw implemented a marriage application process. The reason for this was that many Bengali men married more than one woman, and in some cases without legal marriage registration. This situation led to a significant increase in birth rates, resulting in children without identifiable paternal information, and created numerous social issues related to family structure and community relations. To address these challenges, a formal marriage application process was introduced to ensure systematic record-keeping. There was no harassment, humiliation, cruelty, inhumane treatment, or degrading interactions involved in this process, and no fees were required. Furthermore, there was no cases of applicants having to wait as long as two years to receive marriage permission, as has been alleged. At most, applicants only had to wait up to two weeks.

¹⁶⁸³ RG, para. 5.42 footnote 395.

¹⁶⁸⁴ See CMM, paras. 7.48-7.65, and this Rejoinder, paragraphs 7.64-7.71 above.

¹⁶⁸⁵ CMM, para. 10.122.

- 10.66 The Gambia claims, again relying on the 2018 FFM Detailed Findings, that Regional Order 1/2005 was still being applied in 2016, after the Na Sa Ka had been abolished in 2013.¹⁶⁸⁶ However, the Counter-Memorial of Myanmar has already stated,¹⁶⁸⁷ and the Reply of The Gambia itself has noted,¹⁶⁸⁸ that Regional Order 1/2005 was abolished on 13 August 2018. The Gambia does not suggest that it was still being applied after that date.
- 10.67 The Gambia argues that Regional Order 1/2005 was discriminatory because, even though 18 years is now the minimum age for marriage for everyone in Myanmar, at the time that Regional Order 1/2005 was adopted, marriage at a younger age was possible elsewhere in Myanmar.¹⁶⁸⁹ However, The Gambia does not suggest that it is inappropriate to set 18 years as the minimum age for marriage. Regional Order 1/2005 set this minimum age for everyone in Maungdaw Township, both Muslim and non-Muslim. The body that issued Regional Order 1/2005 had no authority outside of Maungdaw Township. The Gambia is incorrect in stating that “the age requirement for marriage was only applied to the Rohingya”.¹⁶⁹⁰ The prescription of the minimum age of 18 years in Regional Order 1/2005 was therefore not discriminatory.
- 10.68 In any event, The Gambia’s discussion of the requirement for permission to marry does not explain how this provision of Regional Order 1/2005 could be a breach of Article II (*d*) of the Genocide Convention, or a basis for inferring genocidal intent. The Gambia provides no evidence that the requirement for permission to marry was intended to reduce the size of the population of Bengalis in a way that would lead to its destruction, or that it had that effect.¹⁶⁹¹ It is not tenable to suggest, as The Gambia

¹⁶⁸⁶ RG, para. 5.43.

¹⁶⁸⁷ CMM, para. 10.120.

¹⁶⁸⁸ RG, para. 5.43 first sentence.

¹⁶⁸⁹ RG, para. 5.44. It is noted that RG, footnote 400, states that at the time that Regional Order 1/2005 was adopted, one of the laws regulating the minimum legal age for marriage was the Child Marriage Restraint Act of 1930. In fact, that law was repealed by the Law for the Repeal of Laws, 1992.

¹⁶⁹⁰ RG, para. 5.44. The Gambia is also incorrect in suggesting in this paragraph of its Reply that the age requirement under Regional Order 1/2005 applied until 2019. It applied only until August 2018, when Regional Order 1/2005 was repealed. Thereafter, there was a gap in time before the nationwide minimum age of 18 years was enacted into law in 2019.

¹⁶⁹¹ See paragraph 10.63 above.

apparently seeks to do, that every act of discrimination against a group, if it is proved, is evidence of a genocidal intent towards that group.

3. Alleged obligatory birth control

- 10.69 This Sub-Section of this Chapter responds to **paragraphs 5.45 to 5.48 (Chapter 5, Sub-section II.C) of the Reply** of The Gambia, dealing with the provision of Regional Order 1/2005¹⁶⁹² which stated that “those who have permission to marry must limit the number of children, in order to control the birth rate so that there is enough food and shelter”.
- 10.70 This provision of Regional Order 1/2005 is also dealt with in paragraphs 6.39 to 6.53 of the Memorial of The Gambia, and paragraphs 10.132 to 10.145 of the Counter-Memorial of Myanmar.
- 10.71 The Reply of The Gambia refers to the 1961 judgment of the District Court of Jerusalem in the *Eichmann* case.¹⁶⁹³ However, the relevance of this judgment is not apparent. In the *Eichmann* case, the measures in question consisted of a complete ban on births and forced terminations of pregnancies.¹⁶⁹⁴ That case bears no similarity to the present case.
- 10.72 The Counter-Memorial of Myanmar points out that Regional Order 1/2005 stated that “those who have permission to marry must limit the number of children, in order to control the birth rate”,¹⁶⁹⁵ but did not itself impose any specific limit on the number

¹⁶⁹² Regional Order 1/2005 issued by the Maungdaw Township Peace and Development Council, MG, Vol. VI, Annex 177. This Regional Order was in force from 2005 to 2018.

¹⁶⁹³ RG, para. 5.45, referring to Israel, District Court of Jerusalem, *Attorney-General v. Eichmann*, Judgment of 11 December 1961 (“*Eichmann*”), RM, Vol. II, Annex 26. The Reply of The Gambia does not even annex the relevant parts of this judgment, but merely refers to a discussion of it in a commentary.

¹⁶⁹⁴ *Eichmann*, pp. 159 and 244, RM, Vol. II, Annex 26: “With regard to Terezin, ... Dr. Munk [sent a statement] ... which reads as follows: ‘... The information to be given to the pregnant women must be in unequivocal language, saying that the abortions have to be made on official instructions.’ ... Rahm ... stated ...: ‘Until about March 1944, I knew nothing about the prohibition according to which women in the ghetto were forbidden to bear children’ ... [W]ith regard to Terezin, the Accused’s responsibility for the order given there for the termination of pregnancy, and for its implementation, has been proved fully. ... We convict the Accused ... in that during the years 1943 and 1944 he took measures calculated to prevent births among Jews, by directing that births be banned and pregnancies terminated among Jewish women in the Terezin Ghetto, with intent to exterminate the Jewish People.”

¹⁶⁹⁵ CMM, para. 10.134.

of children that those marrying may have. It further points out that many of the witness statements produced by The Gambia indicate that those giving the statements had more than two children.¹⁶⁹⁶ The Gambia's only response to this is to suggest that the additional children of those witnesses might have all been born before Regional Order 1/2005 came into force in 2005, or after their mothers came to Bangladesh in 2016-2017.¹⁶⁹⁷ That is not a plausible answer. First, this suggestion is contradicted by population statistics.¹⁶⁹⁸ Second, it is clear from some of these witness statements that additional children were born in Myanmar during the time that Regional Order 1/2005 was in force. For instance, LAW Witness Statement No. 007¹⁶⁹⁹ indicates that this witness had four children, who were aged 7, 12, 14 and 16 years in 2020. The second, third and fourth of these children would have been born while Regional Order 1/2005 was in force, and before their mother went to Bangladesh in 2017. LAW Witness Statement No. 009¹⁷⁰⁰ indicates that this witness had seven children, the sixth and seventh of which were aged 5 and 10, and would have been born while Regional Order 1/2005 was in force, and before their mother went to Bangladesh in 2017. LAW Witness Statement No. 022¹⁷⁰¹ indicates that this witness had six children, and that their ages in 2017 were 15, 11, 3, 2 and 1 years, and 3 months, at the time of the 2017 counter-terrorism operation in Tula Toli (Min Gyi). The second to sixth of these would have been born while Regional Order 1/2005 was in force, and before their mother went to Bangladesh in 2017.

- 10.73 The Gambia cites two sources in support of a claim that Regional Order 1/2005 was the reason why women in northern Rakhine State had abortions.¹⁷⁰² The first cited source is the 2018 FFM Detailed Findings, which in fact states only that “Women *reportedly* resorted to unsafe abortions for fear of contravening local orders and

¹⁶⁹⁶ CMM, paras. 10.134-10.140.

¹⁶⁹⁷ RG, para. 5.47.

¹⁶⁹⁸ CMM, para. 10.139.

¹⁶⁹⁹ MG, Vol. X, Annex 344.

¹⁷⁰⁰ At para. 5, MG, Vol. X, Annex 346.

¹⁷⁰¹ At p. 1, and p. 3, para. 5, MG, Vol. XI, Annex 360.

¹⁷⁰² RG, para. 5.58.

associated criminal penalties”.¹⁷⁰³ Only a single anonymous source is cited by the FFM for this information. It is not known what qualifications this person had to make such a claim, or what source of information that person based the claim on. This is hardly conclusive evidence of this claim. The second source cited by The Gambia does not suggest any *reasons* for abortions. The Reply of The Gambia does not address the evidence of other reasons for abortions cited in the Counter-Memorial of Myanmar (low awareness or acceptance of family planning, and intimate partner abuse).¹⁷⁰⁴

- 10.74 The Gambia states, entirely falsely, that “birth spacing measures contained in the 2015 Population Control and Health Care Law ... apply to all Rohingya women in Myanmar, requiring them to wait at least three years after having a child before having another child”.¹⁷⁰⁵ The Gambia simply ignores what is stated in this respect in the Counter-Memorial of Myanmar,¹⁷⁰⁶ which explains that *no* obligatory birth spacing is imposed in Rakhine State. In fact, birth spacing health care services have been provided *nationwide* in Myanmar for every woman who *desires* such services, as one of the rights of women, in the National Sexual and Reproductive Health and Rights Policy 2022. According to a publication of the United Nations Population Fund, “‘Birth spacing’ continues to be a widely-used term referring to the use of contraception to space birth to leave an interval of 2 to 3 years between births as recommended for maternal and newborn health”.¹⁷⁰⁷ A survey published by the Government of Myanmar in 2017 states (with reference to the whole country) that:

Spacing children at least 36 months apart reduces the risk of infant death. The typical birth interval in Myanmar is quite long—a median of 49 month.

Infants born less than two years after a previous birth have the highest under-five mortality rates: 159 deaths for every 1,000 live births. In contrast, the under-five mortality rate among

¹⁷⁰³ RG, para. 5.58, quoting 2018 FFM Detailed Findings, para. 599 (emphasis added), MG, Vol. II, Annex 40.

¹⁷⁰⁴ CMM, para. 10.144.

¹⁷⁰⁵ RG, para. 3.24.

¹⁷⁰⁶ CMM, para. 10.153.

¹⁷⁰⁷ United Nations Population Fund (UNFPA), *Expanding choices, Ensuring rights in a diverse and changing world, UNFPA Strategy for Family Planning 2022-2030*, November 2022, p. 6, RM, Vol. IV, Annex 132.

children born 4 or more years after a sibling is only 48 deaths per 1,000 live births.¹⁷⁰⁸

- 10.75 In fact, it appears that the Government of Bangladesh has been promoting birth control in the camps in Bangladesh. According to a media report:

Officials with the Directorate of Family Planning, which is connected to the [Bangladesh] Ministry of Health and Family Welfare, launched the birth control program in Rohingya camps in September [2017] ...

Pintu Kanti Bhattacharjee, the department's deputy director, told BenarNews ...

"A majority of Rohingya, who are largely uneducated, are not aware of birth control measures. The ones who are aware are convinced that family planning methods conflict with their faith ... So far, we have managed to talk about birth control with 150,000 Rohingya. We convinced 7,500 of them to take contraceptive measures ..."

Abdul Muktalif, 57, a camp leader in Teknaf, said that all Rohingya couples had "at least five children in hopes that the more kids they have, the more money they will bring in when they grow up."

Muktalif, who has been living at the Leda camp for the last 14 years, has 15 children – the youngest 1 year old – from three wives.¹⁷⁰⁹

The Gambia presumably would not consider these efforts by the Government of Bangladesh to be indicative of a genocidal intent on the part of Bangladesh.

- 10.76 The section of the Reply of The Gambia dealing with the allegation of "obligatory birth control"¹⁷¹⁰ makes no mention of the other three of the four "Race and Religion" laws adopted in Myanmar in 2015.¹⁷¹¹ The conclusion to be drawn is that The Gambia has no answer to what is stated in the Counter-Memorial of Myanmar in relation to

¹⁷⁰⁸ Myanmar, Ministry of Health and Sports (MOHS) and ICF, *Myanmar: 2015-16 Demographic and Health Survey Key Findings*, 2017, p. 7, RM, Vol. III, Annex 66.

¹⁷⁰⁹ BenarNews, "Bangladesh family planning officials face challenge in Rohingya camps", *Radio Free Asia*, 3 November 2017, RM, Vol. V, Annex 199.

¹⁷¹⁰ RG, paras. 5.45-5.48.

¹⁷¹¹ CMM, paras. 10.146-10.158. Passing reference is made elsewhere in the Reply of The Gambia to the Myanmar Buddhist Women's Special Marriage Law (RG, para. 5.44 footnote 400), and to the Monogamy Law (RG, para. 6.9 footnote 498 and accompanying text), but there is no suggestion in the Reply that these Laws amount to "obligatory birth control".

these Laws, and has abandoned any allegations that they impose “obligatory birth control”.

- 10.77 In any event, The Gambia’s discussion of limitations on the number of children does not explain how this provision of Regional Order 1/2005 could be a breach of Article II (d) of the Genocide Convention, or a basis for inferring genocidal intent. Even if The Gambia could establish that it imposed compulsory birth spacing on a discriminatory basis (*quod non*), The Gambia provides no evidence that any restrictions on the number of children were intended to reduce the size of the population of Bengalis in a way that would lead to its destruction, or that they had that effect.¹⁷¹²

4. Alleged denial of birth registration

- 10.78 This Sub-Section of this Chapter responds to **paragraphs 5.49 to 5.52 (Chapter 5, Sub-section II.D) of the Reply** of The Gambia, dealing with an alleged failure of authorities in Myanmar to register the births of Bengali children.
- 10.79 This allegation is also dealt with in paragraphs 6.62 to 6.64 of the Memorial of The Gambia, and paragraphs 10.159 to 10.175 of the Counter-Memorial of Myanmar.
- 10.80 The Counter-Memorial of Myanmar accepts that birth registrations of Bengali babies born in northern Rakhine State came almost to a halt after the violence in 2012, and gives details of steps taken since 2017 to seek to rectify the situation, and to ensure the registration of all births that should have been registered since 2012.
- 10.81 The Gambia quotes from a 2017 publication which states that “[l]ess than 10 per cent of Muslim children under the age of five had birth certificates, compared with two-thirds of Rakhine children of the same age”.¹⁷¹³ That is consistent with the explanation given by Myanmar in its Counter-Memorial. The quoted passage refers only to children “under the age of five” in 2017, that is to say, children born since 2012. At the time that the report was published in 2017, steps to rectify the situation were only beginning. The quoted passage also points out that a third of *Rakhine* children did not

¹⁷¹² See paragraph 10.63 above.

¹⁷¹³ RG, para. 5.59 final sentence.

have birth certificates, demonstrating that the challenges of achieving universal birth registration (including poor awareness of the entitlement to, and requirement for, birth registration¹⁷¹⁴) are not confined to the Bengali population.

10.82 The Reply of The Gambia does not engage with what is stated in the Counter-Memorial of Myanmar, but simply repeats the claim made in its Memorial that birth registrations of Bengali children in northern Rakhine State have not in fact occurred since the 1990s, and that since the 1990s the only “registration” of births has been the inclusion of children in household lists.¹⁷¹⁵ The Gambia provides no evidence capable of proving this claim.

(1) The Gambia refers to the 2018 FFM Detailed Findings,¹⁷¹⁶ which was already cited in the Memorial of The Gambia,¹⁷¹⁷ and which states only that this is the case “[a]ccording to credible reports”.¹⁷¹⁸ In support of this statement, the FFM cites only two pseudonyms of anonymous persons. It is unclear whether these anonymous persons were considered by the FFM to have given the “credible reports”, or whether these two anonymous persons had given hearsay evidence about the contents of reports that the FFM did not even see. In any event, it is not known what qualifications these two anonymous persons had to make such a statement, or what sources of information the information was based on.

(2) The Gambia cites a report of an NGO that makes a bare claim that “Since the mid-1990s, Rohingya new-born childrens have not been issued with a birth certificate”,¹⁷¹⁹ but that report cites no source for that claim.

¹⁷¹⁴ CMM, para. 10.163.

¹⁷¹⁵ MG, paras. 6.62-6.63.

¹⁷¹⁶ RG, para. 5.50, citing 2018 FFM Detailed Findings, paras. 463 and 494. The citation is presumably meant to be to paragraphs 463-464, MG, Vol. II, Annex 40.

¹⁷¹⁷ MG, paras. 6.62-6.63.

¹⁷¹⁸ 2018 FFM Detailed Findings, para. 463 first sentence, MG, Vol. II, Annex 40.

¹⁷¹⁹ RG, para. 4.49 footnote 411.

- (3) The Gambia relies on report of a UN Special Rapporteur stating that births of Bengali children are “not systematically registered”,¹⁷²⁰ and a report of the UN High Commissioner for Human Rights stating that “Rohingya newborns are usually not registered”.¹⁷²¹ However, neither of these documents states that birth registrations ceased in the 1990s. Neither cites sources of information.

- 10.83 The Gambia’s claim is incorrect. The situation is as described in paragraphs 10.159 to 10.174 of the Counter-Memorial of Myanmar, which are not unnecessarily repeated. Any newborn child will be issued with a birth certificate if one is applied for.
- 10.84 The Counter-Memorial of Myanmar also points out that The Gambia in any event does not explain how the non-issue of birth certificates, or any impediments to inclusion on household lists, could lead to the physical or biological destruction of Muslims in northern Rakhine State, as such, or establish an intention on the part of the Government of Myanmar to bring about that result.¹⁷²² The Reply of The Gambia provides no explanation. The Gambia argues that a deliberate failure to register births is part of a “comprehensive set of policies” to “deny the existence of the Rohingya, strip them of the basic rights of citizenship, and treat them as outsiders who do not belong in Myanmar”. However, even if that were true, which it is not, denial of the existence of a group and treating its members as outsiders would not amount to destroying the group *physically or biologically*, as such. Nor would it amount to direct and public incitement to anyone else to bring about such physical or biological destruction. Nor of itself would it establish an intent to bring about that result.

G. Alleged forcible confinement and denial of access to sustenance

1. General

- 10.85 This Section of this Chapter of this Rejoinder responds to **paragraphs 5.33 to 5.69 (Chapter 5, Section III) of the Reply of The Gambia.**

¹⁷²⁰ RG, para. 5.50 footnote 414 and accompanying text.

¹⁷²¹ RG, para. 5.51 footnote 415 and accompanying text.

¹⁷²² CMM, para. 10.61.

- 10.86 Paragraphs 6.65 to 6.89 of the Memorial of The Gambia set out allegations that the authorities in Myanmar have forced many Bengali Muslims in northern Rakhine State to live in separate areas removed from the general population, and has denied them freedom of movement and restricted their access to food, healthcare and other basic necessities of life.
- 10.87 Paragraphs 10.176 to 10.245 of the Counter-Memorial of Myanmar respond to these allegations. The Counter-Memorial demonstrates that IDP camps are not “internment” camps, and that no one is forced to live in them against their will, that Aung Mingalar is just a ward in Sittwe town that has been subject to no restrictions at any time since 2012, that not all Bengali Muslims live in “isolated villages” in northern Rakhine State, that those Bengalis who hold any kind of citizenship card are free to live and move anywhere in Myanmar, and that NVC holders can presently travel freely within their township of residence,¹⁷²³ and can travel outside their township with permission. Since 2018, NVC holders in Maungdaw Township and Buthidaung Township have a greater freedom, in that they can travel freely within Maungdaw District (which comprises both townships), rather than just their township of residence.¹⁷²⁴ The Counter-Memorial further points out that levels of humanitarian assistance provided in northern Rakhine State, both to Muslim and other members of the population, have been shown in Myanmar’s Provisional Measures Reports, and that residents of Bengali IDP camps are engaged in fishing and farming.
- 10.88 The Gambia yet again begins a section of its Reply with a reference to the Holocaust, saying that “approximately 13.7% of all Jewish Holocaust victims died as a result of disease and starvation ... [in] ghettos at a time prior to their deportation to forced-labor and extermination camps”.¹⁷²⁵ The reason for this reference to the Holocaust is not

¹⁷²³ There was formerly a requirement for a person who is not a citizen of Myanmar to have a village leaving certificate issued by the ward/village tract administrator in order to travel outside their village within the same township. This requirement no longer exists. There is a requirement that applies throughout the whole of Myanmar, not just in northern Rakhine State, that the ward/village tract administrator must be informed if someone from outside that ward/village tract stays overnight. The Bengali residents living in IDP camps are allowed to move freely without any discrimination based on ethnicity, religion whether Muslim or Hindu, or foreign nationality. Those who do not possess NVC card are also granted freedom of movement, provided they have endorsements from relevant village administrators and authorities.

¹⁷²⁴ See CMM, para. 10.95.

¹⁷²⁵ RG, para. 5.53.

explained. There is no evidence (or even any suggestion) in the present case that significant numbers of Bengali Muslims have died of starvation or disease, or that they have been deported to forced-labour and extermination camps.

10.89 The Gambia also quotes opinions expressed in a witness statement of someone who formerly worked for Action Contre La Faim and Fortify Rights.¹⁷²⁶ However, the opinions of this person are not evidence of facts.

10.90 Nothing in paragraphs 5.53 to 5.69 of the Reply of The Gambia affects the conclusions in the Counter-Memorial of Myanmar in relation to these matters.

2. Alleged “forcible confinement” in “internment” camps

10.91 This Sub-Section of this Chapter responds to **paragraphs 5.55 to 5.59 (Chapter 5, Sub-section III.A) of the Reply** of The Gambia, dealing with The Gambia’s claim that internally displaced persons (IDP) camps in Rakhine State are “internment camps”.

10.92 This allegation is also dealt with in paragraphs 6.66 to 6.72 of the Memorial of The Gambia, and paragraphs 10.179 to 10.208 of the Counter-Memorial of Myanmar.

10.93 The Gambia claims that although IDP camps were established after the 2012 violence not only for Bengalis, but also for Rakhines and others, all of the IDP camps for Rakhines and others have since been closed, while those for Bengalis have not.¹⁷²⁷

10.94 The reasons for this are given in paragraph 10.188 of the Counter-Memorial of Myanmar. The Gambia presents nothing to contradict what is stated by Myanmar in this respect, but argues only that “Myanmar apparently expects the Court to take its word for this self-serving assertion, as it offers no supporting evidence”.¹⁷²⁸ The Gambia thereby overlooks the fact that it bears the burden of proof in this case, and must discharge the very high standard of proof applicable in cases of the present kind. The Gambia does not establish that the failure to close all Bengali IDP camps has been due to discriminatory treatment against Bengalis, much less due to an intent to *destroy*

¹⁷²⁶ RG, para. 5.54.

¹⁷²⁷ RG, para. 5.55.

¹⁷²⁸ RG, para. 5.58.

the Bengali population as such. In fact, seven Bengali IDP camps have been closed. The Gambia relies solely on a statement in the 2018 FFM Detailed Findings that “segregation has been maintained and contacts between communities have been extremely limited in central Rakhine”.¹⁷²⁹ This statement is not even contained in the part of the FFM’s report dealing with IDP camps, and is not addressing the question whether residents of IDP camps are free to leave.

10.95 In its Memorial, The Gambia systematically refers to the IDP camps in Rakhine State as “internment camps”, as if that was an undisputable objective fact. The Memorial goes so far as to label a map that it reproduces as a “UN Map of *Internment* Camps in Northern Rakhine State”, despite the fact that the word “internment” appears nowhere in the map itself.¹⁷³⁰ The Counter-Memorial of Myanmar establishes that no one is forced to live in IDP camps against their will. The Counter-Memorial in particular cites a profiling exercise of the IDP camps in Rakhine State conducted by the Danish Refugee Council and the United Nations High Commissioner for Refugees (“UNHCR”), which deals specifically and in detail with conditions in the camps, and which indicates that residents of the IDP camps are able to interact with others outside the camps, can choose to leave the camps, or can go from one camp to another camp.¹⁷³¹

10.96 The Gambia’s claimed evidence to the contrary is the 2018 FFM Detailed Findings.¹⁷³² The FFM merely refers to anonymous interviewees as sources for the claim that “*some humanitarian actors and analysts* have referred to the camps as ‘internment camps’”.¹⁷³³ However, opinions of such anonymous persons are not evidence of facts. The Gambia also relies on bare references to Bengalis being “confined” in IDP camps, found in a report of a UN Special Rapporteur,¹⁷³⁴ and in a

¹⁷²⁹ RG, para. 5.58, referring to 2018 FFM Detailed Findings, para. 516, RG, Vol. II, Annex 1.

¹⁷³⁰ MG, Figure 6.1 following page 154, and pages 515 and 543, description of Figure 6.1 in the list of Figures and Maps (emphasis added); CMM, para. 10.181.

¹⁷³¹ CMM, paras. 10.198-10.201.

¹⁷³² RG, para. 5.56, referring to 2018 FFM Detailed Findings, paras. 517-518, MG, Vol. II, Annex 40.

¹⁷³³ 2018 FFM Detailed Findings, para. 518 (emphasis added).

¹⁷³⁴ RG, para. 5.56 footnote 426 and accompanying text.

draft UN General Assembly resolution.¹⁷³⁵ These bare statements provide no details and cite no evidence in support. Nor do the reports of International Crisis Group, Amnesty International or Human Rights Watch that are relied on by The Gambia.¹⁷³⁶

10.97 The Gambia refers to the fact that anyone in Myanmar who does not hold a citizenship card requires permission to travel outside of their township of residence.¹⁷³⁷ However, this requirement applies to anyone in Myanmar who does not hold a citizenship card, and not just Bengalis. This does not mean that residents of IDP camps are not free to leave the camps.

10.98 The Gambia has not established that IDP camps in Rakhine State are any worse than those typically found in IDP camps in any other country with a similar level of income to Myanmar. The Gambia claims to dispute this fact,¹⁷³⁸ but provides no details or evidence of any kind to the contrary. The Gambia also presents no details or evidence in support of its claim that “the living conditions in Rohingya camps were substantially worse than the rest of the camps in Rakhine State”.¹⁷³⁹ The Gambia does not appear to dispute the findings in the “Sittwe Camp Profiling Report”, published in 2017 by the Danish Refugee Council and UNHCR, that all camps but one met the SPHERE standard for drinking water,¹⁷⁴⁰ and that nearly three quarters (73%) of households living in Muslim camps had acceptable levels of food consumption, which was higher than the figure for households in Muslim villages (67%).¹⁷⁴¹ The Gambia apparently accepts that a greater percentage of Bengalis living in IDP camps have acceptable levels of food consumption than those who do not.¹⁷⁴² This report also notes that “The

¹⁷³⁵ RG, para. 5.56 footnote 427 and accompanying text. Statements in General Assembly resolutions are in any event political statements, and do not purport to be findings of fact based on evidence: see paragraph 7.115 above.

¹⁷³⁶ RG, para. 5.57.

¹⁷³⁷ RG, para. 5.58 fourth and fifth sentences.

¹⁷³⁸ RG, para. 5.59.

¹⁷³⁹ RG, para. 5.59.

¹⁷⁴⁰ CMM, para. 10.199. The “SPHERE standard” is a reference to standards of the Sphere Project. According to its Sphere Handbook, the Sphere Project “was initiated in 1997 by a group of NGOs and the Red Cross and Red Crescent Movement to develop a set of universal minimum standards in core areas of humanitarian response”: Sphere Association, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response*, 2018 Edition, p. ii, CMM, Vol. VII, Annex 313.

¹⁷⁴¹ See CMM, paras. 10.198-10.199.

¹⁷⁴² RG, para. 5.59 third sentence.

vast majority of respondents from the Muslim camps reported that they did not face difficulties accessing humanitarian assistance in the last six months (95 per cent)”.¹⁷⁴³ This report also notes the provision of medical care for those living in the IDP camps.¹⁷⁴⁴ In IDP camps, not only government health employees, but also NGOs/INGO groups, provide regular health care, health education awareness activities such as personal hygiene, and the distribution of related support items. As to education, Basic Education Schools have been established in IDP camps and villages, and children are free to attend the schools.

3. Aung Mingalar

- 10.99 This Sub-Section of this Chapter responds to **paragraph 5.62 of the Reply** of The Gambia, dealing with The Gambia’s claim that Aung Mingalar (a part of Sittwe, the capital of Rakhine State) is a “ghetto”.
- 10.100 This allegation is also dealt with in paragraphs 6.73 to 6.75 of the Memorial of The Gambia, and paragraphs 10.209 to 10.221 of the Counter-Memorial of Myanmar.
- 10.101 The Reply of The Gambia repeats the same claims that are already made in its Memorial, based on the same evidence, namely three paragraphs of the 2018 FFM Detailed Findings,¹⁷⁴⁵ the information in which is said to be based on the evidence of three anonymous interviewees.¹⁷⁴⁶ The response already provided in the Counter-Memorial of Myanmar is not unnecessarily repeated. As regards daily life in Aung

¹⁷⁴³ Danish Refugee Council and UNHCR, *Sittwe Camp Profiling Report*, June 2017, p. 123, RM, Vol. V, Annex 155.

¹⁷⁴⁴ *Ibid*, p. 73: “Health services in the Sittwe rural camp area are provided by the Government and humanitarian partners. The highest-level healthcare facility is the Government-run Thet Kae Pyin Observation Centre which operates 24 hours per day and seven days per week. ... The Government runs two other health facilities in the Sittwe rural camp area: Dar Paing Rural Health Centre and Thae Chaung sub-rural health centre. ... The humanitarian community runs mobile clinics, which provide primary healthcare services at the camp level. ... Nutrition programmes [are] run by Government and humanitarian partners in the Sittwe rural camps ... Emergency cases and cases requiring a higher level of healthcare than is available in the Sittwe rural camp area are referred to Sittwe General Hospital. ... For non-police cases, the ambulance service from Thet Kae Pyin to Sittwe General Hospital does not require a police escort. Muslim patients at Sittwe General Hospital are regularly accompanied by someone who can translate from Myanmar or Rakhine language into the local Muslim language; Sittwe General Hospital staff also assist with translation.”

¹⁷⁴⁵ RG, para. 5.62, referring to 2018 FFM Detailed Findings, paras. 520-521 and 643, RG, Vol. II, Annex 1.

¹⁷⁴⁶ These paragraphs of the 2018 FFM Detailed Findings contain footnote references only to interviews with the anonymous persons identified as K-069, V-047, and DM-004.

Mingalar, this is depicted in video-footage¹⁷⁴⁷ and in an interview with Kyaw Tin Hlaing,¹⁷⁴⁸ which details freedom of movement, access to commercial life, food, sanitary water supply, health care, education, telecommunication services and unfettered religious freedom. Such evidence stands in stark contrast to the exaggerated or unfounded statements upon which The Gambia relies.

- 10.102 The Gambia refers to Aung Mingalar as a “ghetto”, and refers to the use of that word by the FFM and Médecins Sans Frontières.¹⁷⁴⁹ The Reply of The Gambia elsewhere refers to the Theresin (Theresienstadt) ghetto during the Holocaust,¹⁷⁵⁰ and appears to seek to convey the impression that Aung Mingalar is somehow the same as Theresienstadt. However, no possible comparison can be made.¹⁷⁵¹ Furthermore, there is nothing to suggest that the FFM and Médecins Sans Frontières were in any way intending to make such a comparison. The *Encyclopaedia Britannica* notes for instance that the word “ghetto” “formerly meant a street, or quarter, or a city set apart as a legally enforced residence area for Jews”, but that “More recently, the term *ghetto* has come to apply to any urban area exclusively settled by a minority group.”¹⁷⁵² The FFM and Médecins Sans Frontières presumably were using the word in the latter sense.

4. Alleged confinement to isolated villages

- 10.103 This Sub-Section of this Chapter responds to **paragraph 5.61 of the Reply** of The Gambia, which contends that since 2021, “Rohingya have been subjected to additional movement restrictions, particularly in Buthidaung”.
- 10.104 This paragraph in the Reply of The Gambia is presumably related to the claim originally made in paragraphs 6.76 to 6.84 of its Memorial that those Bengalis who

¹⁷⁴⁷ Documentary video of the daily activities of residents in Aung Mingalar ward, produced by the Rakhine State Government, RM, Vol. III, Annex 81.

¹⁷⁴⁸ Interview with Kyaw Tin Hlaing, resident at Aung Mingalar Ward, produced by the Rakhine State Government, RM, Vol. III, Annex 82.

¹⁷⁴⁹ RG, para. 5.62 final sentence, quoting from a report of Médecins Sans Frontières. The Gambia has not annexed this report to its Reply, contrary to Article 50, paragraph 1, of the Rules of Court.

¹⁷⁵⁰ MG, para. 5.45.

¹⁷⁵¹ See paragraph 10.71 above.

¹⁷⁵² *Encyclopaedia Britannica*, “ghetto”, RM, Vol. II, Annex 51.

are not in IDP camps or in Aung Mingalar “are restricted to isolated villages in central and northern Rakhine State, which they can only leave with great difficulty”.

- 10.105 Paragraphs 10.222 to 10.231 of the Counter-Memorial of Myanmar demonstrate that this claim is incorrect.
- 10.106 The Gambia does not explain the significance of the claimed additional movement restrictions since 2021. The Gambia does not suggest that the introduction of any such new measures in 2021, some four years after the conclusion of the counter-terrorism operations in 2017, of themselves would amount to acts of genocide. Nor does The Gambia explain how the introduction of any such new measures in 2021 would demonstrate that authorities in Myanmar have a genocidal intent, let alone that they had a genocidal intent four years earlier at the time of the counter-terrorism operations.
- 10.107 Contrary to what The Gambia claims,¹⁷⁵³ the Counter-Memorial of Myanmar did not state that no Form 4 is needed to travel between townships. It stated that no Form 4 is needed to travel between Maungdaw Township and Buthidaung Township.¹⁷⁵⁴
- 10.108 The Reply of The Gambia otherwise contains no response to paragraphs 10.222 to 10.231 of the Counter-Memorial of Myanmar. The Gambia thereby appears to concede that it has no answer to what is stated in those paragraphs of the Counter-Memorial.

5. Alleged deprivation of food

- 10.109 This Sub-Section of this Chapter responds to **paragraphs 5.63 to 5.69 (Chapter 5, Sub-section III.B) of the Reply** of The Gambia, dealing with The Gambia’s claim that the authorities in Myanmar have imposed restrictions on access by Bengalis to food and humanitarian assistance.
- 10.110 This allegation is also dealt with in paragraphs 6.85 to 6.89 of the Memorial of The Gambia, and paragraphs 10.232 to 10.245 of the Counter-Memorial of Myanmar.

¹⁷⁵³ RG, para. 5.60.

¹⁷⁵⁴ CMM, para. 10.226. See also this Rejoinder, paragraphs 10.87 and 10.97 above.

- 10.111 The Gambia claims, incorrectly, citing the 2018 FFM Detailed Findings, that “a survey conducted by Myanmar’s government in 2015 showed that Rakhine State had the highest rates of global acute malnutrition and severe acute malnutrition in the country”.¹⁷⁵⁵ The Gambia simply cites the 2018 FFM Detailed Findings as claimed evidence of this incorrect fact. The Gambia has evidently not even looked at the Government survey in question, which is readily available on the internet.¹⁷⁵⁶ That survey, the *2015-16 Demographic and Health Survey*, contains only a single reference to “acute malnutrition”.¹⁷⁵⁷ That page of the survey indicates only that Rakhine State has the *third* highest rate of stunting among children (which it says is an indication of *chronic* malnutrition). The States with the highest incidence are Chin State and Kaya State. According to the Myanmar Micronutrient and Food Consumption Survey (2017-2018), food poverty incidence in Rakhine State was far lower than in Chin State,¹⁷⁵⁸ and food poverty incidence in Rakhine State was comparable to that in Tanintharyi Region and Shan State.¹⁷⁵⁹
- 10.112 The Gambia further claims, incorrectly, that the 2018 FFM Detailed Findings states that the *2015-16 Demographic and Health Survey* says that “in northern Rakhine State, where most Rohingya live, rates [of global acute malnutrition and severe acute malnutrition] were four to five times higher”.¹⁷⁶⁰ This Government survey does not say that, and the 2018 FFM Detailed Findings does not suggest that it does. Rather, the 2018 FFM Detailed Findings attributes this claimed fact to an anonymous person that the FFM interviewed, identified by the FFM only as K-076.44.¹⁷⁶¹ It is not known what qualifications this anonymous person had to make such a statement, or what sources of information the information was based on.

¹⁷⁵⁵ RG, para. 5.63, referring to 2018 FFM Detailed Findings, para. 534, RG, Vol. II, Annex 1.

¹⁷⁵⁶ Myanmar, Ministry of Health and Sports (MOHS) and ICF, *Myanmar: 2015-16 Demographic and Health Survey Key Findings*, 2017, RM, Vol. III, Annex 66.

¹⁷⁵⁷ *Ibid.*, p. 11.

¹⁷⁵⁸ Myanmar, Ministry of Health and Sports, Department of Public Health, National Nutritional Centre, *Myanmar Micronutrient and Food Consumption Survey MMFCS (2017-2018), Interim Report*, February 2019, p. 9, RM, Vol. III, Annex 70, indicating that food poverty incidence in Chin State was 25%, compared to 10% in Rakhine State.

¹⁷⁵⁹ *Ibid.*, indicating that food poverty incidence was 10% in Rakhine State, 9.6% in Tanintharyi Region, and 9% in Shan State.

¹⁷⁶⁰ RG, para. 5.63.

¹⁷⁶¹ 2018 FFM Detailed Findings, para. 534 footnote 1151 and accompanying text, RG, Vol. II, Annex 1.

10.113 The Gambia then claims that Myanmar “weaponised” assistance provided by the World Food Program, by revoking the travel and activity permissions of all humanitarian agencies in advance of the August 2017 counter-terrorism operations.¹⁷⁶² Myanmar denies this. As is explained in the Counter-Memorial of Myanmar, the Government withdrew the authorisation of the World Food Programme to provide assistance in northern Rakhine State for only two months, from 25 August 2017 to 27 October 2017.¹⁷⁶³ The evidence presented in the Reply of The Gambia does not contradict this.

10.114 Apart from this, Myanmar denies that its authorities have ever denied support for Bengali Muslims’ food security and health condition in Rakhine State.

(1) Bengalis with medical emergencies are sent to the nearest hospitals in time and the necessary treatments are provided. Since late 2018, international organizations and non-government organisations such as Malteser International, International Committee of the Red Cross (ICRC), International Rescue Committee (IRC), Myanmar Red Cross Society (MRCS), Mercy-Malaysia, Médecins Sans Frontières (MSF), Myanmar Medical Association (MMA), Myanmar Health Assistant Association (MHAA), Relief International (RI), Action contre la faim (ACF), International Organization for Migration (IOM), World Health Organization (WHO) and United Nations Children’s Fund (UNICEF), have been allowed to conduct healthcare services in collaboration with the Ministry of Health, for the health of Bengali Muslims in northern Rakhine State.

(2) Nutritional care activities have been carried out since 1978 in Maungdaw and Buthidaung Townships by UN agencies, international organizations and INGOs such as United Nations Children’s Fund (UNICEF), World Food Program (WFP), ACF and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ). Many UN agencies and INGOs such as the United Nations High Commissioner for Refugees (UNHCR), United Nations Development Programme (UNDP), WFP, Food and Agriculture Organization (FAO), Group

¹⁷⁶² RG, para. 5.64.

¹⁷⁶³ CMM, para. 10.239.

for Research and Technology Exchanges (GRET), Médecins Sans Frontières-Artsen Zonder Grenzen (Holland), CARE, Bridge Asia Japan (BAJ), MRCS and ACF have signed MoUs with the respective ministries. The activities of these organisations includes implementing their projects, and matters relating to displaced persons from the neighbouring country and those of unknown origin, providing loans and food supplies, drilling hand pumps for water access, planting trees, implementing Small and Medium Enterprise, providing health care services using mobile clinics for people in remote areas, providing sewing training courses, and collaborating with the respective organizations and departments.

10.115 Therefore, the allegation by The Gambia is not correct.

10.116 After the terrorist incidents in 2017, policies were issued and implemented to enable all communities in Rakhine State, both Muslim and non-Muslim, to access government healthcare services without discrimination, and to receive medical treatments in departments of health and public hospitals without discrimination.

10.117 Like everyone else, Bengalis in Rakhine State can equally access necessary healthcare in mobile health teams' temporary clinics, departments of public health, public hospitals and private healthcare activities within Rakhine State, with no restrictions or discrimination. Notices providing "announcements of access to medical treatments without discrimination" are posted in the Myanmar, Rakhine and English languages. Hospitals and clinics that provide healthcare are regarded as Protected Zones for the safety of all people receiving medical treatment. In hospitals/departments of public health, vinyl signboards are displayed which say that it is a "Protected Zone", and that "everyone, regardless of gender, citizen, nationality and religion can access medical treatment".¹⁷⁶⁴

10.118 Bengalis received medical treatments freely in rural health centres, sub-rural health centres, station hospitals and public hospitals within Buthidaung and Maungdaw Townships in Rakhine State during those years. For those who needed medical

¹⁷⁶⁴ Eighth Provisional Measures Report, para. 126 and Annex 9; Ninth Provisional Measures Report, para. 88.

treatment at the General Hospital in Sittwe, the necessary procedures for transfer were arranged.

- 10.119 Among hospitals in northern Rakhine State, arrangements are carried out, with the collaboration of NGO/INGOs, for those from Muslim IDP Camps in Pauk Taw township and villages who need to be hospitalised to be transferred to Sittwe Hospital.
- 10.120 Bengali Muslims from Mrauk-U, Min Bya and Myebon Townships could receive medical treatment freely at Mrauk-U Hospital, Myaung Bwe Station Hospital and Minbya Hospital, Pan Myaung Station Hospital and Myebon Hospital, and if necessary, they could be treated at Sittwe Hospital.
- 10.121 Bengali Muslims from Kyauk Taw Township were freely hospitalised and could access medical treatment at Kyauk Taw Hospital, Ah Pauk Wa Station Hospital and Wei Gyi Dauk Station Hospital.
- 10.122 Bengali Muslims in Rathedaung Township could be hospitalised at Rathedaung Hospital and Ku Taung Station Hospital, and if necessary, arrangements were made for their transfer to get medical treatment at Sittwe Hospital.
- 10.123 For Bengali Muslims in Sittwe to access regular healthcare services, medical services such as Mobile Clinics with the cooperation of INGOs, carrying out public healthcare activities, assisting Thet Kae Pyin Station Hospital, run regularly, and if necessary, patients were transferred to Sittwe General Hospital.
- 10.124 Bengali Muslims from Kyauk Ta Lone IDP camp in Kyauk Phyu Township could receive healthcare services at the nearest health centre, Ohn Taw Gyi rural sub-health centre. They also could be freely hospitalised at Kyauk Phyu Hospital.
- 10.125 The educational opportunities at medical related universities and training schools under the Ministry of Health were given to study without discrimination.
- 10.126 The Gambia argues that the Bengali population on average is poorer than the Rakhine population in Rakhine State.¹⁷⁶⁵ However, while that may be so, the fact that one part of a State's population is poorer than another hardly establishes that the government

¹⁷⁶⁵ RG, para. 5.59 fourth sentence.

of that State has an intent physically or biologically to destroy the former, as such. The Rakhine population in Rakhine State is also poor. The World Bank has stated that in Rakhine State, “per capita GDP is 25 percent below the country average and 78 percent of the population lives below the poverty line”, and that World Bank projects in Rakhine State aim to “help all communities, including the remaining Rohingya”.¹⁷⁶⁶ To the extent that The Gambia may be seeking to insinuate that the Government has a policy of seeking to impoverish the Bengali population, it provides no evidence of this whatsoever. Myanmar is actively developing plans for nationwide development, drafting short-term, medium-term, and long-term plans to ensure balanced implementation across the country. In line with the vision for “sustainable development that includes all people in Rakhine State, allowing them to live peacefully and prosperously”, a regional order has been formulated for Rakhine State. It must be clarified that there is no policy aimed at marginalizing or impoverishing the Bengali community. Any assertion to that effect is inaccurate.

¹⁷⁶⁶ World Bank Group, Statement, “The World Bank and Myanmar’s Rakhine State”, 12 June 2019, RM, Vol. V, Annex 161.

CHAPTER 11

ALLEGED HATE SPEECH

A. Introduction

- 11.1 The Gambia contends that Myanmar has conducted a “campaign of official and officially-sanctioned hate speech carried out over many years, inciting genocide against the Rohingya and indicating Myanmar’s genocidal intent at the time of the ‘clearance operations’”.¹⁷⁶⁷
- 11.2 Myanmar denies this. Chapter 11 of the Counter-Memorial of Myanmar sets out the reasons why The Gambia does not prove these allegations. The Gambia’s reply is set out in Chapter 6 of its Reply. For the reasons below, these allegations of The Gambia should not be accepted by the Court.

B. The problem of hate speech generally

- 11.3 Paragraphs 11.12 to 11.25 of the Counter-Memorial of Myanmar deal with the problem of hate speech generally. These paragraphs note that hate speech is a significant problem in many countries. These paragraphs further note that UN bodies and officials with responsibilities for human rights consider that criminal sanctions for unlawful forms of expression should be seen as last resort measures, in order to respect the right to freedom of expression.
- 11.4 The Gambia provides no substantive response to these paragraphs of the Counter-Memorial of Myanmar. Instead, The Gambia simply resorts to invective, accusing Myanmar of hypocrisy and of being “a State that has only known military or military-dominated governments for decades”.¹⁷⁶⁸ Myanmar declines to respond to such statements, which have nothing to do with the issues in the case.
- 11.5 The point made in the Counter-Memorial of Myanmar is that it would be of no assistance to The Gambia’s case for The Gambia to prove merely that hate speech has

¹⁷⁶⁷ RG, para. 6.1.

¹⁷⁶⁸ RG, paras. 6.26 and 6.27.

existed within the general population in Myanmar, since hate speech exists within the general population in many countries, and hate speech expressed by members of the general public in a particular country says nothing about the intent of the government or military of that country. The Gambia has not sought to dispute this. The Gambia's own case is that there was a *campaign* of hate speech that was conducted by the Government and the Myanmar Defence Services *themselves*.¹⁷⁶⁹ It therefore appears to be undisputed that this is what The Gambia must prove.

- 11.6 As has already been explained in the Counter-Memorial of Myanmar, many of the examples of claimed hate speech relied on by The Gambia were not in fact made by officials of, and are not otherwise attributable to, the Government of Myanmar or the Myanmar Defence Services.¹⁷⁷⁰ In particular, for the reasons given in the Counter-Memorial of Myanmar, statements of Buddhist monks and religious figures are not attributable to the Government or the Myanmar Defence Services.¹⁷⁷¹ The Gambia does not apparently dispute this, but states that the Tatmadaw's senior leadership is "closely intertwined" with certain monks, and that "What matters most ... is that the hate speech of the extremist monks was integrated into Myanmar's anti-Rohingya hate campaign", and that "Myanmar disseminated hate speech from the monks on the Facebook Pages that it secretly controlled".¹⁷⁷² The Gambia thereby now appears to accept that statements by religious figures are not in fact attributable to the Government or the Myanmar Defence Services, and cannot be considered part of any "campaign" by the Government or the Myanmar Defence Services, except to the extent that such statements by religious figures were disseminated by the Government or the Myanmar Defence Services themselves. If so, paragraphs 7.43 to 7.64 of the Memorial of The Gambia are no longer relevant.

¹⁷⁶⁹ See in particular CMM, paras. 11.2, 11.3, 11.7 and 11.25; RG, paras. 6.26 ("Myanmar's ... own multi-year anti-Rohingya hate campaign"), 6.27 ("Myanmar, the State, through its military and other official security forces, engaged in a prolonged and persistent hate campaign").

¹⁷⁷⁰ See especially CMM, paras. 11.64, 11.67, 11.88, 11.90, and 11.93-11.109.

¹⁷⁷¹ See especially CMM, paras. 11.114-11.142. RG, para. 6.35, maintains that statements by political parties should be attributable to the Government. That is disputed, for the reasons already given in CMM, paras. 11.96 and 11.99. The statements of the political parties concerned were published on their own initiative, without authorization from the Government, and did not reflect Government policy.

¹⁷⁷² RG, para. 6.36.

- 11.7 Furthermore, contrary to what The Gambia seeks to argue, statements made by a political party represented in the Rakhine State legislature cannot be attributed to the Government of Myanmar.¹⁷⁷³ By law in Myanmar, political parties are free to express their own opinions, which cannot be taken to reflect the will or the opinion of the government.
- 11.8 The Gambia's contention that the Government of Myanmar itself has been conducting a campaign of hate speech is unsubstantiated, and is denied by Myanmar. The Government of Myanmar has been taking steps to combat hate speech within its population. Steps taken to combat hate speech have been described in Myanmar's regular Provisional Measures Reports.¹⁷⁷⁴ For instance, since 2016, the educational curriculum in its schools includes a subject of morality and civics taught from Grade-1 to Grade-11 in which the peaceful coexistence of different religions is taught.¹⁷⁷⁵
- 11.9 It is similarly denied that the Myanmar Defence Services has conducted any such campaign of hate speech. It has not authorized or permitted any organization or individual to engage in the dissemination of hate speech. On 4 August 2020, the Office of the Adjutant General issued, to all Command Headquarters, all Sub-Regional Command Headquarters, all Light Infantry Division Headquarters, and all Mobile Operation Command Headquarters Measures, instructions for implementation of the Directive on Prevention of incitement to hatred and violence (or) Prevention of proliferation of hate speech, issued by the Office of the President on 20 April 2020.¹⁷⁷⁶

¹⁷⁷³ RG, para. 6.35.

¹⁷⁷⁴ First Provisional Measures Report, paras. 89(3), 92, 106-117, 167; Second Provisional Measures Report, paras. 41-44, 62-69, 98, 100; Third Provisional Measures Report, paras. 26, 40-42, 62, 65; Fourth Provisional Measures Report, paras. 30, 58-59, 94; Fifth Provisional Measures Report, paras. 36, 38, 49-54; Sixth Provisional Measures Report, paras. 17, 19-20, 30-34; Seventh Provisional Measures Report, paras. 24, 35-38; Eighth Provisional Measures Report, paras. 56, 71-76; Ninth Provisional Measures Report, paras. 23, 28-32; Tenth Provisional Measures Report, paras. 18, 23-26, 37-38.

¹⁷⁷⁵ See, for instance, Myanmar, Ministry of Education, Textbook, Morality and Civics, Grade 6, 7, 8, 10, Chapter 4, "Peaceful coexistence", RM, Vol. III, Annex 78: "In dealing with other people, peace can only be built when people treat each other as equals, regardless of race, religion, wealth, or poverty. ... To achieve peace, citizens of the country, irrespective of gender, race, religion, age, or geographical location, must take the initiative and participate actively. ... People who live together in a society or country may have diverse genders, religions, races, ethnicities, socioeconomic levels and birthplaces. Social equality is defined as equitable access to opportunities and resources, regardless of these variations."

¹⁷⁷⁶ Myanmar, Office of the Commander-in-Chief of Myanmar (Army), Office of the Adjutant General, Letter No. 1/ 85/ 727/ Adjutant 3(C), 4 August 2020, RM, Vol. III, Annex 72. See also First Provisional Measures Report, paras. 89(3) and 92.

The Myanmar Defence Services are closely monitoring and regulating the use of social media by its personnel. Regarding the recent violent attacks in northern Rakhine State, it can be firmly stated that the expression of individual personal sentiments in this context has no connection with the Myanmar Defence Services and does not represent its position.

C. Hate speech alleged in the Memorial of The Gambia

- 11.10 Paragraphs 11.26 to 11.37 of the Counter-Memorial of Myanmar note that certain forms of speech do *not* fall within the definition of “hate speech” in international law. For the reasons there given, it is for instance *not* hate speech to fail to use the name “Rohingya” to refer to Muslims in northern Rakhine State, or to use instead the name “Bengali”, or to express (correct or incorrect) opinions or interpretations of past events, or to express the view that there is no “race” called the “Rohingya” or that Bengali Muslims are not natives of Myanmar.
- 11.11 The Gambia provides no substantive response to these paragraphs of the Counter-Memorial of Myanmar. Instead, The Gambia merely resorts to emotive rhetoric, saying that it is an “impossible task” to “sanitize” or “clean up” the statements in question.¹⁷⁷⁷
- 11.12 The Reply of The Gambia asserts that “Myanmar strains to explain why its anti-Rohingya speech is not hate speech”, and that “Myanmar fails to show how this speech does not seek to dehumanize and stigmatize the Rohingya to justify ... their destruction as a group”.¹⁷⁷⁸ The Gambia thereby overlooks the fact that the burden of proof is on The Gambia to prove what it alleges, and that there is no burden on Myanmar to disprove what The Gambia alleges. Myanmar does not unnecessarily repeat what is stated in its Counter-Memorial in this respect.¹⁷⁷⁹

¹⁷⁷⁷ RG, para. 6.31.

¹⁷⁷⁸ RG, para. 6.28.

¹⁷⁷⁹ RG, para. 6.31 contains an additional reference to a passage in the *IIMM Hate Speech Report* (see paragraphs 11.18-11.42 below), which refers to a post on a Facebook page dealing with the invasion of Poland by Nazi Germany in 1939. It is noted that the *IIMM Hate Speech Report* itself says that this post “was not counted as hate speech against Rohingya”, and states only that it is “very possible” that the purpose this post “was to persuade readers that allegations of genocide are political and unreliable”. See RG, Vol. II, Annex 5, p. 73, para. 196.

- 11.13 The Reply of The Gambia implies that it amounts to “hate speech” for Myanmar as a State to have a policy “‘that citizenship should not be given’ to the Rohingya”.¹⁷⁸⁰ In fact, Myanmar does not have such a policy. Details of Myanmar’s citizenship legislation from the time of Burma’s independence until the present are given in paragraphs 10.13 to 10.38 of the Counter-Memorial of Myanmar. As is there explained, some Bengali Muslims have (full) Citizenship or Associate Citizenship of Myanmar, and others have or are entitled to obtain Naturalised Citizenship, which can lead to their children or grandchildren obtaining (full) Citizenship. Some Bengali Muslims do not have citizenship of Myanmar because they or their ancestors did not apply for Burmese citizenship at a time when they were fully entitled to do so. Others are not entitled to citizenship of Myanmar because they or their ancestors were illegal immigrants. In any event, the Reply of The Gambia does not identify any statement by the Government of Myanmar about the citizenship laws that would fall within the international law definition of *hate speech*. It is impossible to see how a mere expression of a view as to who should or should not be entitled to citizenship of a country could of itself amount to hate speech.
- 11.14 The Reply of The Gambia now begrudgingly acknowledges that the motto of the Ministry of Labour, Immigration and Population, “Race cannot be swallowed by the ground but only by another race”, is “in theory perhaps” not directed against any group.¹⁷⁸¹ The Reply of The Gambia nonetheless asserts, without providing any justification, that in practice it has been “directed at and weaponized against the Rohingya”.¹⁷⁸² However, the only specific examples of the use of this expression given in the text of The Gambia’s pleadings consist of a speech of Senior General Min Aung Hlaing and a presentation by a trainee officer of the Myanmar Defence Services,

¹⁷⁸⁰ RG, para. 6.30.

¹⁷⁸¹ RG, para. 6.32. In fact, this motto was first used in a speech by U Mye, Chairperson of the General Council of Burmese Associations, at a conference of that organisation in 1921, with reference to the need for Burma to obtain independence from British colonial rule: see Dr Myint Khine, *Depeyin History* (2017-2018), pp. 236-239, RM, Vol. II, Annex 43. Due to unrestricted immigration during the British colonial period, when Burma was part of British India, by 1900 “in most of the largest cities in Burma – Rangoon (Yangon), Akyab (Sittwe), Bassein (Patheingyi), Moulmein – the Indian immigrants formed a majority of the population”, and “Rangoon [Yangon] was more or less an Indian city, and it remained so until the 1930s”: D. Ghosh, “Burma–Bengal Crossings: Intercolonial Connections in Pre-Independence India”, *Asian Studies Review*, vol. 40 (2016), pp. 156-172, at p. 159, RM, Vol. II, Annex 41. See also the first footnote to paragraph 2.2(1) above.

¹⁷⁸² RG, para. 6.32.

which are explained in the Counter-Memorial of Myanmar, at paragraphs 11.52 to 11.60 and 11.95 respectively. The Gambia has not demonstrated that this motto was “directed at and weaponized against the Rohingya”.

11.15 The Reply of The Gambia still maintains, untenably, that a letter sent by the Ambassador of Myanmar to the Chair of the Foreign Relations Committee of the lower house of the British Parliament in October 2017 somehow amounted to *hate speech*.¹⁷⁸³ There is in fact no suggestion by The Gambia that anything contained in the letter itself amounted to hate speech. The letter listed 10 press releases and other documents that are said to have been provided with the letter. The Gambia contends that *one* of those ten items, an article written by Rick Heizman, included content that amounted to hate speech, to the effect that Bengali Muslims had repeatedly attacked others in the region and would continue to do so if allowed to live there. Even if this content of this article were to be characterised as hate speech (and it is not accepted that this has been established¹⁷⁸⁴), the fact that *one* of ten items sent with a letter included such content does not mean that the letter itself can be characterised as hate speech, or that the letter can be taken to have “officially espoused” everything stated in each of the ten items.

11.16 The Reply of The Gambia now provides an internet link to *one* of the four videos that The Gambia claims were sent by Myanmar’s Ministry of Foreign Affairs to “several UN offices”.¹⁷⁸⁵ The video itself is not annexed to the Reply of The Gambia as required by Article 50, paragraph 1, of the Rules of Court. The Gambia states incorrectly in relation to these videos that Myanmar does not deny “that these

¹⁷⁸³ See MG, para. 7.17 footnote 534; CMM, paras. 11.62-11.63; RG, paras. 6.33-6.34.

¹⁷⁸⁴ For instance, according to one scholar: “The recent wave of anti-Muslim sentiment in the US which developed out of this period [following the 9 September 2001 (“9/11”) attacks], encouraged by political leaders and media outlets, culminated in the 2016 Presidential race in which Donald Trump famously called for a ban on Muslims entering the US. The present dissertation argues that public fear of terrorism is a proxy measure for racial and other identity-based anxieties and one of many perceived threats to the dominant culture in America posed by non-white foreigners. This is fueled by nearly two decades of propaganda efforts and media portrayals of terrorists as a foreign, Arab, Muslim threat to the US homeland and way of life”. See R.C. Reis-Beattie, “Fear and Loathing in Post 9/11 America: Public Perceptions of Terrorism as Shaped by News Media and the Politics of Fear”, (2020) Doctoral Dissertations, 2502, p. 3, RM, Vol. II, Annex 46. However, this author did not suggest that this encouragement on the part of political leaders or media outlets amounted to “hate speech”, much less to evidence of a genocidal intent, even though he accepts that there was a rise in hate crimes in the United States the same period (*ibid.*, p. 71).

¹⁷⁸⁵ See MG, para. 7.17; CMM, para. 11.61; RG, para. 6.33.

materials were sent by elements of Myanmar’s Ministry of Foreign Affairs’’:¹⁷⁸⁶ In fact, the Ministry of Foreign Affairs never shared the video link formally. It could be the case that the video was shared by somebody on their own volition. The Counter-Memorial of Myanmar states that Myanmar is no longer able to access the actual messages in question, and The Gambia’s only evidence of them is a media article. The Gambia incorrectly states that “their hateful character is established by the Fact-Finding Mission report”.¹⁷⁸⁷ If The Gambia alleges that they have a hateful character, it is for the Court, not the FFM, to determine whether The Gambia has proved this allegation. The Court cannot conclude that videos have a “hateful character” merely because the FFM said that this was the case. Furthermore, even if one or more statements in this video were to be characterised as hate speech, this would not mean that anyone forwarding the video to others could be characterised as engaging in hate speech, or as having “officially espoused” everything stated in the video. The video in question was produced by a citizen of the United States of America and presents alternative perspectives on Rakhine issues. Even if the video was shared, this might have been for the purpose of demonstrating that different perspectives exist.

- 11.17 Paragraph 6.35 of the Reply of The Gambia merely expresses disagreement with what is stated in the Counter-Memorial of Myanmar, the contents of which are not unnecessarily repeated. The Counter-Memorial of Myanmar notes that two articles in *The Global New Light of Myanmar*, referred to in the Memorial of The Gambia, deal specifically with terrorism and extremism, not with the Bengali population in general. The Reply of The Gambia retorts that “the object and purpose of such hate speech is to treat all Rohingya as terrorists”.¹⁷⁸⁸ However, no justification is given by The Gambia for this claim in relation to these two articles. The Gambia in effect merely asserts that all statements should be given whatever interpretation that The Gambia says should be put upon them.

¹⁷⁸⁶ RG, para. 6.33.

¹⁷⁸⁷ RG, para. 6.33.

¹⁷⁸⁸ RG, para. 6.35.

D. Hate speech alleged in the IIMM *Hate Speech Report*

- 11.18 The Gambia says that “[s]ince the filing of The Gambia’s Memorial, more evidence of this [hate speech] campaign, and its indication of genocidal intent, has become available”.¹⁷⁸⁹ This new evidence is said to consist of extracts from an analytical report produced by the Independent Investigative Mechanism for Myanmar (“IIMM”) in 2023 (the “IIMM *Hate Speech Report*”),¹⁷⁹⁰ and an affidavit by the Head of Security Policy at the parent company of Facebook.¹⁷⁹¹ However, this evidence does not prove the claims made by The Gambia.
- 11.19 The IIMM *Hate Speech Report* is limited in scope. On 28 August 2018, the parent company of Facebook announced that it had removed 18 Facebook accounts, one Instagram account and 52 Facebook Pages.¹⁷⁹² Facebook announced the removal of yet further Facebook pages, Facebook groups, Facebook accounts and Instagram accounts on 15 October 2018 and 18 December 2018,¹⁷⁹³ and on 21 August 2019.¹⁷⁹⁴ However, the IIMM *Hate Speech Report* only considers the 52 Facebook pages that were taken down on 28 August 2018, and not the Facebook pages removed on 15 October 2018, 18 December 2018, or 21 August 2019. Furthermore, the report examines these Facebook pages only for the period between July and December 2017, a short 5 month period.¹⁷⁹⁵

¹⁷⁸⁹ RG, para. 6.1.

¹⁷⁹⁰ United Nations Independent Investigative Mechanism for Myanmar, *Anti-Rohingya Hate Speech on Facebook: Content and Network Analysis* (2023) (the “IIMM *Hate Speech Report*”), RG, Vol. II, Annex 5.

¹⁷⁹¹ Until 2021, the parent company of Facebook was called Facebook, Inc. (“Facebook”). In 2021, it changed its name to Meta Platforms, Inc. (“Meta”).

¹⁷⁹² Facebook, “Removing Myanmar Military Officials From Facebook”, 28 August 2018, MG, Vol. IX, Annex 292, under the heading “Original post published on August 28, 2018”.

¹⁷⁹³ See *ibid.*, under the headings “Update added on October 15, 2018 at 8:37 AM PST to include additional takedowns”, and “Update added on December 18, 2018 at 5:00PM PT to include additional takedowns”. See also the affidavit of Nathaniel Gleicher, paras. 8-11, RG, Vol. IV, Annex 52.

¹⁷⁹⁴ Facebook, “Taking Down More Coordinated Inauthentic Behavior in Myanmar”, by N. Gleicher, 21 August 2019, MG, Vol. IX, Annex 314.

¹⁷⁹⁵ IIMM *Hate Speech Report*, Executive Summary, para. 3, and p. 2, para. 5, RG, Vol. II, Annex 5.

- 11.20 The IIMM *Hate Speech Report* states that of the 52 Facebook pages considered, nine had no public content in the period under review, and that the report accordingly analyses only the remaining 43.¹⁷⁹⁶
- 11.21 Six of these 43 were Facebook pages of Senior General Min Aung Hlaing, the Office of the Commander-in-Chief of Defence Services, the Myawady media network, and Phay Sit Gyi.¹⁷⁹⁷ These six Facebook pages were taken down, not because Facebook considered that there was anything objectionable in these pages, but because “international experts” and the FFM had found that the individuals and organizations concerned “committed or enabled serious human rights abuses in the country”.¹⁷⁹⁸ It is therefore not objectively correct for the IIMM, as it does, to describe these as pages that “Meta removed from its Facebook platform for human rights abuses”, or as “HR designation takedown Pages”.¹⁷⁹⁹ Meta (the parent company of Facebook) did not find that any of the pages taken down constituted human rights abuses, nor did Meta itself determine that any of the individuals and organizations concerned committed human rights abuses. Meta merely acted on the views of “international experts” and the FFM.
- 11.22 The remaining 37 of the 43 Facebook pages were taken down for what Facebook considered to be “coordinated inauthentic behaviour”.¹⁸⁰⁰ “Coordinated inauthentic behaviour” means that Facebook considered that the people behind the activity had used fake accounts “to promote their content, increase engagement, and manage Groups and Pages”.¹⁸⁰¹ As has already been noted in the Counter-Memorial of Myanmar, Meta stated expressly that “We’re removing these Pages, Groups and

¹⁷⁹⁶ *Ibid.*, p. 2, para. 3.

¹⁷⁹⁷ *Ibid.*, Executive Summary, p. 3, para. 8. Myawady media is owned by the Myanmar Defence Services. “Phay Sit Gyi” is an unknown account name. The IIMM *Hate Speech Report*, *ibid.*, at p. 2, footnote 13, acknowledges that “It is not known to be the name of any individuals or organizations within the Myanmar military”.

¹⁷⁹⁸ See CMM, para. 6.74; IIMM *Hate Speech Report*, Executive Summary, p. 2, para. 6, RG, Vol. II, Annex 5; affidavit of Nathaniel Gleicher, para. 8, RG, Vol. IV, Annex 52.

¹⁷⁹⁹ IIMM *Hate Speech Report*, Executive Summary, p. 3, para. 7, RG, Vol. II, Annex 5.

¹⁸⁰⁰ Facebook, “Removing Myanmar Military Officials From Facebook”, 28 August 2018, MG, Vol. IX, Annex 292; IIMM *Hate Speech Report*, Executive Summary, p. 2, para. 6, RG, Vol. II, Annex 5.

¹⁸⁰¹ CMM, para. 11.81. See also the affidavit of Nathaniel Gleicher, paras. 2 and 4, RG, Vol. IV, Annex 52.

accounts based on their behaviour, not the content they posted”.¹⁸⁰² There is no suggestion that Meta considered these pages to contain hate speech.

11.23 The 43 Facebook pages examined in the IIMM *Hate Speech Report* are said to have contained over 817,238 items.¹⁸⁰³ Of these, only 10,485 items (some 1.2 percent) were considered to fall within the definition of “hate speech” *used by the IIMM or for the purposes of the report*. However, the report notes that many of these items were simply duplicate posts of other items, and that ultimately, only 4,232 unique items (some 0.52 percent of the total of 817,238 items) contained material falling within the definition of hate speech *used by the IIMM*.

11.24 As to the definition of “hate speech” used by the IIMM in the report, this was *not* the definition of “hate speech” in international law. The report states that it does *not* “purport to delineate between speech that a government must censure and speech that must be tolerated in order to conform to free speech guarantees”.¹⁸⁰⁴ In other words, the definition adopted by the IIMM for purposes of that report would characterise as “hate speech” even statements that the Government of Myanmar is required by international law to tolerate in order to respect the human right of free speech. The report furthermore states that the definition of “hate speech” that it uses is “not intended as a legal test of when speech constitutes incitement to crimes”.¹⁸⁰⁵

11.25 Rather, the definition of “hate speech” used in the report is as follows:

For the purposes of this analytical project, the [IIMM] considered content to amount to “hate speech” if, in the view of the [IIMM], it appeared that the content was intended or likely to influence its Facebook audience to fear the target group, hate the target group and/or to encourage, support or excuse discriminatory measures or violence directed against the target group, with the target group in this case being persons of Rohingya ethnicity or Muslims in general.¹⁸⁰⁶

11.26 This definition is completely subjective. Whether or not a statement falls within this definition is said expressly to depend entirely on “the view of the [IIMM]”. The report

¹⁸⁰² CMM, para. 11.81.

¹⁸⁰³ IIMM *Hate Speech Report*, pp. 4, 6, paras. 11 and 19, RG, Vol. II, Annex 5.

¹⁸⁰⁴ *Ibid.*, p. 4, para. 13.

¹⁸⁰⁵ *Ibid.*

¹⁸⁰⁶ *Ibid.*, quoted in RG, para. 6.8.

itself openly acknowledges that “[t]he assessment as to whether particular content meets the definition of hate speech applied by the [IIMM] is necessarily subjective”.¹⁸⁰⁷

11.27 This definition is also inexplicably broad. It is not confined to statements that, for instance, would likely lead a person to hate a particular group, or incite a person to commit violence against a group. It certainly is not confined to statements that would incite a person to commit *genocide* against a particular group. Instead, this definition of the IIMM would apply even to statements that would be likely to *influence* a person to *excuse* certain measures that the *IIMM* considers to be *discriminatory*. The definition is so broad that statements falling within it would presumably include the decision of the Advisory Commission on Rakhine State (which was chaired by the late former UN Secretary-General, Mr. Kofi Annan) that it would not use the name “Rohingya”,¹⁸⁰⁸ and the statements by that Commission and by the Special Envoy of the UN Secretary-General on Myanmar that were supportive of the National Verification Card (NVC) process.¹⁸⁰⁹ The witness statement of Andrew Riley filed by The Gambia notes that many international NGOs also do not use the word “Rohingya”, and that in the case of Action Contre la Faim, the decision not to do so went all the way to its headquarters in Paris.¹⁸¹⁰ On the IIMM’s definition, all of these NGOs were willing to participate in “hate speech”.

11.28 This definition is furthermore tendentious. For instance, it classifies as “hate speech” a post on the Facebook page of the Office of the Commander-in-Chief of Defence Services disowning allegations of rape.¹⁸¹¹ The reasoning of the report is that this post, when juxtaposed with media articles from Agence France-Presse (AFP), “gives the effect of the AFP report coming across as ‘fake news’”.¹⁸¹² The assumption of the

¹⁸⁰⁷ IIMM *Hate Speech Report*, p. 4, para. 14, RG, Vol. II, Annex 5.

¹⁸⁰⁸ See CMM, paras. 2.166 and 11.17, read in the light of paragraph 11.30 below.

¹⁸⁰⁹ See CMM, paras. 11.89-11.90, read in the light of IIMM *Hate Speech Report*, p. 28, para. 85, RG, Vol. II, Annex 5, which indicates that an example of “hate speech” is “urging the government ‘to protect the 1982 citizenship law’”. See also *ibid.*, p. 10, para. 29 footnote 44, which gives as an example of “hate speech” a statement that “the citizenship law of Myanmar [is] similar to those of every country, needs of Bengalis to accept necessary scrutiny in line with the 1982 Myanmar’s Citizenship Law and to accept the NVC cards”.

¹⁸¹⁰ IIMM, Witness Statement No. IIMM0001557475 (Andrew Riley), para. 57, RG, Vol. IV, Annex 48.

¹⁸¹¹ IIMM *Hate Speech Report*, p. 16, para. 49, RG, Vol. II, Annex 5.

¹⁸¹² *Ibid.*

report appears to be that all allegations against Myanmar are true, and that any denial of such allegations by Myanmar will amount to “hate speech”.

- 11.29 The IIMM *Hate Speech Report* indicates that statements will be considered to be “hate speech” for purposes of the report if they fall within “commonly deployed discriminatory or derogatory themes” or “hate speech narratives”.¹⁸¹³
- 11.30 One of these “hate speech narratives” is said to be “denial of the Rohingya identity as a distinct ethnicity and/or as natives of Myanmar”.¹⁸¹⁴ This suggests that any reference to any of the historical facts set out in Chapter 2 of the Counter-Memorial of Myanmar or in Chapter 2 of this Rejoinder would be considered by the IIMM to be “hate speech”. The omission of “Rohingya” from the list of 135 national races,¹⁸¹⁵ and references to the fact of that omission, are similarly characterised as “hate speech”.¹⁸¹⁶ According to the IIMM’s definition, Article 153 of the Constitution of Malaysia would constitute “hate speech”,¹⁸¹⁷ as would provisions of the constitutions of various other States.¹⁸¹⁸ According to the IIMM, referring to a Bengali Muslim from northern Rakhine State as a “Bengali” would of itself be hate speech,¹⁸¹⁹ despite the fact that the term “Bengali” has been used internationally into the 21st century.¹⁸²⁰
- 11.31 Other statements said by the report to fall within “hate speech narratives” include references to “pro-Rohingya” statements made by terrorist groups such as Islamic State of Iraq and Syria (ISIS),¹⁸²¹ statements approving of the Monogamy Law,¹⁸²²

¹⁸¹³ *Ibid.*, p. 5 and 8-9, paras. 16 and 25.

¹⁸¹⁴ *Ibid.*, p. 8, para. 25(a).

¹⁸¹⁵ See CMM, paras. 2.2 and 10.30.

¹⁸¹⁶ IIMM *Hate Speech Report*, pp. 9-10, paras. 28-29, RG, Vol. II, Annex 5. See also RG, para. 6.9 footnote 486, giving the following examples of claimed “hate speech”: “Rohingya is not recognized by the State”, “Rohingya is not the name of an ethnic group”.

¹⁸¹⁷ See CMM, paras. 11.31-11.33.

¹⁸¹⁸ See CMM, paras. 10.51-10.52.

¹⁸¹⁹ IIMM *Hate Speech Report*, p. 10, para. 29, RG, Vol. II, Annex 5, giving the following examples of claimed “hate speech”: “they are Bengali”, “Call Bengali Bengali”. RG, para. 6.9 footnote 486, also cites these as examples of “hate speech”.

¹⁸²⁰ See CMM, paras. 2.147-2.153.

¹⁸²¹ IIMM *Hate Speech Report*, p. 10, para. 31, RG, Vol. II, Annex 5.

¹⁸²² *Ibid.*, pp. 12-13, paras. 36-37, giving as an example of hate speech the statement “make sure there are only families that uphold the ‘monogamy law’”.

statements referring to the destruction of Buddhist statues by ARSA,¹⁸²³ or statements that some Bengali Muslims left Myanmar because they were threatened by ARSA terrorists.¹⁸²⁴ The IIMM appears to consider that such statements would fall within its own definition of “hate speech”, regardless of whether or not they are true, on the ground that they are considered by the IIMM to fall within the “hate speech narratives” that “the Rohingya [are] an existential threat to Myanmar”, that “the Rohingya [are] a threat to racial purity of the recognised Myanmar ethnic people”, that “Islam [is] a threat to Buddhist religious sanctity”, and that “crimes against [the Rohingya are] fabrications”.¹⁸²⁵ The sheer breadth of the IIMM definition is readily apparent.

11.32 Ultimately, The Gambia contends that the 4,232 unique items posted on 43 Facebook pages “incited genocide against the Rohingya”, and establish the existence of a genocidal intent. The burden of proof is on The Gambia to establish this claim, and not on Myanmar to disprove it. In these proceedings, the Court itself, and not the IIMM, must decide whether this claim is established. The Court itself must look at the primary evidence. It is obvious that the IIMM’s definition of “hate speech” includes many kinds of statements that would never be considered “hate speech” within the normal meaning of that word, let alone be considered evidence of a genocidal intent. For instance, in 1998, the Governor of Assam State in India expressed the view to the President of India that illegal immigration into Assam from East Pakistan/Bangladesh over several decades had altered the demographic complexion of the State, and posed a grave threat both to the identity of the Assamese people and to India’s national security.¹⁸²⁶ On the definition of the IIMM and The Gambia, this would amount to hate speech by the Governor of Assam. On the reasoning of The Gambia, this would also amount to proof of a genocidal intent on the part of the Governor of Assam. That is clearly absurd.

11.33 Myanmar cannot respond to every instance of claimed “hate speech” in the IIMM report. Nor can Myanmar be expected to do so. It is for The Gambia to set out

¹⁸²³ *Ibid.*, p. 13, para. 40.

¹⁸²⁴ *Ibid.*, pp. 14-15, para. 45.

¹⁸²⁵ *Ibid.*, pp. 8-9, para. 25.

¹⁸²⁶ Report on Illegal Migration into Assam, Submitted to the President of India by the Governor of Assam, 8 November 1998, RM, Vol. V, Annex 184.

specifically in its pleadings what statements are said to have “incited genocide against the Rohingya people”, and Myanmar therefore confines itself to responding to what is stated in The Gambia’s Reply itself.¹⁸²⁷ The Reply of The Gambia gives ten specific examples of claimed “hate speech” found in these Facebook pages.¹⁸²⁸ It is to be presumed that these are the ten most egregious instances that The Gambia was capable of finding in the IIMM *Hate Speech Report*, and that the limited examples in that report are the most egregious that the IIMM was able to find amongst the 4,232 unique items that were considered by it to contain material falling within its own extremely broad definition of “hate speech”.¹⁸²⁹

11.34 The central message of each of the ten examples given by The Gambia can reasonably be understood to be as follows:

- (1) Buddhists should not marry non-Buddhists.¹⁸³⁰
- (2) Bengali Muslims were taking over northern Rakhine State, and Buddhists should be “vigilant”.¹⁸³¹
- (3) The invasion of Poland by Nazi Germany in 1939 was justified by preceding killings of ethnic Germans in Poland.¹⁸³²
- (4) A well-known singer, who was an ethnic Karen, had posted on his Facebook account that he was ready to take up a gun in response to the “West Rakhine Gate” being broken down [presumably a reference to ARSA attacks in northern

¹⁸²⁷ See CMM, paras. 1.31-1.32.

¹⁸²⁸ RG, paras. 6.13-6.23.

¹⁸²⁹ The IIMM *Hate Speech Report* at pp. 54-105 gives 12 “Examples of Hate Speech Narratives”, and at pp. 106-228 gives 29 “Emblematic Examples of Hate Speech to Show Coordination across Identified Military Network”.

¹⁸³⁰ See RG, para. 6.13, quoting a post in the IIMM *Hate Speech Report*, pp. 62-63, paras. 189-190. The quote uses the word “Kalar”, which does not necessarily specifically mean Bengali Muslims, but can include others originating from places to the west of Myanmar: see CMM, paras. 2.169-2.170. The post refers to “Chinese and Kalar of different religions” (*ibid.*, p. 62).

¹⁸³¹ See RG, para. 6.14, quoting a post in the IIMM *Hate Speech Report*, p. 66-67, paras. 192-193.

¹⁸³² See RG, para. 6.15, quoting a post in the IIMM *Hate Speech Report*, pp. 71-73, paras. 195-196. See also RG, para. 6.31. In fact, the IIMM *Hate Speech Report* itself says that this post “was not counted as hate speech against Rohingya”, and that it is only “very possible” that the purpose of this post “was to persuade readers that allegations of genocide are political and unreliable”. See RG, Vol. II, Annex 5, p. 73, para. 196.

Rakhine State], and the spirit of another singer who agreed with the post was to be respected.¹⁸³³

- (5) Villagers did not need to be afraid and flee because of advancing attackers from the adjacent Bengali village because soldiers were there to protect the village (an interpretation disputed by The Gambia).¹⁸³⁴
- (6) Jihad attacks in Indonesia and Bangladesh had resulted in deaths of Buddhists in their homes, and ethnic Rakhine people in Myanmar should be prepared for such attacks.¹⁸³⁵
- (7) Bengali Muslims in northern Rakhine State burned their own homes in order to gain advantage from the international attention this would attract.¹⁸³⁶
- (8) Recent opening up and transparency, and activities of the UN and NGOs, had led Bengali Muslims to agitate for a seat at the political table, which would be resisted.¹⁸³⁷
- (9) The inability to free oneself from obsession with one's already committed crime / sin will only make his suffering worse.¹⁸³⁸
- (10) Certain politicians have acted too much in the interests of Muslims.¹⁸³⁹

11.35 These posts to social media can be contrasted with the media statements in Rwanda that were found by the International Criminal Tribunal for Rwanda to evidence a

¹⁸³³ See RG, paras. 6.16-6.17, quoting a post in the IIMM *Hate Speech Report*, pp. 81-82, paras. 207-209.

¹⁸³⁴ See CMM, paras. 13.82-13.84; RG, para. 6.18, quoting a post in the IIMM *Hate Speech Report*, pp. 158-161, paras. 320-322 (not included in the extract at RG, Vol. II, Annex 5). In the English translation appearing in RG, para. 6.18, a slang word in the Myanmar language has been translated as "these animals". The correct translation would be "these guys".

¹⁸³⁵ See RG, para. 6.19, quoting a post in the IIMM *Hate Speech Report*, pp. 180-182, paras. 360-362 (not included in the extract at RG, Vol. II, Annex 5).

¹⁸³⁶ See RG, para. 6.20, quoting a post in the IIMM *Hate Speech Report*, p. 84, para. 210.

¹⁸³⁷ See RG, para. 6.21, quoting a post in the IIMM *Hate Speech Report*, pp. 98-99, paras. 228-229.

¹⁸³⁸ See RG, para. 6.22, quoting a post in the IIMM *Hate Speech Report*, p. 218, para. 410 (not included in the extract at RG, Vol. II, Annex 5). The Reply of The Gambia omits from the quote the sentence: "The morale of the story is that the inability to free oneself from obsession with one's already committed crime/ sin will only make his suffering worse."

¹⁸³⁹ See RG, para. 6.23, quoting a post in the IIMM *Hate Speech Report*, pp. 225-227, para. 425 (not included in the extract at RG, Vol. II, Annex 5).

genocidal intent and to amount to direct and public incitement to commit genocide. In the case of Rwanda, these included media statements with express and unequivocal calls for all Tutsis in Rwanda to be killed.¹⁸⁴⁰ The Trial Chamber of the ICTR said that:

Many of the RTLM [Radio Télévision Libre des Mille Collines] broadcasts explicitly called for extermination. In the 13 May 1994 RTLM broadcast, Kantano Habimana spoke of exterminating the *Inkotanyi* so as “to wipe them from human memory”, and exterminating the Tutsi “from the surface of the earth ... to make them disappear for good”. In the 4 June 1994 RTLM broadcast, Habimana again talked of exterminating the *Inkotanyi*, adding “the reason we will exterminate them is that they belong to one ethnic group”. In the 5 June 1994 RTLM broadcast, Ananie Nkurunziza acknowledged that this extermination was underway and expressed the hope that “we continue exterminating them at the same pace”. On the basis of all the programming he listened to after 6 April 1994, Witness GO testified that RTLM was constantly asking people to kill other people, that no distinction was made between the *Inyenzi* and the Tutsi, and that listeners were encouraged to continue killing them so that future generations would have to ask what *Inyenzi* or Tutsi looked like.¹⁸⁴¹

- 11.36 The examples of claimed “hate speech” given in the Reply of The Gambia are simply not comparable. There is no way that even the ten most egregious examples that The Gambia could find could be characterised as incitement to commit genocide or as evidence of a genocidal intent.
- 11.37 Furthermore, as has been noted above, The Gambia apparently accepts that it is required to prove that there was a *campaign* of hate speech that was conducted by the Government and the Myanmar Defence Services *themselves*.¹⁸⁴² Myanmar denies that there was any such campaign, and The Gambia has not proved that there was. First,

¹⁸⁴⁰ See, for instance, International Criminal Tribunal for Rwanda, *Nahimana*, ICTR-99-52- T, Judgment and Sentence, Trial Chamber, 3 December 2003, RM, Vol. II, Annex 12, at paras. 425 (“At all costs, all *Inkotanyi* have to be exterminated, in all areas of our country. Whether they reach at the airport or somewhere else, but they should leave their lives on the spot”), 427 (“If someone has a false identity card, if he is *Inkotanyi*, a known accomplice of RPF, don’t accept anything in exchange. He must be killed”), 437 (“RTLM was constantly asking people to kill other people ... And they said that they should continue to search for those people and kill them so that the future generations would have to actually ask what *Inyenzi* looked like, or, ultimately, what Tutsis looked like”), 451 (“Mugenzi ... was saying that in 1959 they had sent the Tutsi away but that this time around they were not going to send them away, they were going to kill them, that the Hutu should kill all the Tutsi - the children, women and men - and if they had come back it is because they were not killed last time”).

¹⁸⁴¹ *Ibid.*, para. 483.

¹⁸⁴² See paragraph 11.5 above.

none of the ten posts referred to in paragraph 11.34 above was on an official Facebook page. All of them were on Facebook pages that were taken down for what Facebook decided was “coordinated inauthentic behaviour”. The IIMM *Hate Speech Report* claims that although the Facebook pages taken down for “coordinated inauthentic behaviour” had no outward affiliation to the military, they had connections with the official Facebook pages that were designated by Facebook as “HR takedown pages” (see paragraphs 11.21 and 11.22 above). The IIMM said that these connections were “evidenced in numerous ways, ranging from the overlapping administrators and creators behind these Pages, the overlapping accounts posting to these Pages (the editors), the shared user names and email addresses associated with the underlying accounts, and the appearance of the abbreviation DSITD (for the Defence Services Information Technology Department) in email addresses used to register the accounts”, as well as “through overlapping additional metadata”.¹⁸⁴³ The IIMM *Hate Speech Report* contends that because of this, the Facebook pages taken down for “coordinated inauthentic behaviour” form part of an interconnected “Military Network” together with the “HR takedown pages”.¹⁸⁴⁴ That is denied. In fact, during 2016 and 2017, many individuals and groups created fake Facebook accounts. Some of those who did so were government employees, or members of the Tatmadaw or the Police Force. A few of those may have used office internet connections to do so. However, they might have done so outside the scope of their employment, on their own initiative. There were no instructions by the Tatmadaw or the Government to spread hateful speech, and the content of such fake accounts had nothing to do with the Government or the Tatmadaw.

- 11.38 The posts in question in any event represent a very tiny percentage of the overall number of posts on a limited number of Facebook pages, and were identified according to a sweepingly broad definition of hate speech that goes far beyond the definition of hate speech in international law (see paragraphs 11.24 to 11.31 above). This does not establish the existence of any *campaign* of hate speech within the normal definition of that word in international law at all. Furthermore, the items in question

¹⁸⁴³ IIMM *Hate Speech Report*, p. 52, para. 77, RG, Vol. II, Annex 5.

¹⁸⁴⁴ *Ibid.*

were all posted in July 2017 or later,¹⁸⁴⁵ such that they hardly establish a campaign of hate speech in the decades leading up to the events of 2016 and 2017, as originally claimed by The Gambia.

11.39 Despite this, The Gambia claims that “the extensive spread of anti-Rohingya hate speech on Facebook ... was fomented by the military’s clandestine online hate campaign”.¹⁸⁴⁶ If The Gambia is thereby suggesting that claimed “hate speech” for which the Government or Myanmar Defence Services was responsible fomented further hate speech by others for whom the Government or Myanmar Defence Services was not responsible, no evidence has been presented by The Gambia to establish this.

11.40 Contrary to what The Gambia apparently contends,¹⁸⁴⁷ statements made by soldiers during counter-terrorism operations do not establish the intent or policy of the Government in conducting those operations, and do not establish that those statements were provoked or caused by the content of Facebook pages.

11.41 In short:

- (1) The IIMM *Hate Speech Report* looks at social media posts only for a six month period in 2017. The IIMM report therefore does not support the claim of The Gambia that “hate speech [was] carried out over many years”.¹⁸⁴⁸
- (2) The overwhelming majority of the Facebook pages analysed in the IIMM report were *not* official Facebook pages of governmental officials or organizations of Myanmar. Rather, they were pages that were taken down by Facebook in 2018 on the ground that Facebook considered them to contravene its policy on “co-ordinated inauthentic behaviour”.
- (3) The IIMM report looks at only at 52 of a much larger number of Facebook pages that were taken down by Facebook in 2018.

¹⁸⁴⁵ See paragraph 11.19 above.

¹⁸⁴⁶ RG, para. 6.37.

¹⁸⁴⁷ RG, para. 6.37.

¹⁸⁴⁸ See paragraph 11.1 above.

- (4) In considering whether any of these 52 Facebook pages contained “hate speech”, the IIMM applied a definition of “hate speech” that was far broader than the definition in international law, and indeed, was so broad that it would apparently have covered even statements by former UN Secretary-General Kofi Annan and the Special Envoy of the UN Secretary-General on Myanmar.
- (5) Nine of the Facebook pages examined contained no public content.
- (6) Of the remaining 43 Facebook pages, the IIMM found that only some 0.52 percent (half of one percent) of the posts on them were unique items containing material falling within the IIMM’s exceptionally broad definition of hate speech.
- (7) The Reply of The Gambia has presented what are presumably the ten worst examples that The Gambia could identify. None of these calls for the killing or destruction of Bengali Muslims, as a group, as such, in contrast to the kinds of media statements that were found by the International Criminal Tribunal for Rwanda to amount to evidence of a genocidal intent. None of them could remotely be considered as incitement to commit genocide or evidence of a genocidal intent.

11.42 Although it is for the Court, not the IIMM, to determine whether these Facebook pages provoked genocide,¹⁸⁴⁹ or establish a genocidal intent, it is significant that the IIMM *Hate Speech Report* in any event contains no such suggestion. The report only expresses the view that these Facebook pages “excused and promoted violence against the Rohingya minority” at the time that the counter-terrorism operations were being conducted in 2017.¹⁸⁵⁰

11.43 If the Government or the Myanmar Defence Services had wanted to “incit[e] genocide against the Rohingya” by means of “campaign of official and officially-sanctioned hate speech”,¹⁸⁵¹ it is unclear why it would have confined the campaign to less than

¹⁸⁴⁹ See MG, paras. 4.56-4.57 and 12.130-12.131, indicating that on The Gambia’s own case, for a State to be responsible for direct and public incitement to commit genocide, the words in question must “provoke genocide”.

¹⁸⁵⁰ IIMM *Hate Speech Report*, p. 53, para. 179, quoted in RG, para. 6.11.

¹⁸⁵¹ See paragraph 11.1 above.

half of a percent of the posts on the Facebook pages in question, or why an intent to destroy Bengali Muslims, as a group, as such, would not have been expressed clearly. The posts do not expressly call for the commission of genocidal acts, and are capable of reasonable explanations other than a genocidal intent.

E. Conclusion

11.44 Regarding the existence of a genocidal intent, the posts on these Facebook pages identified by The Gambia as examples of hate speech do not provide direct evidence of a genocidal intent. Furthermore, from the examples given by The Gambia, the existence of a genocidal intent cannot be inferred. This would not even be *a* reasonable inference, let alone the *only* reasonable inference.

11.45 Regarding The Gambia’s claim of direct and public incitement to commit genocide, as the Court found in the *Bosnia Genocide* case, the Court “must only accept precise and incontrovertible evidence”.¹⁸⁵²

11.46 As a commentary on the Genocide Convention observes in relation to Article III (c) of the Convention, dealing with direct and public incitement to commit genocide:

[T]he perpetrator’s declaration must call for the realisation of all material and mental elements of the crime of genocide as set out by Article II. ... [*In abstracto*, the perpetrator’s utterance would have to express the following request: “[Readers or listeners!] I beg you to share the goal of destroying a certain group (in whole or in part) on the grounds of its national, ethnic, racial or religious characteristics, and to commit an act or acts pursuant to Article II lit. (a)–(e)!” ...

[A] line must be drawn between incitement to commit genocide and mere “hate-speeches”, which aim to spread contempt or anger against a group but leaves it to the recipient to decide if action should be taken.¹⁸⁵³

11.47 The statements relied on by The Gambia do *not* expressly call for the destruction of the Bengali population in northern Rakhine State, as such, and do *not* specifically call for the commission of acts falling within Article II of the Convention. A conclusion that anyone reading or hearing the statements relied on by The Gambia could only

¹⁸⁵² *Bosnia Genocide* case, p. 216, para. 417.

¹⁸⁵³ C. Tams *et al.*, *The Genocide Convention: Article-by-Article Commentary* (2nd edition, 2023), Article III, margin no. 31, RM, Vol. II, Annex 49.

have understood them to have this meaning is *not* the only reasonable conclusion that can be inferred from the evidence.

- 11.48 For similar reasons, the conclusion that the Government or Myanmar Defence Services had a genocidal intent is *not* the only reasonable conclusion that can be inferred from the evidence.
- 11.49 In short, The Gambia’s claims about hate speech do not assist its claim that genocide was committed during the counter-terrorism operations in northern Rakhine State in 2016 and 2017. Quite apart from anything else, even if The Gambia were able to prove that there was a campaign of hate speech (*quod non*), this would not without more amount to incitement to commit *genocide*, and would not without more establish the existence of a *genocidal intent*.
- 11.50 Contrary to what The Gambia contends, the evidence does not “make it irrefutable that the Myanmar Defence Services implemented a campaign of hate speech against the Rohingya, which dehumanized the Rohingya group and incited the genocidal ‘clearance operations’”.¹⁸⁵⁴ The Gambia’s claim that the alleged “hate speech undeniably incited genocidal acts by the Tatmadaw’s military forces”¹⁸⁵⁵ is mere assertion.

¹⁸⁵⁴ RG, para. 6.2.

¹⁸⁵⁵ RG, para. 6.4.

CHAPTER 12

ALLEGED IMPUNITY AND DESTRUCTION OF EVIDENCE

A. Introduction

- 12.1 This Chapter of this Rejoinder responds to Chapter 8 of The Gambia’s Reply, entitled “The Tatmadaw’s impunity and destruction of evidence”.
- 12.2 Chapter 11 of The Gambia’s Memorial sets out its initial allegations that Myanmar has failed to investigate or prosecute persons “for crimes against the Rohingya”, has conducted “sham trials”, and has destroyed evidence.
- 12.3 Chapter 12 of the Counter-Memorial of Myanmar responds to these allegations. It begins by seeking to identify their claimed relevance. It notes that The Gambia appears to consider that the alleged impunity and destruction of evidence:
- (1) is evidence of a genocidal intent; and
 - (2) is a breach of the obligation under the Genocide Convention to punish genocide.
- 12.4 For the reasons given in Chapter 12 of the Counter-Memorial of Myanmar, and in this Chapter of this Rejoinder, these claims of The Gambia are denied. However, even if (*quod non*) The Gambia could establish that Myanmar has failed to investigate or prosecute persons “for crimes against the Rohingya”, has conducted “sham trials”, and has destroyed evidence, The Gambia does not articulate clearly how this would be of any relevance to this case.
- 12.5 As has been noted in the Counter-Memorial of Myanmar, even if it could be established (*quod non*) that there has been a failure to prosecute “crimes against the Rohingya”, or that evidence of “crimes against the Rohingya” has been destroyed, this would not prove that the crimes in question were genocide within the meaning of the Genocide Convention. The mere fact that certain crimes go unpunished or are covered up does not somehow mean that the crimes in question must have been genocide. The Gambia’s allegations concerning failure to prosecute “crimes against the Rohingya”, even if they could be proved, are thus not themselves evidence of a genocidal intent,

and are therefore irrelevant to The Gambia's claim that genocide has been committed.¹⁸⁵⁶ It would only be if The Gambia were first to prove, independently of these allegations, that genocide within the meaning of the Convention has been committed, that the allegations of failure to prosecute and destruction of evidence might become relevant to the question whether there has been a failure to punish that genocide.¹⁸⁵⁷

- 12.6 As The Gambia has failed to discharge its burden of proving that genocide within the meaning of the Convention has been committed, the allegations in Chapter 11 of its Memorial concerning impunity and destruction of evidence simply do not fall for consideration in these proceedings at all.
- 12.7 Without prejudice to this position, Myanmar furthermore notes the following. Even if it were to be assumed, purely for the sake of argument, that The Gambia could prove that genocide was committed during the counter-terrorism operations, this would not of itself mean that there has been a breach by Myanmar of the duty under the Convention to punish genocide.
- 12.8 The Counter-Memorial notes that:
- (1) The duty to punish under the Genocide Convention only applies to acts within the scope of Article III of the Convention. It is not a duty to punish every kind of crime committed against members of a protected group. Thus, if the authorities of a Contracting Party have no information to suggest that suspected perpetrators of a crime acted with intent to destroy physically or biologically a protected group in whole or in part, as such, the duty to punish under the Genocide Convention is not engaged.
 - (2) To establish a breach of the duty to punish under the Genocide Convention, The Gambia would therefore need to prove not only that genocide has been committed, but would also need to prove:

¹⁸⁵⁶ CMM, paras. 12.3-12.13.

¹⁸⁵⁷ CMM, paras. 12.14-12.16.

- (a) that the relevant authorities in Myanmar had information suggesting that suspected perpetrators committed a crime *of a kind described in Articles II and III of the Convention*;
- (b) that the information was sufficient to meet the evidential threshold to trigger the duty to punish; and
- (c) that the steps taken by the authorities in Myanmar in all the circumstances fell short of what “due diligence” required in relation to the investigation of *that* crime¹⁸⁵⁸—it would not be enough for The Gambia to establish a failure to punish “crimes against the Rohingya” generally.¹⁸⁵⁹

12.9 As The Gambia has not proved the matters in paragraph 12.8(2) above, it has not proved a breach of the duty to punish under the Genocide Convention.

12.10 Chapter 8 of the Reply of The Gambia does not engage with these points, but simply repeats the same arguments that it already advanced in its Memorial.

12.11 First, the Reply of The Gambia continues to maintain that the alleged impunity and destruction of evidence “confirm that Myanmar acted with genocidal intent”.¹⁸⁶⁰ However, The Gambia advances no reasons as to why a failure to investigate or punish alleged “crimes against the Rohingya”, even if proved, would somehow establish that the crimes in question were genocide rather than some other kind of crime, or conduct that does not amount to any crime at all. This argument of The Gambia is another example of the kind of circular logic found throughout its pleadings. The Gambia argues that because the acts that the authorities in Myanmar allegedly failed to investigate and prosecute were genocide, their failure to investigate and prosecute indicates that they also had a genocidal intent. The Gambia then argues that the acts in question were genocide because those who failed to investigate and prosecute them had a genocidal intent. According to The Gambia, A proves B, and B proves A. This reasoning is fallacious.

¹⁸⁵⁸ The expression “due diligence” is taken from the *Bosnia Genocide* case, p. 221, para. 430, where it is used in the context of the duty to prevent.

¹⁸⁵⁹ CMM, paras. 12.24-12.36.

¹⁸⁶⁰ RG, para. 8.1. See also RG, paras. 8.4 and 8.41.

- 12.12 Secondly, to the extent that The Gambia appears to suggest that a failure to prosecute and punish “crimes against the Rohingya”,¹⁸⁶¹ or a covering up of “crimes against the Rohingya”,¹⁸⁶² is a breach of the duty to punish under the Genocide Convention even if genocide has not been committed, this is also obviously incorrect.¹⁸⁶³ The Gambia itself expressly acknowledges elsewhere in its pleadings that there can be no breach of the duty to punish unless genocide has in fact been committed.¹⁸⁶⁴
- 12.13 Thirdly, even if The Gambia could prove that genocide has been committed (*quod non*), that of itself would not automatically mean that Myanmar is responsible for a failure to punish genocide. The Gambia would still need to prove the matters set out in paragraph 12.8(2) above. The Gambia says that “the premise of this argument is dubious”,¹⁸⁶⁵ but gives no reason why. It is obvious that the duty to punish in the Genocide Convention cannot require a Contracting Party to commence an investigation into an alleged crime unless the authorities of that State have information to suggest that the crime may be genocide within the meaning of the Convention. This will not be the case unless they have information that is sufficiently plausible and credible to suggest (1) that acts of the kind falling within Article II of the Convention may have been committed, and (2) that the acts may have been committed with a genocidal intent. It is unrealistic to suggest that the Convention imposes a duty on a Contracting Party to investigate every single alleged crime committed in its territory against victims who happen to be members of a protected group, even if there is nothing to suggest that the alleged crimes were committed with a genocidal intent. Such a duty would in practice amount to a duty to investigate every alleged crime of violence committed against every person in its territory,¹⁸⁶⁶ given that every individual has a race and an ethnicity within the meaning of the Convention, and is

¹⁸⁶¹ RG, paras. 8.2 (“crimes committed against the Rohingya group”), 8.8 (“sexual and gender-based crimes ... committed against the Rohingya”), 8.10 (“crimes committed against the Rohingya”), 8.11 (“crimes committed against the Rohingya”), 8.14 (“crimes committed against the Rohingya”), 8.23 (“crimes committed against the Rohingya”), 8.24 (“crimes committed during the clearance operations”), 8.27 (“violence committed by the Tatmadaw against the Rohingya”), 8.27 (“crimes committed against the Rohingya”).

¹⁸⁶² RG, footnotes 1004 and 1012.

¹⁸⁶³ CMM, paras. 12.35-12.36.

¹⁸⁶⁴ See paragraph 14.26 below.

¹⁸⁶⁵ RG, para. 8.19.

¹⁸⁶⁶ Or at least, every alleged crime committed against every person in its territory that involves killing, serious bodily or mental harm, etc.

therefore a member of a protected group. Indeed, such a duty would go much further still, given that The Gambia alleges in this case that various “discriminatory laws and policies” were acts of genocide. The duty as defined by The Gambia would appear to amount also to a duty for the police and prosecutorial authorities of a Contracting Party to investigate all allegations of discriminatory laws and policies, regardless of whether or not there is anything to suggest that these laws and policies have a genocidal intent.

- 12.14 The Court should reject any attempt by The Gambia to expand the scope of the duty to punish to include a duty to investigate and punish crimes other than genocide, as well as any attempt by The Gambia to characterise any failure to punish any crime as evidence of a genocidal intent.
- 12.15 Chapter 8 of the Reply of The Gambia generally does not address the matters in paragraph 12.8 above. Instead, it simply seeks to find fault with Myanmar’s constitutional and legal system, and to criticise various bodies that have been established by the Government of Myanmar. The Gambia thereby seeks to turn an argument about whether there has been a breach of the duty to punish under the Genocide Convention into an irrelevant political critique of features of Myanmar’s military justice system, and of the various bodies concerned. The Gambia thereby distracts attention from the real issues in the case.
- 12.16 The remainder of this Chapter will demonstrate that the irrelevant criticisms made by The Gambia are in any event unjustified.

B. Alleged failure of Myanmar to “demonstrate” investigations and prosecutions

- 12.17 This Section of this Chapter responds to **paragraphs 8.5 to 8.10 (Chapter 8, Sub-section I.A) of the Reply** of The Gambia.
- 12.18 The title of this Sub-section of The Gambia’s Reply states that “Myanmar has Failed to Demonstrate That it Investigated or Prosecuted the Tatmadaw’s Crimes”.¹⁸⁶⁷ By using this wording, The Gambia apparently seeks to suggest that the burden of proof

¹⁸⁶⁷ RG, title above para. 8.5.

is on Myanmar to demonstrate that it has discharged the obligation under Articles I and IV of the Genocide Convention to punish genocide. That is not so. The burden of proof is on The Gambia to prove its allegation that Myanmar has failed to discharge that obligation, and it must do so in accordance with the very high standard of proof applicable in this case.¹⁸⁶⁸

- 12.19 The Gambia presents no evidence that prosecutions of members of the Myanmar Defence Services for acts during the counter-terrorism operations¹⁸⁶⁹ only occurred because of international pressure or media publicity, and this is denied. These prosecutions of military personnel do not establish that “Myanmar does not hold its military personnel accountable for acts of genocide”.¹⁸⁷⁰
- 12.20 Contrary to what The Gambia claims, for the reasons given in the Counter-Memorial of Myanmar and this Rejoinder generally, there is no “overwhelming evidence of genocidal acts”,¹⁸⁷¹ and no “convincing evidence that genocidal acts were committed” in Gu Dar Pyin.¹⁸⁷² The Gambia therefore does not prove, in accordance with the applicable very high standard of proof, that authorities in Myanmar have sufficiently plausible and credible information suggesting that any military personnel acted during the counter-terrorism operations with intent to destroy physically or biologically a protected group as such.¹⁸⁷³ The duty to punish under the Convention is therefore not engaged. If that duty is not engaged, any failure to punish “crimes committed against

¹⁸⁶⁸ In relation to the burden of proof and standard of proof generally, see CMM, paras. 5.1-5.18, and this Rejoinder, paragraphs 5.1-5.40 above. In relation to the burden of proof and standard of proof for proving a breach of the duty to punish, see CMM, paras. 5.40, 12.33-12.34, and 12.68, and this Rejoinder, paragraph 5.40 above.

¹⁸⁶⁹ CMM, paras. 12.65-12.66.

¹⁸⁷⁰ A crime can be prosecuted only when there is sufficient evidence. Under military rules in Myanmar, if there is any doubt whether an alleged crime was committed, a Court of Inquiry is established to ensure that the incident is properly investigated. If the Court of Inquiry finds that there are crimes to be judged by a court-martial, the case is heard by a court-martial. In the case of some alleged crimes given media publicity, it was found, following enquiries, that there was insufficient evidence to proceed further. On the other hand, legal action has been taken in some cases even though there has been no media publicity. The investigation of the incidents of northern Rakhine State had already commenced before these proceedings before the Court had commenced.

¹⁸⁷¹ Contrary to what is claimed in RG, para. 8.9.

¹⁸⁷² See CMM, paras. 9.11-9.22, and this Rejoinder, paragraphs 9.11-9.39 above.

¹⁸⁷³ See paragraphs 12.8(2) and 12.13 above.

the Rohingya” more generally¹⁸⁷⁴ cannot be a breach of the duty to punish under the Convention.¹⁸⁷⁵

- 12.21 If the duty to punish under the Genocide Convention is not engaged, the Court has no jurisdiction to make any finding that the authorities of a State should have investigated or brought prosecutions in relation to alleged crimes. In particular, there is no legal basis for The Gambia’s apparent suggestion that this Court could make a finding that military personnel involved in the counter-terrorism operation in Gu Dar Pyin should be prosecuted for sexual and gender-based crimes.
- 12.22 Furthermore, and in any event, contrary to what The Gambia claims, there is not “extensive evidence”, or indeed, any evidence of any probative quality, that sexual violence occurred during the counter-terrorism operation in Gu Dar Pyin,¹⁸⁷⁶ Given the state of the evidence, it cannot be considered surprising that no prosecutions for sexual crimes have been brought against members of the Myanmar Defence Services in relation to the counter-terrorism operation in Gu Dar Pyin.¹⁸⁷⁷ The quality of any evidence of sexual crimes in Gu Dar Pyin was so poor that The Gambia did not even mention alleged sexual offences at Gu Dar Pyin in its Memorial. The Gambia only does so in its Reply, relying on weak anonymous evidence from the FFM. It is noted that IIMM witness P1548 admitted to the IIMM that an earlier statement that he had given to another organization about witnessing a sex crime in Gu Dar Pyin was untrue, and he said to the IIMM that he did not learn of any such incidents in Gu Dar Pyin.¹⁸⁷⁸
- 12.23 The prosecution of two journalists for breaches of the Official Secrets Act¹⁸⁷⁹ is irrelevant for the reasons given in the Counter-Memorial.¹⁸⁸⁰ Although this is irrelevant, the following is noted for the Court’s information. The convictions were imposed by the Northern Yangon District Court (Now Insein District Court) following a trial at which the journalists were represented by an advocate and had the right to

¹⁸⁷⁴ RG, para. 8.10.

¹⁸⁷⁵ See paragraphs 12.5 and 12.12 above.

¹⁸⁷⁶ See paragraphs 9.26-9.39 above.

¹⁸⁷⁷ *Ibid.*, especially paragraph 9.39 above.

¹⁸⁷⁸ See paragraphs 9.18-9.19 above. See generally paragraphs 7.24-7.32 above.

¹⁸⁷⁹ See MG, paras. 11.21-11.22; CMM, paras. 12.65-12.66; RG, para. 8.6.

¹⁸⁸⁰ CMM, paras. 12.65-12.66.

cross-examine prosecution witnesses and to present evidence in their defence. The convictions were upheld on appeal by the High Court of the Yangon Region (Criminal Appeal Case No. 266/2018), and the Supreme Court of the Union (Criminal Revision Case No. 148 (b) / 2019). The two journalists began serving their sentences on 3 September 2018, and were pardoned on 7 May 2019 by a Amnesty Order of the President. Therefore, they served only 8 months and 4 days in prison.

- 12.24 Contrary to what The Gambia contends, the Provisional Measures Reports of Myanmar do not “confirm ... that Myanmar still refuses to investigate the Tatmadaw’s crimes”.¹⁸⁸¹ The Eighth Provisional Measures Report, dated 23 November 2023, indicates that the military Court of Inquiry has “reached out to police outposts near Chut Pyin (Bengali) Village, as well as the Chut Pyin village administrator and the hundred-household administrator of Pyin Shay Village, to gather updated information regarding witnesses from Chut Pyin (Bengali) Village and nearby villages”.¹⁸⁸² The Ninth Provisional Measures Report, dated 23 May 2024, indicates that recent attacks by the Arakan Army in Rakhine State have hindered the work of the military Court of Inquiry.¹⁸⁸³
- 12.25 Nor is it the case that the Independent Commission of Enquiry (“ICOE”) found “that ARSA and ARSA collaborators committed the crimes against the Rohingya, not the Tatmadaw”.¹⁸⁸⁴ The Gambia cites no basis for this statement. As the Counter-Memorial points out, the ICOE said that there may have been “disproportionate use of force by some members of Myanmar’s Defence Services and Police Force in the course of the internal armed conflict against ARSA”, and that “This must be further investigated, verified, and thereafter prosecuted by Myanmar’s national legal processes, in particular its military justice system”.¹⁸⁸⁵

¹⁸⁸¹ RG, para. 8.10.

¹⁸⁸² Eighth Provisional Measures Report, para. 65.

¹⁸⁸³ Ninth Provisional Measures Report, para. 26.

¹⁸⁸⁴ RG, para. 8.10.

¹⁸⁸⁵ CMM, paras. 12.107-12.108.

C. Alleged failure of Myanmar to “show ... accountability”

- 12.26 This Section of this Chapter responds to **paragraphs 8.11 to 8.17 (Chapter 8, Sub-section I.B) of the Reply** of The Gambia.
- 12.27 The title of this Sub-section of The Gambia’s Reply states that “Myanmar has Failed to Show That There is any Accountability Within its Justice System”. Again, this wording suggests that The Gambia claims that Myanmar is subject to some kind of obligation to prove that there is accountability in its justice system. Again, that is not so: the burden of proof is on The Gambia to prove, in accordance with the very high standard of proof applicable in this case, its allegation that Myanmar has failed to discharge the duty to punish genocide.
- 12.28 The Gambia does not deny that there is a military justice system in Myanmar that has jurisdiction to investigate and prosecute crimes allegedly committed by military personnel.¹⁸⁸⁶ Nor does The Gambia deny that the position in Myanmar, where crimes allegedly committed by military personnel are subject to the jurisdiction of the military justice system rather than the civilian justice system, is materially similar to that in various other Contracting Parties to the Genocide Convention.¹⁸⁸⁷
- 12.29 However, The Gambia appears to claim that it is a breach of the duty to prevent genocide for a State to have a military justice system that is not subject to “civilian oversight”.¹⁸⁸⁸ Thus, The Gambia apparently claims that it is consistent with the Genocide Convention for the Commander-in-Chief of the Armed Forces of the United States of America (the President of the United States of America) to issue pardons to persons convicted of crimes under international law, but that it is contrary to the Genocide Convention for the Supreme Commander of the Myanmar Defence Services to do so, on the ground that the former is a civilian but the latter is not.¹⁸⁸⁹
- 12.30 No justification is given by The Gambia for these arguments. They are not well-founded. The Gambia cites no authority at all for its apparent claim that the Genocide

¹⁸⁸⁶ CMM, para. 12.52.

¹⁸⁸⁷ CMM, para. 12.54.

¹⁸⁸⁸ RG, paras. 8.11-8.13.

¹⁸⁸⁹ RG, para. 8.15.

Convention prohibits States from having the particular form of government that Myanmar presently has, or that the Genocide Convention requires a State to provide for “civilian oversight” of its military justice system. This suggestion appears to be a pure invention of The Gambia. The suggestion that the Genocide Convention is intended to intrude into the internal affairs of a State to the point of determining the kind of oversight that its military justice system is required to have is astonishing, especially given that The Gambia can point to absolutely nothing in the text of the Convention, the *travaux préparatoires*, or any case law or commentary, to suggest that this is the case. The Gambia appears to make the even more far-reaching suggestion that the Genocide Convention prohibits a State’s Constitution from “enshrining” the structural or legal control of the military.¹⁸⁹⁰ These claims of The Gambia should be rejected.

- 12.31 Obviously, every Contracting Party to the Genocide Convention must comply with its provisions, no matter what its domestic constitutional arrangements may be. However, the suggestion that a State with particular constitutional arrangements is incapable of complying with the Convention, and will be in breach of the Convention merely by having those domestic constitutional arrangements, is so extreme that it cannot even be seriously entertained.
- 12.32 It is for a competent prosecutorial body of a State to decide whether sufficient evidence exists against any specific individual to justify a prosecution. Contrary to what The Gambia appears to contend,¹⁸⁹¹ it is not for the FFM to decide that Myanmar should investigate or prosecute specific individuals.¹⁸⁹² Nor, contrary to what The Gambia apparently suggests,¹⁸⁹³ is it for the government of any other State or for the European Union to decide that Myanmar should do so.¹⁸⁹⁴ Furthermore, contrary to what The Gambia contends,¹⁸⁹⁵ this Court is itself not able to make any determination

¹⁸⁹⁰ RG, para. 8.12.

¹⁸⁹¹ RG, para. 8.13. See also RG, para. 8.19.

¹⁸⁹² See CMM, para. 12.44.

¹⁸⁹³ RG, para. 8.13 footnote 942.

¹⁸⁹⁴ Furthermore, The Gambia provides no answer at all to the point that none of the documents of the European Union, the United States of America, or the United Kingdom relied on by The Gambia contains any reference at all to genocide: see CMM, paras. 12.49-12.50.

¹⁸⁹⁵ RG, para. 8.14.

of whether sufficient evidence exists to justify the prosecution of specific named individuals, for reasons already given in the Counter-Memorial of Myanmar,¹⁸⁹⁶ to which The Gambia provides no answer.¹⁸⁹⁷

- 12.33 The Gambia claims that “an independent research group from the Columbia Law School Human Rights Institute” has alleged that crimes have been committed under the command of certain military commanders.¹⁸⁹⁸ However, if the Genocide Convention does not require Myanmar to investigate named persons merely because the FFM considers that an investigation is warranted, it certainly does not require Myanmar to do so merely because such an opinion has been expressed by “an independent research group from the Columbia Law School Human Rights Institute”.
- 12.34 For the reasons given in the Counter-Memorial of Myanmar, the Genocide Convention does not require military and civilian justice systems to conduct all of their operations in public, or to disclose who is or is not under investigation for what crimes.¹⁸⁹⁹ In the case of inquiries into large-scale events involving very large numbers of people (such as inquiries into whether crimes were committed in the course of military operations), investigations and prosecutions are both complex and lengthy. There would be a risk to the integrity of such investigations and prosecutions if authorities were compelled by the Genocide Convention to give a running commentary on their progress. There would also be a risk to the integrity of such investigations and prosecutions if authorities were placed under pressure by the Genocide Convention to complete them prematurely.¹⁹⁰⁰
- 12.35 If The Gambia alleges that Myanmar is in breach of its duty to punish under the Genocide Convention, then The Gambia has the burden of proving that, in accordance with the very high standard of proof that applies in this case. Contrary to what The Gambia seems to assume, it cannot merely allege a failure to punish, and then shift the burden to Myanmar to prove that investigations and prosecutions have been

¹⁸⁹⁶ CMM, paras. 12.39-12.42.

¹⁸⁹⁷ RG, para. 8.14 contains a bare statement of disagreement.

¹⁸⁹⁸ RG, para. 8.13.

¹⁸⁹⁹ CMM, paras. 12.37-12.38.

¹⁹⁰⁰ See paragraphs 12.82-12.85 below, dealing with the investigations by the authorities of the United Kingdom into allegations of serious criminal behaviour by United Kingdom armed forces in Iraq.

undertaken. Furthermore, as has been noted above, to establish a breach of the duty to punish under the Genocide Convention, The Gambia needs to prove a failure to punish *genocide*.¹⁹⁰¹ The Gambia's allegation of failure to investigate "disappearances, killings, rape or torture",¹⁹⁰² of itself, is not even a *allegation* of a failure to investigate *genocide*.

12.36 The Gambia argues that the form of criminal liability known as "superior responsibility" or "command responsibility" is provided for in the Genocide Convention.¹⁹⁰³ That is not the case, for reasons that have already been given in the Counter-Memorial of Myanmar.¹⁹⁰⁴ The Gambia provides no basis for its contrary view, other than to point out that Article IV of the Convention indicates that even "constitutionally responsible rulers [and] public officials" must be punished for "genocide or any of the other acts enumerated in article III". However, Article IV of the Convention indicates only that "constitutionally responsible rulers [and] public officials" may be criminally responsible for *genocide* (Article III (a) of the Convention) or *any of the other acts enumerated in article III* (Article III (b) to (e) of the Convention). Thus, according to the plain wording of the Convention, a Contracting Party has a duty to punish any person (including any military commander) who commits *acts enumerated in Article III of the Convention*.¹⁹⁰⁵ However, there is no duty to punish a military commander who does *not* commit acts enumerated in Article III, merely because the military commander does not punish those who *do* commit such acts.

12.37 If the position is different under the Statute of the International Criminal Court ("ICC"), or the Statutes of the ICTY and ICTR, or customary international law, that is irrelevant for purposes of these proceedings.¹⁹⁰⁶ It is in any event not in fact clear that the position is different under customary international law or under the Statutes of the ICC, ICTY or ICTR. For instance, the ICC Statute provides that the *ICC itself*

¹⁹⁰¹ See paragraphs 12.5 and 12.12 above.

¹⁹⁰² RG, para. 8.13.

¹⁹⁰³ RG, para. 8.14.

¹⁹⁰⁴ CMM, paras. 12.45-12.47.

¹⁹⁰⁵ CMM, paras. 12.45-12.47.

¹⁹⁰⁶ CMM, paras. 4.1-4.7 and 12.46; and see this Rejoinder, paragraphs 4.3(2), 4.13-4.15 and 4.51(5) above.

can convict an accused on the basis of the doctrine of command responsibility, but does not provide that all States Parties to the ICC Statute must include and give effect to the doctrine of command responsibility in their municipal criminal law. The Gambia cites no consistent State practice or expressions of *opinio juris* in support of the proposition that under customary international law, States are required to include the principle of command responsibility for genocide in their municipal law.

- 12.38 The Gambia then claims that the military justice system of Myanmar is ineffective because it grants “impunity ... to the entire Tatmadaw chain of command”.¹⁹⁰⁷ This is a sweeping statement, for which The Gambia provides no justification, other than to claim, entirely falsely, that Myanmar has admitted this.¹⁹⁰⁸ This claim is another example of the use by The Gambia of circular logic in order to create “self-proving facts”. It is akin to arguing that the fact that pardons were granted by the United States President to the persons referred to in paragraph 12.57 of the Counter-Memorial of Myanmar,¹⁹⁰⁹ and the fact that the President of the United States was himself never prosecuted for the crimes for which he granted the pardons, proves that the justice system in the United States of America grants “impunity ... to the entire military chain of command”.

¹⁹⁰⁷ RG, para. 8.14. The Gambia adds (*ibid.*, para. 8.15) that since February 2021, when the State Administration Council became the Government of Myanmar, “this lack of accountability has become more deeply ensconced”.

¹⁹⁰⁸ The Gambia states, entirely falsely, that “Myanmar’s former Agent publicly acknowledged that the lack of military accountability is built into the country’s constitutional and legal structure” (RG, para. 8.16). What the then Agent of Myanmar said was: “Under its 2008 Constitution, Myanmar has a military justice system. Criminal cases against soldiers or officers for possible war crimes committed in Rakhine must be investigated and prosecuted by that system. On 25 November 2019, the Office of the Judge Advocate General announced the start of a court martial for allegations linked to the Gutar Pyin [Gu Dar Pyin] village incident, one of the 12 main incidents referred to earlier. The Office also let it be known that there will be additional courts martial if further incriminating evidence is brought up by the Independent Commission of Enquiry (ICOE). ... It is never easy for armed forces to recognize self-interest in accountability for their members, and to implement a will to accountability through actual investigations and prosecutions. I respectfully invite the Members of the Court to consider for a moment the record of other countries. This is a common challenge, even in resource-rich countries.” See (CR 2019/19, 11 December 2019, p. 16, paras. 17 and 19). It is a distortion of what she said for The Gambia to state that her “basic point” was that “the Tatmadaw is not, and refuses to be, accountable to civilian authorities in Myanmar”, and that she was acknowledging that “lack of military accountability is built into the country’s constitutional and legal structure” (RG, para. 8.16). Her basic point was, on the contrary, that domestic accountability procedures were in progress. The Gambia has provided no answer to what is stated in CMM, para. 12.53 footnote 2188.

¹⁹⁰⁹ CMM, para. 12.57, referring to the grant of pardons by the President of the United States of America to Army officers and Armed Forces contractors who had been convicted by United States courts of crimes against civilians in Iraq and Afghanistan.

12.39 This reasoning of The Gambia is not only fallacious; it is also irrelevant. The matters that The Gambia needs to establish in order to prove a breach of the duty to punish genocide are dealt with in paragraphs 12.22 to 12.50 of the Counter-Memorial of Myanmar and paragraphs 12.7 to 12.9 above. The Gambia seeks to turn an argument about whether there has been a breach of the duty to punish into an irrelevant argument about the features of Myanmar’s domestic military justice system. The Gambia thereby distracts attention from the real issues in the case.

D. Alleged refusal of access to “fact-finding teams”

12.40 This Section of this Chapter responds to **paragraphs 8.18 to 8.19 (Chapter 8, Sub-section I.C) of the Reply** of The Gambia.

12.41 The Gambia claims that Myanmar “continues to refuse to allow independent international fact-finding teams into the country ... includ[ing] the Special Rapporteur on human rights in Myanmar and the IIMM”.¹⁹¹⁰

12.42 However, The Gambia apparently accepts, as it must, that there is no obligation under the Genocide Convention to co-operate with “independent international fact-finding teams”, and that failure to do so therefore cannot be a breach of the Convention.¹⁹¹¹

12.43 The Gambia nonetheless seeks to argue that “Myanmar’s refusal to allow independent and impartial investigations further demonstrates its stubborn opposition to holding the Tatmadaw accountable”.¹⁹¹²

12.44 This is a *non sequitur*. It is another example of the kind of fallacious logic employed by The Gambia, which seeks to argue here that Myanmar’s failure to do something that it is not required to do somehow provides evidence of a breach of the Genocide Convention. Again, The Gambia seeks to distract attention from the matters that it must establish in order to prove a breach of the duty to punish genocide.

¹⁹¹⁰ RG, para. 8.18.

¹⁹¹¹ *Ibid.*

¹⁹¹² *Ibid.*

- 12.45 In any event, The Gambia provides no basis for its claim that the reason why Myanmar has not permitted entry to the Special Rapporteur, the FFM and the IIMM is because it is opposed to “holding the Tatmadaw accountable” for violations of the Genocide Convention. The Gambia thereby simply assumes what it seeks to prove.
- 12.46 It is correct that since the inception of the FFM, Myanmar has not accepted its mandate. This is because Myanmar has considered that its establishment was politically motivated, and because Myanmar has had concerns about its impartiality.¹⁹¹³ Myanmar also does not recognise the IIMM, for reasons that have already been given in Chapter 6 above.¹⁹¹⁴ However, the fact that Myanmar for these reasons does not recognise these two bodies or their mandates does not mean that Myanmar is “opposed to accountability”. The Gambia simply asserts that to be the case, without providing any basis for that assertion.
- 12.47 As regards the UN Special Rapporteur on the situation of human rights in Myanmar, the position is as follows. Ms. Yanghee Lee was appointed by the Human Rights Council to act in this capacity in 2014. The Government of Myanmar allowed her to visit Myanmar six times between 2014 and 2017. However, following her 12-day visit from 10-21 July 2017, she issued an end of mission statement on 21 July 2017 that contained broad allegations and several factual inaccuracies.
- 12.48 On 3 January 2018, the Permanent Representative of Myanmar to the United Nations wrote to the President of the Human Rights Council, stating that the report of Ms.

¹⁹¹³ See UN SC, 8333rd meeting Tuesday, 28 August 2018, S/PV.8333, p. 26 column 2 (Mr Suan (Myanmar)), RM, Vol. IV, Annex 120: “... I would like to reiterate that we did not accept the mandate of the Mission because we have concerns about its impartiality”. UN SC, 8381st meeting Wednesday, 24 October 2018, S/PV.8381, p. 24 columns 1 and 2 (Mr Suan (Myanmar)), RM, Vol. IV, Annex 121: “When the fact-finding mission on Myanmar was established by the Human Rights Council, in March 2017, we objected to the mission because of our serious concerns, particularly about the advisability of its establishment and the mandate itself. ... The mandate was very clear. The mission has already designated who should be perpetrators and who should be victims. From its genesis, the establishment of the fact-finding mission has been flawed, biased and politically motivated, with hidden agendas. ... The methodology of its investigation is also flawed, as the report was prepared from results of interviews of selected groups of displaced persons in Cox’s Bazar and information gathered from some non-governmental organizations (NGOs), international NGOs and human rights groups who had already set their predetermined agenda on the issue. Therefore, the mission’s report did not shed new light on the problem but was found to be identical with the reports of certain human rights groups with no accountability for their work at all. ... [W]e are dismayed by the fact that the fact-finding mission has deliberately and glaringly discounted ARSA terrorist atrocities, which could even be interpreted by many as justifying or condoning the acts of Muslim extremist terrorists”. See also paragraph 6.5 above.

¹⁹¹⁴ See paragraphs 6.5-6.6 and 7.8 above.

Yanghee Lee lacked impartiality and objectivity, indicating that Myanmar did not consider continued cooperation with Ms. Yanghee Lee to be fruitful, and proposing her replacement. The letter stated:

As it has been the case with [Ms. Yanghee Lee's] predecessors, the Government of Myanmar has been facilitating her visits to the country for six times since extension of the mandate of the Special Rapporteur on the situation of human rights in Myanmar by A/HRC/RES/25/26, and her appointment in May 2014. In her 12-day visit in July 2017, she met with the State Councillor Daw Aung San Suu Kyi and six Union Ministers responsible respectively for Border Affairs; Natural Resources and Environmental Conservation; Labour, Immigration and Population; Information; Health and Sports; Education and Commerce. She also had the opportunity to meet with Union Attorney General, members of *Amyotha Hluttaw* (House of Nationalities) Bills Committee, Legal Affairs and Special Cases Commission, Central Committee for the Implementation of Stability, Peace and Development of Rakhine State, Investigation Commission for Maungdaw, Central Review Committee on Confiscated Farmlands and other lands. In addition to capital Nay Pyi Taw and Yangon city visits, she made field trips to Rakhine, Shan and Kayin States as well.

Despite the fullest possible cooperation extended to her, the end-of-mission statement issued by Ms. Yanghee Lee on 21 July 2017 lacks, among others, impartiality and objectivity while highlighting sweeping allegations, unverified information coupled with a number of factual errors. Her non-compliance with the code of conduct as stipulated in Resolution A/HRC/RES/5/2 has caused public resentment against her and doubt on value of cooperation with her. The issue was debated heatedly at the *Phyithu Hluttaw* (House of Representatives) session on 25 July 2017. As she failed to reflect in her statement the comments, responses, views and clarifications provided by the authorities of Myanmar and even the threat posed by the extremists, her statement was considered unfair, imbalanced and biased. The *Phyithu Hluttaw* session, consequently and unanimously, denounced her statement.

In this light; the people of Myanmar and the Government came to a conclusion that it will no longer be fruitful to continue to extend cooperation with Ms. Yanghee Lee, and that there is a clear need to substitute her.¹⁹¹⁵

- 12.49 That letter did not state that Myanmar would no longer cooperate with the UN Special Rapporteur on the situation of human rights in Myanmar. It merely proposed that a

¹⁹¹⁵ Letter from the Permanent Representative of Myanmar to the United Nations Office and other International Organizations to the President of the Human Rights Council, dated 3 January 2018, RM, Vol. III, Annex 67.

different person should be appointed to act in that capacity. Indeed, the letter went on to state that:

The authorities of Myanmar are fully determined to promote and protect the human rights of the people in close cooperation with the Human Rights Council. As such, Myanmar is ready to engage with an appropriate person who is cognizant of legacy, politic, diversity and understand the challenges that Myanmar is encountering on her peaceful way to democratic society. It is also essential for the new Special Rapporteur to understand the complexity of situation in Rakhine State on which the Government is materializing a sustainable solution through implementation of the recommendations by the Advisory Commission on Rakhine State led by Dr. Kofi Annan.

I am fully confident that Your Excellency in your good offices role as the President of the Human Rights Council, could kindly consider Myanmar's submission to appoint a new Special Rapporteur on the situation of human rights in Myanmar. On my part, I am fully prepared to extend my full support for and cooperation with you.¹⁹¹⁶

- 12.50 This letter thus clearly expressed a continuing willingness to cooperate with the UN Special Rapporteur. Furthermore, the letter did not seek to interfere in the decision as to who should take over the role of UN Special Rapporteur. Myanmar has otherwise also expressed its willingness to work with United Nations bodies, including the Special Envoy of the Secretary-General, Ambassador Christine Schraner Burgener, as well as with other international organizations such as the Association of Southeast Asian Nations (ASEAN).¹⁹¹⁷

¹⁹¹⁶ *Ibid.*

¹⁹¹⁷ See, for instance, UN SC, 8333rd meeting Tuesday, 28 August 2018, S/PV.8333, p. 26 column 1 (Mr Suan (Myanmar)), RM, Vol. IV, Annex 120: “[T]he Government of Myanmar also signed a memorandum of understanding with the United Nations Development Programme and the Office of the United Nations High Commissioner for Human Rights to assist with speedy and efficient resettlement and rehabilitation of the returnees. On 7 August, United Nations officials were granted access to 23 villages in 13 village tracts selected for the first phase of the assessment programme. ... We recognize the crucial role of the United Nations in addressing the issue of Rakhine, and the present humanitarian crisis in particular. Last April, we facilitated the visit by members of the Security Council, representatives of neighbouring countries and the Chair of the Association of Southeast Asian Nations. We welcomed the appointment of Ambassador Christine Schraner Burgener as Special Envoy of the Secretary-General. We believe that we could maintain a constructive and fruitful relationship with the Special Envoy. We have facilitated the opening of her office in Naypyidaw”. UN SC, 8477th meeting Thursday, 28 February 2019, S/PV.8477, pp. 19 column 1 and 20 column 1 (Mr Suan (Myanmar)), RM, Vol. IV, Annex 123: “[W]e are also working with the Association of Southeast Asian Nations (ASEAN) to facilitate the repatriation process. ... [W]e are engaging constructively with the United Nations in our efforts to resolve the multitude of challenges we are facing as a nascent democracy ... [T]he Government of Myanmar has signed a joint communiqué with the Special Representative of the Secretary-General on Sexual Violence in Conflict to prevent and address conflict-related sexual violence. The Government of Myanmar has recently facilitated the visit of

- 12.51 Despite this willingness on the part of the Government of Myanmar, Ms. Yanghee Lee was not replaced, leading to the cessation of co-operation. This was for reasons specific to her.

E. Examination of The Gambia's evidence

- 12.52 This Section of this Chapter responds to **paragraph 8.20 (Chapter 8, Sub-section I.D) of the Reply** of The Gambia.
- 12.53 The Gambia claims that the material on which it relies as evidence in this case is “credible, meticulously researched, clear, convincing, and from reliable sources”.¹⁹¹⁸ That is not so, for reasons that have been given in Chapters 6 and 7 of the Counter-Memorial of Myanmar, and in Chapters 6 and 7 above of this Rejoinder.
- 12.54 The Gambia also claims, wholly incorrectly and disingenuously, that Myanmar’s “primary” response in this case is to challenge the *quality* of The Gambia’s evidence, that Myanmar does not attempt “to engage substantively with the facts”, that Myanmar fails to address the content of most of the material relied upon by The Gambia, and that the content of this material is “largely uncontested”.¹⁹¹⁹ These contentions are manifestly false and lacking in any foundation.
- 12.55 The content of the evidence relating to the counter-terrorism operations is examined by Myanmar, at length and in detail, in Chapters 8 and 9 of the Counter-Memorial of Myanmar, and in Chapters 8 and 9 above of this Rejoinder. The content of the material relating to the allegations of The Gambia concerning discriminatory policies and hate speech is examined, at length and in detail, in Chapters 10 and 11 of the Counter-Memorial of Myanmar, and in Chapters 10 and 11 above of this Rejoinder. The content of the material relating to the allegations of The Gambia concerning impunity and destruction of evidence is examined, at length and in detail, in Chapter 12 of the

Special Representative Patten. ... We have also been working very closely with the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Ms. Gamba. The Government is now in the process of forming a ministerial committee on the prevention of the six grave violations affecting children. We conducted training on the six grave violations in December 2018. We have been cooperating closely with Special Representative Gamba.”

¹⁹¹⁸ RG, para. 8.20.

¹⁹¹⁹ *Ibid.*

Counter-Memorial of Myanmar, and in this present Chapter of this Rejoinder. Evidence of relevant background facts concerning the history of Rakhine State and of ARSA is presented, at length and in detail, in Chapters 2 and 3 of the Counter-Memorial of Myanmar, and in Chapters 2 and 3 above of this Rejoinder.

- 12.56 Overall, in the Counter-Memorial of Myanmar, some 366 pages are devoted to a detailed examination of the facts and the substance of the evidence (Chapters 2, 3, 8, 9, 10, 11 and 12), and only some 86 pages (Chapters 6 and 7) are specifically devoted to an examination of the quality of The Gambia's evidence.
- 12.57 Obviously, when engaging in a detailed examination of the substance of evidence, it is necessary to consider matters such as whether two items of evidence are contradictory, or emanate from the same anonymous source, or are unclear or lacking in detail as to what happened. The Gambia appears to suggest that any consideration of such matters should be characterised as a "failure to engage with the substance" of the evidence. Any such suggestion is untenable. That is precisely what a consideration of the substance of evidence involves.
- 12.58 The Counter-Memorial of Myanmar clearly gives detailed and comprehensive consideration to the substance of all of the evidence relied on by The Gambia. It is difficult to see how any suggestion by The Gambia to the contrary could be made.
- 12.59 Any such suggestion by The Gambia is all the more absurd, given that the Reply of The Gambia itself simply fails to deal with 70% of the 43 locations in which it claims that acts of violence were committed by the Myanmar Defence Services during the counter-terrorism operations of 2016 and 2017,¹⁹²⁰ and says nothing of substance in relation to many of the 13 locations that it does address in its Reply.¹⁹²¹ The locations that The Gambia does not address in its Reply are those where the Counter-Memorial of Myanmar has shown that there is no evidence of large-scale acts of violence, or of any such acts at all, as alleged by The Gambia. Rather than engage with the substance of the evidence in relation to these locations, the Reply of The Gambia simply ignores

¹⁹²⁰ See paragraphs 8.13-8.14 above.

¹⁹²¹ See paragraphs 9.2-9.10 above.

these locations altogether. The Reply of The Gambia also largely ignores the background facts presented in Chapters 2 and 3 of the Counter-Memorial of Myanmar.

- 12.60 The simple fact is that an examination of the substance of the evidence in the case shows quite clearly that it does not support The Gambia's claim. Despite acknowledging that the evidence should be examined on a "village-by-village" basis, The Gambia not only fails to follow such an approach itself, but also fails even to provide an explanation to the Court of why it fails even to mention the overwhelming majority of the locations in its Reply.¹⁹²² The only possible conclusion that can be drawn is that The Gambia has no answer to what is stated in Myanmar's Counter-Memorial in relation to these locations.
- 12.61 The Gambia's erroneous claim that Myanmar does not engage with the substance of the evidence, and that Myanmar instead seeks primarily only to challenge the quality of that evidence, appears to be an attempt by The Gambia to divert the Court's attention away from Myanmar's treatment of the substance of the evidence.
- 12.62 Myanmar clearly asks the Court to look at *both* the substance *and* the quality of the evidence relied on by The Gambia. The Gambia's suggestion that the substance of the evidence is largely uncontested is incorrect.

F. Alleged "sham" investigations

1. General

- 12.63 This Section of this Chapter responds to **paragraphs 8.21 to 8.32 (Chapter 8, Section II) of the Reply** of The Gambia, entitled "The Investigations Undertaken by Myanmar Have Been a Sham".
- 12.64 The Reply of The Gambia makes the sweeping claim that "the investigatory bodies Myanmar set up to 'investigate' allegations of genocide" were "created to make it appear as though Myanmar was pursuing accountability but were never intended to actually hold the Tatmadaw accountable", and that "actual activities of these bodies

¹⁹²² See paragraph 8.13 above.

and the reports they have produced ... make this clear”.¹⁹²³ The Gambia’s basis for this claim is unclear.

12.65 First, the Reply of The Gambia does not specify which bodies this statement is referring to. If it is referring to all of the bodies mentioned in paragraphs 11.52 to 11.103 of its Memorial (and dealt with in paragraphs 12.86 to 12.112 of the Counter-Memorial of Myanmar), then it is a tendentious and misleading statement. This is because, as is pointed out in the Counter-Memorial of Myanmar, various of these bodies were not even given any mandate to investigate alleged human rights violations or crimes, or to make findings as to individual responsibility.¹⁹²⁴ The Reply of The Gambia does not dispute this, but seeks to argue that “the limited mandate of those bodies ... further proves that they were never actually intended to achieve true accountability”.¹⁹²⁵

12.66 This is a further example of the kind of fallacious logic used by The Gambia in this case. As Myanmar points out in its Counter-Memorial, in every State in the world, there will be some bodies that are set up for the purpose of investigating and prosecuting crimes, and there will be other bodies that are set up for different purposes. It can hardly be said that bodies set up for different purposes must be “shams”, merely because they do not have the purpose of investigating and prosecuting crimes. The logical consequence of The Gambia’s argument would be that because Myanmar’s Ministry of Health and Sports or its Department of Civil Aviation have never prosecuted anyone for genocide, these bodies must be “shams” whose activities make clear that there is no intent to make the Myanmar Defence Services accountable.¹⁹²⁶ That conclusion would be absurd. It is equally absurd to suggest that a body such as the Annan Commission must have had the purpose “to create the false impression that an investigation was occurring”, merely because it was not established for the purpose of investigating and prosecuting crimes, and therefore did not do so.

¹⁹²³ RG, para. 8.21.

¹⁹²⁴ CMM, para. 12.88.

¹⁹²⁵ RG, para. 8.22.

¹⁹²⁶ RG, para. 8.22.

12.67 Once again, the arguments of The Gambia distract attention from the real issues in the case. The bodies which have responsibility for the investigation and prosecution of crimes are the Myanmar Police Force and the Prosecution Department of the Ministry of Legal Affairs (formerly the Union Attorney General’s Office) in the case of crimes committed by civilians, and the military justice system in the case of crimes committed by members of the Myanmar Defence Services.¹⁹²⁷ The matters that The Gambia needs to establish in order to prove a breach of the duty to punish genocide are dealt with in paragraphs 12.22 to 12.50 of the Counter-Memorial of Myanmar and paragraphs 12.7 to 12.9 above. The Gambia seeks to turn an argument about whether there has been a breach of the duty to punish genocide into an irrelevant discussion about whether or not certain other bodies are effective for investigating and prosecuting crimes.

2. Advisory Commission on Rakhine State (“Annan Commission”)

12.68 This Sub-section of this Chapter responds to **paragraphs 8.26 to 8.28 (Chapter 8, Sub-section II.A) of the Reply** of The Gambia.

12.69 The Advisory Commission on Rakhine State (“Annan Commission”) did not have a mandate to investigate alleged human rights abuses, as the Reply of The Gambia acknowledges.¹⁹²⁸ This body is therefore irrelevant to the arguments concerning the alleged breach of the duty to punish genocide, for the reasons given immediately above. There was therefore no need for this body to be addressed in detail in Chapter 12 of the Counter-Memorial of Myanmar, and it requires no further consideration here. This was explained in the Counter-Memorial.¹⁹²⁹

12.70 Although there is no need to discuss this body any further, Myanmar nonetheless notes that The Gambia does not establish that this body was a “sham”.

12.71 Myanmar has pointed out that the Annan Commission was chaired by a former United Nations Secretary-General, Mr. Kofi Annan.¹⁹³⁰ The Gambia questions the relevance

¹⁹²⁷ See paragraphs 12.19 above and 14.32 below, and First Provisional Measures Report, para. 87.

¹⁹²⁸ RG, para. 8.23.

¹⁹²⁹ CMM, paras. 12.88-12.90, specifically referencing the Annan Commission in footnote 2227.

¹⁹³⁰ CMM, para. 2.78.

of this.¹⁹³¹ However, this is of obvious relevance. If the body was a “sham”, it is highly unlikely that a former United Nations Secretary-General would have failed to realise this before the completion of the body’s mandate. It is also highly unlikely that a former United Nations Secretary-General would have continued to chair such a body until the conclusion of its mandate if he did realise that.

- 12.72 After the Annan Commission published its report, the Kofi Annan Foundation initiated a “lessons learned” process to assess the work of the Annan Commission, and produced a report in June 2018.¹⁹³² This stated:

In one sense, the [Annan] Commission succeeded. Its final report provided fair and actionable recommendations within all the thematic areas defined by the ToR [terms of reference]. The recommendations were endorsed by a variety of key stakeholders, including the Myanmar Government and the vast majority of international partners. In mid-October 2017, the Commission’s work was endorsed by all fifteen members of the UN Security Council, securing a greater degree of international buy-in and legitimacy than anyone could have expected at the onset. To this day, the implementation of the Commission’s recommendations remains a core component of the Rakhine strategy of the Myanmar Government, the UN and a broad segment of the international community. While relations between the Myanmar Government and its international partners have suffered major setbacks, the Commission’s recommendations provide one of the few frameworks where they all agree.¹⁹³³

- 12.73 That report of the Kofi Annan Foundation went on to note that after the final report of the Annan Commission was published, the situation in northern Rakhine State deteriorated. This was because, as has been noted in the Counter-Memorial, on the very night that the final report of the Annan Commission was published, ARSA launched a series of co-ordinated attacks on 30 police posts and the base of the 552nd Light Infantry Battalion, which required Myanmar to respond with counter-terrorism operations.¹⁹³⁴ The Report of the Kofi Annan Foundation states that:

During and immediately after the Commission’s mandate period, northern Rakhine State descended into violence, generating one

¹⁹³¹ RG, para. 8.23.

¹⁹³² Kofi Annan Foundation, *Advisory Commission on Rakhine State: Lessons Learned* (June 2018), RM, Vol. V, Annex 159.

¹⁹³³ *Ibid.*, pp. 57-58.

¹⁹³⁴ CMM, paras. 2.83-2.84. See also this Rejoinder, paragraph 13.108 above.

the greatest refugee disasters in the world. This does not mean that the Commission's work was in vain: the Commission successfully carried out its mandate, presenting fair and implementable recommendations to the Myanmar Government. The final report was endorsed by the Government – which pledged to implement its recommendations – and the vast majority of international partners. Many actors contend that the situation could have been even worse without the Commission's report. While the relationship between Myanmar and its international partners has deteriorated sharply, the implementation of the Commission's recommendations remains a unique platform for cooperation and mutual agreement.¹⁹³⁵

- 12.74 Thus, even a year after the publication of the final report of the Annan Commission, and after the ARSA attacks and counter-terrorism operations of 2017, the Kofi Annan Foundation itself remained of the view that the Annan Commission's work was of enduring benefit, and that its final report had been endorsed by both the Government of Myanmar and the vast majority of international partners, including all members of the Security Council. It certainly did not consider the Annan Commission to have been a “sham”.
- 12.75 The Gambia states that Myanmar does not address the point that the final report of the Annan Commission called for an “independent and impartial investigation” into crimes committed during the counter-terrorism operations.¹⁹³⁶ In fact, in that very recommendation, the final report of the Annan Commission noted the establishment of the Maungdaw Commission and called for the release of the full report of the Maungdaw Commission as soon as possible.¹⁹³⁷ As is noted in the Counter-Memorial of Myanmar, the final report of the Maungdaw Commission was issued on 8 August 2017.¹⁹³⁸ Furthermore, as also described in both the Memorial of The Gambia and the Counter-Memorial of Myanmar, after the Annan Commission issued its final report on 24 August 2017, the Independent Commission of Enquiry was established on 30

¹⁹³⁵ Kofi Annan Foundation, *Advisory Commission on Rakhine State: Lessons Learned* (June 2018), pp. 59-60, RM, Vol. V, Annex 159.

¹⁹³⁶ RG, para. 8.24.

¹⁹³⁷ Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State*, 24 August 2017 (“**Annan Commission Final Report**”), p. 55, para. 71, MG, Vol. IV, Annex 103.

¹⁹³⁸ CMM, para. 12.98.

July 2018, and was tasked to investigate alleged human rights violations during the armed clashes between the Tatmadaw and ARSA in 2016 and 2017.¹⁹³⁹

- 12.76 The Gambia also claims that Myanmar has not addressed the point that the Annan Commission “referenced the discriminatory policies used against the Rohingya”.¹⁹⁴⁰ However, The Gambia itself then immediately goes on to acknowledge that in fact a committee was set up to implement the recommendations of the Annan Commission, named the Committee for Implementation of the Recommendations on Rakhine State (the “**Implementation Committee**”).¹⁹⁴¹ The Gambia claims that this committee “completely ignored” the recommendations that it was established to implement, and did “not address these recommendations at all”.¹⁹⁴² This is denied.¹⁹⁴³ The Gambia makes this sweeping statement without any consideration at all of the contents either of the final report of the Annan Commission, or of the progress report of the Implementation Committee to which it refers.¹⁹⁴⁴ For instance, some of the recommendations of the Annan Commission were as follows:

19. [T]he Government should establish a road map for the lifting of restrictions [on freedom of movement] – with clear timelines and milestones. ...

¹⁹³⁹ See especially CMM, paras. 2.89 and 12.103.

¹⁹⁴⁰ RG, para. 8.24.

¹⁹⁴¹ RG, para. 8.24.

¹⁹⁴² RG, para. 8.24 and footnote 969.

¹⁹⁴³ In fact, relevant Ministries and four working committees (in which relevant Ministries are involved) were tasked to implement the 88 recommendations of the Annan Commission. To date, 20 of the recommendations have been fully implemented, 12 recommendations are still under process, and one recommendation remains to be implemented. The remaining 55 recommendations are the ones that need to be worked on continuously. Due to the current situation in Rakhine State, the implementation measures have been temporarily suspended. The following committees were established to ensure the successful implementation, and to speedily scrutinize and receive displaced persons from Rakhine State, who left their homes due to various reasons, and to resettle the displaced families and to provide humanitarian assistance: (1) the Central Committee on Implementation of Peace, Stability and Development of Rakhine State; (2) the Rakhine State Stability, Peace and Development Work Coordination Committee; (3) the Immigration and Citizenship Verification Work Committee; (4) the Regional Socio-Economic Development Work Committee; (5) the United Nations Organizations, International Organizations and Coordination Work Committee; and (6) the Humanitarian Assistance and Resettlement Working Committee. The second of these committees is making every effort to scrutinize and receive displaced persons from Rakhine State, who left their homes due to various reasons, as well as to provide humanitarian assistance and resettle them.

¹⁹⁴⁴ RG, para. 8.24 and footnote 969, referring to Myanmar, Committee for Implementation of the Recommendations on Rakhine State, *Report to the People on the Progress of the Implementation of Recommendations on Rakhine State* (January to April 2018), MG, Vol. VI, Annex 165.

20. The Government should introduce measures to prohibit informal restrictions that include, among others, unofficial payments, arbitrary roadblocks, and requirements for the Muslim community to pay for security escorts. Perpetrators should be prosecuted in accordance with the law.

21. Pending the eventual lifting of all above-mentioned movement restrictions, the Government should immediately simplify the travel authorization system to allow movement across townships and outside the state.¹⁹⁴⁵

12.77 The progress report of the Implementation Committee then states:

Freedom of Movement

A road map with a timeline and important milestones is currently being implemented to ensure that all people in Rakhine State – regardless of religion, race and citizenship status – enjoy freedom of movement that will bolster socioeconomic opportunities, in accordance with the existing laws, rules and regulations. As a result, people holding NV Cards can now enjoy freedom of movement in Maungdaw District. Discussions and coordination among relevant departments and agencies were also held to analyze and remove restrictions on movement as required. ...

The Security Sector

... All police personnel on active duty for security and law enforcement now wear visible name badges. ...

Police personnel are executing their duties ... in accordance with the standard operating procedures prescribed within the legal framework. The Myanmar Police Force initiates departmental investigations that they receive for any complaints on breach of such procedures; and takes actions for those who are found guilty as accused.

Additionally, the Myanmar National Human Rights Commission and the Anti-Corruption Commission are also carrying out investigations upon receipt of complaints and taking actions if the accused is found guilty, in accordance with the laws and procedures.¹⁹⁴⁶

12.78 It cannot be said that this progress report of the Implementation Committee “completely ignores” the recommendations that it was established to implement.

¹⁹⁴⁵ Annan Commission Final Report, p. 34, RM, Vol. III, Annex 60.

¹⁹⁴⁶ Myanmar, Committee for Implementation of the Recommendations on Rakhine State, *Report to the People on the Progress of the Implementation of Recommendations on Rakhine State* (January to April 2018) (not included in the extract at MG, Vol. VI, Annex 165), RM, Vol. III, Annex 68.

12.79 The Reply of The Gambia also claims that one official of Myanmar referred to the recommendations of the Advisory Commission on Rakhine State as “a ‘shield’ from criticism by the international community”.¹⁹⁴⁷ This argument was already made by The Gambia in its Memorial,¹⁹⁴⁸ and was addressed in the Counter-Memorial of Myanmar.¹⁹⁴⁹ Repetition by The Gambia of the same argument in its Reply does not make it any stronger. The words used by this government official in one interview did not reflect government policy, and the Annan Commission did not treat them as such. In its “lessons learned” report,¹⁹⁵⁰ the Kofi Annan Foundation notes that the Annan Commission “did not react publicly to U Zaw Htay’s statement but submitted a complaint to the Office of State Counsellor”, and that “Instead of turning into a public shouting match, the story died out quickly”.¹⁹⁵¹

3. Investigation Commission on Maungdaw (the “Maungdaw Commission”)

- 12.80 This Sub-section of this Chapter responds to **paragraphs 8.26 to 8.28 (Chapter 8, Sub-section II.B) of the Reply** of The Gambia, dealing with the Investigation Commission on Maungdaw (the “**Maungdaw Commission**”), the final report of which was issued on 8 August 2017.¹⁹⁵²
- 12.81 The Gambia does not engage with the detail of what is stated in paragraphs 12.95 to 12.103 of the Counter-Memorial of Myanmar, which is not unnecessarily repeated. Instead, The Gambia makes the sweeping statement that the Investigation Commission on Maungdaw was “pure pretence”.¹⁹⁵³ The only basis given by The Gambia for saying this is the fact that this body was chaired by a military general, and the fact that (according to The Gambia) “Commission members admitted that its

¹⁹⁴⁷ RG, para. 8.25.

¹⁹⁴⁸ MG, para. 11.54.

¹⁹⁴⁹ CMM, para. 12.84 footnote 2225. The Gambia assumes for no reason that any use of the word “shield” must mean “shield perpetrators from justice”. The quote cannot be understood to be saying that.

¹⁹⁵⁰ See paragraph 12.72 above.

¹⁹⁵¹ Kofi Annan Foundation, *Advisory Commission on Rakhine State: Lessons Learned* (June 2018), p. 50, RM, Vol. V, Annex 159.

¹⁹⁵² The summary of the final report is at MG, Vol. VI, Annex 149. The full report was not published (*cf.* CMM, para. 12.98).

¹⁹⁵³ RG, para. 8.26.

purpose was to provide a counterweight to the reports produced by international organizations”.¹⁹⁵⁴

- 12.82 However, the fact that the commission was chaired by a military general does not mean that the commission was “pure pretence”. By way of comparison, two bodies set up by the United Kingdom to investigate allegations made by Iraqi civilians of serious criminal behaviour by the United Kingdom’s armed forces in Iraq were the Iraq Historic Allegations Team (“**IHAT**”), and its successor body, the Service Police Legacy Investigations (“**SPLI**”). IHAT was part of the Royal Navy Police (RNP), and reported to the Provost-Marshal of the Navy.¹⁹⁵⁵ The SPLI was led by a senior Royal Navy Police Officer,¹⁹⁵⁶ and was made up of Royal Navy Police Officer and Royal Air Force Police personnel.¹⁹⁵⁷ The head of the SPLI had previously been the deputy head of IHAT.¹⁹⁵⁸
- 12.83 From 2014, the Office of the Prosecutor (“**OTP**”) of the International Criminal Court undertook a preliminary examination into “the situation in Iraq/United Kingdom (UK)”. At the conclusion of that preliminary examination, the OTP issued a report in which it concluded that “there was a reasonable basis to believe that members of UK armed forces committed war crimes within the jurisdiction of the Court against persons in their custody”,¹⁹⁵⁹ namely the war crimes of wilful killing/murder, torture and inhuman/cruel treatment, outrages upon personal dignity, and rape and/or other forms of sexual violence.¹⁹⁶⁰ The report further concluded that “[t]he outcome of the more than ten year long domestic [IHAT/SPLI] process, involving the examination of thousands of allegations, has resulted in not one single case being submitted for prosecution: a result that has deprived the victims of justice”.¹⁹⁶¹ The report stated that, nonetheless, the OTP “cannot conclude that the UK authorities have been

¹⁹⁵⁴ RG, para. 8.26.

¹⁹⁵⁵ International Criminal Court, Office of the Prosecutor, Situation in Iraq/UK, Final Report, 9 December 2020 (“**ICC Iraq/UK Report**”), para. 449, RM, Vol. IV, Annex 126.

¹⁹⁵⁶ United Kingdom, Ministry of Defence, Service Police Legacy Investigations, 8 August 2017, last updated 19 October 2021, RM, Vol. V, Annex 187.

¹⁹⁵⁷ ICC Iraq/UK Report, paras. 182-183, RM, Vol. IV, Annex 126.

¹⁹⁵⁸ *Ibid.*

¹⁹⁵⁹ *Ibid.*, p. 4, paragraph 1 of the Executive Summary.

¹⁹⁶⁰ *Ibid.*, p. 4, paragraph 2 of the Executive Summary.

¹⁹⁶¹ *Ibid.* p. 6, paragraph 6 of the Executive Summary.

unwilling genuinely to carry out relevant investigative inquiries and/or prosecutions”, and specifically, that the OTP:

cannot conclude that the relevant investigative inquiries or investigative/prosecutorial decisions were made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; that there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; or that the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.¹⁹⁶²

The OTP therefore closed its preliminary examination.¹⁹⁶³

- 12.84 The OTP so found, notwithstanding that there had been allegations in media articles in the United Kingdom (BBC and the *Sunday Times*) of intentional disregarding, falsification, and/or destruction of evidence, as well as allegations of impeding or preventing certain investigative inquiries, and of prematurely terminating cases.¹⁹⁶⁴ After investigating, the OTP concluded that it had been unable to substantiate these allegations,¹⁹⁶⁵ notwithstanding its concerns “that professional IHAT investigators ... would have made allegations of a cover-up”,¹⁹⁶⁶ its “concerns on how IHAT/SPLI and the SPA [Service Prosecuting Authority] made certain decisions and applied certain aspects of the evidence sufficiency test”,¹⁹⁶⁷ and its concerns that “former IHAT investigators stated that they felt under pressure to close cases”.¹⁹⁶⁸
- 12.85 This demonstrates that a commission of inquiry into events in which the military was involved cannot be branded a “sham” or a “pure pretence” merely because it is led by a member of the military, or merely because its work ultimately resulted in no prosecutions, or merely because media or other reports have claimed that the body is not independent and impartial, or merely because all of these factors pertain. The

¹⁹⁶² *Ibid.*, para. 502.

¹⁹⁶³ *Ibid.*, p. 9, paragraph 13 of the Executive Summary.

¹⁹⁶⁴ *Ibid.*, paras. 372-373.

¹⁹⁶⁵ *Ibid.*, paras. 409-412.

¹⁹⁶⁶ *Ibid.*, para. 409.

¹⁹⁶⁷ *Ibid.*, para. 410.

¹⁹⁶⁸ *Ibid.*, para. 411.

Gambia presents nothing concrete at all, let alone anything specific and detailed, in support of its allegations that the Maungdaw Commission (or indeed, any of the other bodies that it criticises) were “shams”.

12.86 The Gambia says that the Chair of the Maungdaw Commission said that the Commission would “work quickly to ‘reduce [the] worries’” of international organizations monitoring developments in Rakhine State.¹⁹⁶⁹ That was an entirely understandable statement. Those concerned about allegations of crimes are likely to be less concerned if they know that an independent body will promptly complete an investigation into the matter. It is impossible to characterise this as a statement that the purpose of the Maungdaw Commission was “to provide a counterweight to the reports produced by international organizations”,¹⁹⁷⁰ as The Gambia seeks to do.

12.87 The Gambia then claims that the Chair of the Maungdaw Commission “publicly defended the ‘clearance operations’”.¹⁹⁷¹ In support of this claim, The Gambia refers to an analytical report of the IIMM, which in turn quotes from an article in *The Global New Light of Myanmar* dated 9 December 2016, in which the Chair is reported as having said the previous day that:

Tatmataw-Myanmar Police Force combined troops made a series of area clearance operations, with a view to investigating those involved in armed attacks and recapturing looted arms and ammunition, confronting frequent attacks. Starting from October 9 till now, 7 soldiers and 10 policemen were killed with 3 soldiers, 7 policemen and one civilian injured, and 2 firearms of the Tatmataw and 39 units from the police force lost.¹⁹⁷²

¹⁹⁶⁹ RG, para. 8.26 footnote 974 and accompanying text, referring to MG, para. 11.68 footnote 1500 and accompanying text, referring to International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar* (January 2018), p. 23, MG, Vol. IV, Annex 108, referring to a press release of the Union of Myanmar President’s Office.

¹⁹⁷⁰ RG, para. 8.26.

¹⁹⁷¹ RG, para. 8.26.

¹⁹⁷² RG, para. 8.26 footnote 975 and accompanying text, referring to United Nations Independent Investigative Mechanism for Myanmar, *Efforts to Investigate and Punish Sexual and Gender-Based Crimes Committed Against Rohingya: Evidence Analysis* (27 March 2024), para. 51, RG, Vol. II, Annex 8, quoting an article in *The Global New Light of Myanmar* dated 9 December 2016.

- 12.88 This statement was made after the ARSA attacks and counter-terrorism operations of 2016, but before those of 2017. The Gambia does not establish that what he stated was not an objective statement of what was known at the time.¹⁹⁷³
- 12.89 The Gambia claims that the Maungdaw Commission “blamed the violence in Rakhine state entirely on ARSA and the Rohingya”.¹⁹⁷⁴ That is not correct, as is clear from paragraphs 12.95 to 12.102 of the Counter-Memorial of Myanmar. The Maungdaw Commission in fact found that “there could have been actions that were not in accordance with the law, excessive actions on the part of individual members of security forces”, and that “the responsible persons at various levels of administration need to look into the issues carefully and take action when cases are uncovered”.¹⁹⁷⁵
- 12.90 The Gambia then contends that reports of the Maungdaw Commission found that “well-documented violence committed by the Tatmadaw against the Rohingya was ‘fabricated’ by the media, and these ‘misconceptions’ were what caused the Rohingya to flee, not the violence committed against them”.¹⁹⁷⁶ In fact, the summary of the Commission’s Report states only that “*some* of the media carried horror stories fabricated by some organizations that never actually happened in Myanmar”, and that this “became *another factor* pushing them to leave for the neighbouring country”¹⁹⁷⁷ (emphases added). The Gambia does not establish that this was not an objective statement, let alone that it was so baseless as to establish that the Maungdaw Commission was “pure pretence”.¹⁹⁷⁸
- 12.91 The Gambia acknowledges that the Maungdaw Commission found that “For cases where disproportionate use of force can be proven, the responsible persons concerned will need to be investigated and action taken against them”.¹⁹⁷⁹ The Gambia

¹⁹⁷³ See CMM, paras. 3.26-3.41.

¹⁹⁷⁴ RG, para. 8.26.

¹⁹⁷⁵ CMM, para. 12.98.

¹⁹⁷⁶ RG, para. 8.27.

¹⁹⁷⁷ Summary of the Report of Investigation Commission for Maungdaw in Rakhine State, 8 August 2017, p. 5, para. 18, MG, Vol. VI, Annex 149.

¹⁹⁷⁸ As to the other documents cited in RG footnote 978, The Gambia merely repeats the argument made in MG, para. 11.69, to which a response is already given in CMM, paras. 12.96-12.97.

¹⁹⁷⁹ Summary of the Report of Investigation Commission for Maungdaw in Rakhine State, 8 August 2017, paras. 37-39 and 47, MG, Vol. VI, Annex 149, quoted in CMM, para. 12.98.

incorrectly states that “Myanmar admits in its Counter-Memorial that the Commission did not find that any of the complaints filed were valid”.¹⁹⁸⁰ What the Counter-Memorial states is that “although the Commission did not itself uncover any specific cases, it left open the possibility that cases might be proved by evidence in the future”.¹⁹⁸¹ Again, The Gambia appears to suggest that a body can only be considered independent and impartial if it reaches conclusions that are consistent with The Gambia’s version of events.¹⁹⁸²

12.92 The Gambia also incorrectly states that “the summary of the final report focused on discounting the findings of the OHCHR”.¹⁹⁸³ That is not so. That 15–page document¹⁹⁸⁴ has 58 paragraphs, of which only five refer to the OHCHR,¹⁹⁸⁵ and only two of these deal with perceived shortcomings in the OHCHR report.¹⁹⁸⁶

12.93 Contrary to what The Gambia states,¹⁹⁸⁷ the FFM did not itself call into question the Maungdaw Commission’s “methodology and skills regarding sensitive human rights investigations”. Rather, the FFM merely stated that its “methodology and skills regarding sensitive human rights investigations” had “been called into question”, without giving details of who had done so, or on what basis.¹⁹⁸⁸ A footnote to that statement in the FFM report states merely that “One example regarding the public interviewing and shaming of an alleged victim of sexual violence has been discussed in detail above”, but no cross-reference is given.¹⁹⁸⁹ The Gambia cites other documents that are mere expressions of opinion, unsupported by evidence, to the

¹⁹⁸⁰ RG, para. 8.27.

¹⁹⁸¹ CMM, para. 12.102.

¹⁹⁸² See CMM, para. 12.92.

¹⁹⁸³ RG, para. 8.27.

¹⁹⁸⁴ Summary of the Report of Investigation Commission for Maungdaw in Rakhine State, 8 August 2017, MG, Vol. VI, Annex 149.

¹⁹⁸⁵ *Ibid.*, paras. 2, 40, 41(d), 54 and 55.

¹⁹⁸⁶ *Ibid.*, paras. 54 and 55.

¹⁹⁸⁷ MG, para. 11.71.

¹⁹⁸⁸ 2018 FFM Detailed Findings, para. 1607, MG, Vol. II, Annex 40.

¹⁹⁸⁹ *Ibid.*, para. 1607 footnote 3368. The unstated cross-reference is apparently to *ibid.*, para. 1599 second dot point, which refers to two Facebook videos which are said by the FFM to show a woman being interviewed publicly by a group of “mainly men” in a “hostile tone” (see MG, para. 11.71 footnote 1510 and accompanying text). If The Gambia had wanted to rely on these videos in support of its case, it should have annexed them to its Memorial, rather than relying on a second-hand description of them by the FFM. The videos in question are still freely available on the internet.

effect that the Maungdaw Commission “does not *appear* to have a robust methodology or policies in place to address key issues such as witness protection or documentation of evidence”,¹⁹⁹⁰ or that it was concerning that the Commission, “which had unhindered access to the location of the incidents, found nothing to substantiate the claims”.¹⁹⁹¹ The Gambia also cites a 2-page document from Amnesty International that contains a bare statement that, as far as Amnesty International was aware, the Maungdaw Commission did not have “experienced human rights investigators, forensic specialists, medical experts or staff trained to work with survivors of sexual and other gender based violence or child victims”.¹⁹⁹² The Gambia also cites expressions of opinion by “several international NGOs” expressing opinions about “the problematic nature of the Commission’s investigative methods”.¹⁹⁹³ However, opinions are not evidence. The Gambia provides no substantiated analysis supported by facts to establish its suggestion that the Maungdaw Commission was incapable of undertaking an effective and impartial investigation. In any event, even if The Gambia could prove that the Maungdaw Commission’s methodology or resources were lacking in certain respects (and it has not proved this), this would not mean that this entire body was a “sham”.

4. Independent Commission of Enquiry (“ICOE”)

- 12.94 This Sub-section of this Chapter responds to **paragraphs 8.29 to 8.31 (Chapter 8, Sub-section II.C) of the Reply** of The Gambia.
- 12.95 The Independent Commission of Enquiry (“ICOE”) was established on 30 July 2018, and tasked to investigate allegations of human rights violations and related issues following the terrorist attacks by the Arakan Rohingya Salvation Army (ARSA) in Rakhine State (2016-2017) with a view to seeking accountability and formulating

¹⁹⁹⁰ MG, para. 11.71 footnote 1509 (emphasis added) and accompanying text, citing UN OHCHR, Statement by Ms Yanghee Lee, Special Rapporteur on the Situation of Human Rights in Myanmar at the 34th session of the Human Rights Council (13 March 2017), MG, Vol. III, Annex 68.

¹⁹⁹¹ MG, para. 11.71 footnote 1510 and accompanying text, citing United Nations, Press Release: Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide following OHCHR’s report on the situation in northern Rakhine State, Myanmar (6 February 2017), MG, Vol. III, Annex 61.

¹⁹⁹² MG, para. 11.71, footnote 1510 and accompanying text, citing Amnesty International, *Myanmar: National efforts to investigate Rakhine State violence are inadequate* (21 February 2017), pp. 1-2, MG, Vol. IV, Annex 101.

¹⁹⁹³ MG, para. 11.72, and see also at para. 11.73. See also MG, para. 11.74, referring to an opinion of the UN Committee on the Elimination of Discrimination against Women.

recommendations on steps to be taken to ensure peace and stability in Rakhine State. It was a fact-finding commission with special investigative powers. It was governed by its Terms of Reference (ToR) and it had the necessary powers under Myanmar's Investigation Committee Act 1950 to enable proper and comprehensive fact-finding and to achieve successful investigations.

- 12.96 The Gambia's statement that the "ICOE's 20 January 2020 report found that the crimes committed during the clearance operations were entirely attributable to ARSA, not the Tatmadaw"¹⁹⁹⁴ is simply wrong. The ICOE expressly states that there is evidence that disproportionate force may have been used by the Myanmar Defence Services: see paragraphs 12.106 to 12.108 of the Counter-Memorial of Myanmar. The Gambia simply ignores what is stated in the Counter-Memorial.
- 12.97 The Gambia relies on a media article that reports a Government spokesperson as saying that the ICOE would address "false allegations made by the UN agencies and other international communities".¹⁹⁹⁵ However, that statement was made by a spokesperson for *the Government*, and not by the ICOE, which was independent of the Government. If a government considers that accusations are false, it is entirely appropriate for the government to respond by setting up an independent body to investigate those allegations. While the government may consider the allegations to be false, this does not mean that the body set up to investigate them has yet formed any view on the question, and does not mean that the body is not independent.
- 12.98 The Gambia relies on a statement in the 2018 FFM Detailed Findings that refers to a video on Facebook of a press conference given by the ICOE on 16 August 2018. During the press conference, the Chairperson of the ICOE said that, "there will be no blaming of anybody, no finger-pointing of anybody".¹⁹⁹⁶ The Court should place no weight on this. That video of that press conference is in the Myanmar language, and the context of the statement cannot be considered from the information given by The Gambia. If The Gambia had wanted to rely on this videos in support of its case, it

¹⁹⁹⁴ RG, para. 8.29.

¹⁹⁹⁵ RG, para. 8.30, citing MG, para. 11.87, citing BBC, "Myanmar rejects UN accusation of 'genocide' against Rohingya", 29 August 2018, MG, Vol. IX, Annex 293.

¹⁹⁹⁶ RG, para. 8.30, referring to 2018 FFM Detailed Findings, para. 1619, which in turn refers to International Commission of Enquiry, Press Conference of 16 August 2018 in Naypyidaw.

should have annexed it to its Memorial with a transcript in English, rather than relying on a second-hand description of it in a report of the FFM. The video in question is still freely available on the internet.

- 12.99 The Gambia relies on a description of a media article published by Reuters, according to which one of the members of the ICOE, Dr. Aung Tun Thet, stated *prior to the ICOE's establishment* that “Myanmar has a ‘clear conscience’ and that ‘there is no such thing in our country, in our society, as ethnic cleansing, and no genocide.’”¹⁹⁹⁷ The fact that he made such a statement prior to the existence of the ICOE, prior to his appointment to that body, and prior to his consideration of the evidence presented to the ICOE, does not of itself mean that he was unwilling and incapable of subsequently considering evidence in relation to this question in an impartial way and with an open mind, and of reaching a different view, if that is what the evidence showed.
- 12.100 The Gambia claims that this member of the ICOE was previously the Chief Coordinator of the Union Enterprise for Humanitarian Assistance Resettlement and Development (UEHRD).¹⁹⁹⁸ The Gambia claims that the UEHRD “oversaw the destruction of areas (and including evidence of genocide) in Rakhine state for purposes of new development projects”.¹⁹⁹⁹ The only evidence that The Gambia cites for this is the 2018 FFM Detailed Findings, which makes a bare statement to that effect, and then notes that Dr Aung Tun Thet himself was reported as having denied this.²⁰⁰⁰ The 2018 FFM Detailed Findings refers to a press report by Reuters that he had said that “the remains of Rohingya Muslim villages [were bulldozed] to make way for refugee resettlement, not to destroy evidence of atrocities”.²⁰⁰¹

¹⁹⁹⁷ RG, para. 8.30, citing United Nations Independent Investigative Mechanism for Myanmar, *Efforts to Investigate and Punish Sexual and Gender-Based Crimes Committed Against Rohingya: Evidence Analysis* (27 March 2024), para. 72, RG, Vol. II, Annex 8, citing an article by Reuters. The Gambia does not even annex this media article to its Reply, but instead merely cites an IIMM report that refers to this media article.

¹⁹⁹⁸ RG, para. 8.30.

¹⁹⁹⁹ RG, para. 8.30.

²⁰⁰⁰ 2018 FFM Detailed Findings, para. 1619 footnote 3386 and accompanying text, MG, Vol. II, Annex 40.

²⁰⁰¹ *Ibid.*, referring to S. Naing, “Bulldozing Rohingya villages was not ‘demolition of evidence’, Myanmar official says”, *Reuters*, 26 February 2018.

- 12.101 The Gambia claims that “numerous organizations ... have identified the ICOE as a tool for propaganda and a body lacking credibility”,²⁰⁰² but then cites only one organization.²⁰⁰³ In any event, the opinions of organizations, which may have their own prejudices, biases and agendas, are not evidence. They add nothing to the points made by The Gambia that are addressed above.
- 12.102 The Gambia states that the full report of the ICOE has not been made public. This has already been addressed in the Counter-Memorial of Myanmar.²⁰⁰⁴
- 12.103 The Gambia incorrectly states that the executive summary of the ICOE report “categorically dismisses that rape occurred”,²⁰⁰⁵ and “admits that the ICOE did not interview any Rohingya refugees”, and that “the witnesses who were consulted were interviewed with security forces present”.²⁰⁰⁶ That is not correct. What the executive summary states is that “There were no credible statements on allegations of gang rape committed by Myanmar’s security forces”, and that “Although some interviewees mentioned rape cases, these were all secondhand information heard from someone else”.²⁰⁰⁷ It says that one interview team gave “Priority ... to obtaining statements from Muslim and ethnic national witnesses ...”,²⁰⁰⁸ and that “Muslims were the largest number” of the witnesses interviewed by the other team.²⁰⁰⁹ It does not say that witnesses were consulted with members of the security forces present. In fact, the ICOE was not formed by the Tatmadaw, and the Tatmadaw had no role in the interviewing of witnesses. Members of the Tatmadaw and security forces merely provided the security measures for the witnesses and members of the ICOE. It is denied that there were instances of members of the Tatmadaw disturbing or threatening witnesses.

²⁰⁰² RG, para. 8.30.

²⁰⁰³ RG, para. 8.30 footnote 990, referring to a report which The Gambia, contrary to Article 50, paragraph 1, of the Rules of Court, has failed to annex to its Reply.

²⁰⁰⁴ CMM, paras. 12.37-12.39.

²⁰⁰⁵ RG, para. 8.31.

²⁰⁰⁶ RG, para. 8.31.

²⁰⁰⁷ Independent Commission of Enquiry, Executive Summary, 21 January 2020, p. 6, MG, Vol. VI, Annex 167.

²⁰⁰⁸ *Ibid.*, p. 5.

²⁰⁰⁹ *Ibid.*, p. 7.

- 12.104 The Gambia claims that the ICOE did not identify crimes committed by the military, “despite the overwhelming evidence of their crimes”.²⁰¹⁰ The Gambia thereby ignores what is stated in paragraphs 12.107 and 12.108 of the Counter-Memorial of Myanmar. Furthermore, The Gambia again simply assumes that there was “overwhelming evidence ... crimes”, and that any body that reaches conclusions that are inconsistent with The Gambia’s version of events cannot be considered independent and impartial.²⁰¹¹ The Gambia is not entitled to make that assumption.
- 12.105 Contrary to what The Gambia claims, the fact that the investigation and prosecution of crimes is the role of authorities other than the ICOE does not “confirm that this body was not intended to achieve real accountability”.²⁰¹² See paragraphs 12.65 to 12.67 above.
- 12.106 The Gambia’s claim that Myanmar has “used [the ICOE] to deflect criticism resulting from the UN Fact-Finding Mission’s findings”, and that “the ICOE has not conducted any real investigation into the Tatmadaw’s conduct”,²⁰¹³ have therefore not been substantiated.

5. Criminal Investigation and Prosecution Body (“CIPB”)

- 12.107 **Paragraph 8.32 (Chapter 8, Sub-section II.D) of the Reply** of The Gambia raises nothing that has not already been addressed in the Counter-Memorial of Myanmar.

G. Alleged destruction of evidence

- 12.108 This Section of this Chapter responds to **paragraphs 8.33 to 8.41 (Chapter 8, Section III) of the Reply** of The Gambia, entitled “Myanmar Has Failed to Rebut The Gambia’s Overwhelming Evidence that it Destroyed Evidence of Genocide”.

²⁰¹⁰ RG, para. 8.31.

²⁰¹¹ See CMM, para. 12.92.

²⁰¹² RG, para. 8.31.

²⁰¹³ RG, para. 8.29.

12.109 The Gambia claims that Myanmar has “burn[ed] down Rohingya homes and bulldoz[ed] entire Rohingya villages”, and that in doing so, it has “destroyed evidence of the crime of genocide”.²⁰¹⁴

12.110 This allegation makes some very significant assumptions.

- (1) The Gambia assumes that all damage and destruction of all of the buildings to which it refers was caused deliberately by the Myanmar Defence Services or other persons or entities for whose acts Myanmar is internationally responsible, for no legitimate purpose. However, The Gambia does not establish by evidence that this is the case.
- (2) The Gambia assumes that in all buildings that have been damaged or destroyed by fire or have been bulldozed, there was evidence that genocide had been committed by the Myanmar Defence Services, and that the effect of the damage to or destruction of the building has been to destroy that evidence. However, The Gambia does not establish by evidence that this is the case, or indeed, even explain how this is said to be the case. The Gambia does not explain what it says would have been inside the buildings that would have provided evidence of the commission of crimes, but which would no longer be available due to the fact that it has been destroyed by fire. The Gambia also does not explain why the claimed evidence that is said to have been destroyed would have provided evidence that any alleged crimes were genocide rather than some other kind of crime. To the extent that The Gambia alleges that the destruction of buildings itself was a crime, any destruction of buildings obviously would not amount to destruction of evidence that the building has been destroyed.
- (3) The Gambia furthermore assumes, or at least necessarily implies, that those responsible for the damage to or destruction of all of the buildings knew that the buildings contained evidence of crimes committed by the Myanmar Defence Services, and that they damaged or destroyed those buildings for the express purpose of destroying that evidence. The Gambia furthermore assumes, or at least necessarily implies, that those responsible knew that the evidence in

²⁰¹⁴ RG, para. 8.33.

question was evidence of genocide, rather than of other kinds of crimes. Again, The Gambia does not establish by evidence that this is the case.

- 12.111 The Gambia does not give any justification for making such assumptions in relation to all of the villages that it claims have suffered damage or destruction by fire or bulldozing. In relation to villages said to have been wholly or partly destroyed by fire, apart from the 43 locations described in Chapters 8 and 9 of the Counter-Memorial of Myanmar, and Chapters 8 and 9 above of this Rejoinder, The Gambia presents no evidence at all of the circumstances of the fires or *who* was responsible for them. In relation to the 43 locations dealt with in the Counter-Memorial of Myanmar and in this Rejoinder, even the 2018 FFM Detailed Findings, on which The Gambia places such central reliance, accepts that certain buildings were set alight by ARSA,²⁰¹⁵ and Myanmar has also presented other evidence of this.²⁰¹⁶ Some fires may not have been set deliberately, but may have arisen out of the ongoing violent confrontation taking place between ARSA and its supporters and the Myanmar Defence Services. Other fires may have happened after the counter-terrorism operations had ended. The Gambia claims that hundreds of villages have been partially or wholly destroyed by fire, relying on satellite imagery. However, The Gambia generally does not present evidence that any fire damage occurred when the villages were still occupied, or any evidence as to who was responsible.
- 12.112 As has been demonstrated in Chapters 8 and 9 of the Counter-Memorial of Myanmar, and in Chapters 8 and 9 above of this Rejoinder, the evidence relied on by The Gambia does not suggest that any crimes were committed by members of the Myanmar Defence Services during the counter-terrorism operations in any of the *hundreds* of Bengali Muslim villages in northern Rakhine State, apart from the 43 specific locations dealt with in those chapters. It therefore follows that The Gambia has not established that there could be evidence of any such alleged crimes in any locations other than those 43. Indeed, The Gambia does not even seek to dispute that no counter-terrorism operations occurred in any locations other than the 43 dealt with in the pleadings of the parties, since it specifically asserts at paragraph 9.52 of its Reply that there are “329 villages that Myanmar labelled with green dots (meaning they admit

²⁰¹⁵ CMM, paras. 8.33, 8.37 and 8.50.

²⁰¹⁶ CMM, paras. 8.34, 8.36, 8.45, 8.49-8.50 and 8.93. See also this Rejoinder, paragraph 3.38 above.

that there were no counter-terrorism operations there)”. In any event, The Gambia presents no evidence that there were counter-terrorism operations in those other locations. The Gambia, however, leaps to the conclusion that any fire damage in any of the other locations must have been caused by the Myanmar Defence Services. That is not the only inference that can be drawn from the evidence. Another reasonable inference, indeed, the more probable inference, is that if no counter-terrorism operations were conducted in these locations, any fire damage would have been caused by someone other than the military.

- 12.113 In any event, the alleged destruction of property obviously does not amount to the destruction of evidence but to the destruction of property. Destroying a building by fire does not of itself destroy evidence that the building was destroyed by fire.
- 12.114 For this reason alone, The Gambia’s allegations of “destruction of evidence” must be rejected summarily in relation to all locations other than the 43 locations dealt with in Chapters 8 and 9 of the Counter-Memorial of Myanmar, and in Chapters 8 and 9 above of this Rejoinder. In relation to the latter 43 locations, Myanmar relies on what is stated in Chapters 8 and 9 of its Counter-Memorial of Myanmar, and in Chapters 8 and 9 above of this Rejoinder.
- 12.115 Furthermore, to the extent that the evidence relied on by The Gambia does specifically refer to fires being set by the Myanmar Defence Services, this evidence cannot be given any meaningful evidential weight, for the reasons given in Chapters 6 and 7 of the Counter-Memorial of Myanmar and Chapters 6 and 7 above of this Rejoinder.
- 12.116 The Gambia claims that Myanmar has not adequately responded to an allegation of the UN High Commissioner for Human Rights that OHCHR had documented the “burning of villages’ by the Tatmadaw in May 2020 ... including “large areas of Buthidaung township where Rohingyas lived before 2017”.²⁰¹⁷ However, if The Gambia alleges that this occurred, the burden is on The Gambia to prove it. The only evidence provided by The Gambia is an “oral update” by the UN High Commissioner for Human Rights, which contains a bare statement to the effect that this occurred,

²⁰¹⁷ RG, para. 8.37, referring to MG, para. 11.48.

unsupported by any details or evidence,²⁰¹⁸ and a report by the UN High Commissioner for Refugees that similarly contains a bare statement, unsupported by any details or evidence, that “Throughout the month of May 2020 *there were reports that* the Tatmadaw had burned large swathes of Buthidaung township”.²⁰¹⁹

12.117 Myanmar has already denied this allegation. As is explained in its Second Provisional Measures Report, the Government of Myanmar conducted GIS (geographic information system) analyses of satellite imagery, fire detection data obtained from the United States National Aeronautics and Space Administration (NASA), and Visible Infrared Imaging Radiometer Suite (VIIRS) data from the United States Oceanic and Atmospheric Administration, for the whole of Buthidaung Township for the time period between December 2019 to July 2020. No visible evidence of burned villages in Buthidaung Township was found for the alleged time period. Furthermore, Myanmar has conducted ground assessments and analyses of data sets of high-resolution satellite imagery of the six villages where alleged burnings took place, comparing data sets from January 2020, 10 and 17 May 2020, and June 2020. Myanmar’s analyses have found no visible evidence of burned villages in Buthidaung Township for these time periods. Furthermore, Myanmar’s examination of fire detection data from NASA’s VIIRS and MODIS (Moderate Resolution Imaging Spectroradiometer) sensors, globally recognised for accurate detection of fires as small as 375 square meters up to three to four times a day, found no record of fires in the areas during the claimed time periods.²⁰²⁰ In a letter dated 10 September 2020, the UN High Commissioner for Human Rights indicated that its allegations of burning were based on information from unidentified anonymous witnesses, and “satellite imagery and analysis” of which no details are given.²⁰²¹

12.118 It is therefore misleading of The Gambia to state that Myanmar “does not provide any evidence of how these authorities came to this conclusion or why the OHCHR’s

²⁰¹⁸ MG, para. 11.48, relying on UN Human Rights Council, Oral update on the human rights situation of Rohingya people (S-27/1), Statement by Michelle Bachelet, High Commissioner for Human Rights, 30 June 2020, MG, Vol. III, Annex 81.

²⁰¹⁹ MG, para. 11.48, relying on UN GA, Human Rights Council, Situation of human rights of Rohingya Muslims and other minorities in Myanmar, UN Doc. A/HRC/45/5, 3 September 2020, para. 29, MG, Vol. III, Annex 56.

²⁰²⁰ Second Provisional Measures Report, paras. 85-92.

²⁰²¹ *Ibid.*, Annex 26.

evidence is wrong”.²⁰²² This example reinforces the obvious fact that bare statements about burning of buildings contained in reports of UN bodies, NGO reports and other documents cannot be regarded as proof of the stated fact. Indeed, it is not even evidence of the stated fact to which any meaningful evidential weight could be given.²⁰²³

H. Conclusion

12.119 Unless The Gambia first establishes that genocide was indeed committed, which it has not, its arguments about failure to prosecute, “sham” investigations and destruction of evidence, are of no relevance at all.

12.120 The Gambia contends that where the authorities fail to prosecute an alleged crime, or conduct “sham” investigations into the crime, or destroy evidence of the crime, this suggests that the authorities share the criminal intent of the perpetrator.²⁰²⁴ However, this argument cannot be used to establish that the authorities had a particular intent, unless it is first established that the alleged perpetrator had that intent. Failure to prosecute a person for committing an act, or destruction of evidence of the commission of an act, does not of itself establish that that the person committing that act had a intent to commit genocide as opposed to some other kind of crime, and indeed, does not of itself establish that the person had any intent to commit any crime at all. Therefore, failure to punish, or destruction of evidence, cannot prove that the

²⁰²² RG, para. 8.37.

²⁰²³ Similarly, paragraph 26 of The Gambia’s observations on the Second Provisional Measures Report quotes a report of the Special Rapporteur on the situation of human rights in Myanmar, alleging that “physical structures built since October 2017 for the return of the Rohingya, including Taung Pyo Let Yar Reception Centre, Nga Khu Ya Reception Centre and Hla Poe Khaung Transit Centre, were constructed where Rohingya villages had previously stood, thereby potentially destroying any evidence that may have previously existed at those sites”, and that “[t]here is evidence that similar reconstruction has occurred since 2017 in multiple villages in Maungdaw township, as well as in Paung Zar village in Rathedaung township”. In fact, there was no village named Paung Zar village in Rathedaung Township. In the village tract of Phaung Zar in Rathedaung Township, there was a Muslim village named Kyet Yoe Kone Tan. During the 2012 incidents, members of ARSA terrorists set fire the entire village and the residents abandoned the whole village. On the site of the destroyed village, there is no building constructed under the government plan. There is also no construction and settlement of other ethnic groups. Two repatriation centres, namely Taung Pyo Let Wae, and Nga Khu Ya (2) in Maungdaw township and Hla Phoe Khaung temporary resettlement camp are the temporary sites for the repatriation process. The Assemble Board Houses constructed near Taung Pyo Let Wae, Nga Khu Ya repatriation centres and Hla Phoe Khaung temporary resettlement camp in Maungdaw township are to stay there only temporarily. In relation to allegations of the construction of buildings on the sites of former Bengali villages, see also paragraphs 2.36 and 7.112 above, and paragraph 14.89 below.

²⁰²⁴ RG, para. 8.1.

person committing the act, or the authorities, had a genocidal intent, unless there is some particular reason why the failure to prosecute, or destruction of evidence, somehow indicates that act amounts to genocide, rather than some other crime, or conduct that amounts to no crime at all. The Gambia advances no such particular reasons at all. In the absence of any such particular reason, its arguments that failure to prosecute, “sham” investigations and destruction of evidence prove that the authorities had a genocidal intent are another example of the erroneous reasoning used by The Gambia.

- 12.121 The Gambia also present a simplistic argument that the alleged impunity “created an environment that enabled genocide by communicating to security personnel that they would never be held accountable for crimes committed against the Rohingya group”.²⁰²⁵ Impunity for a crime by definition can only exist *after* an alleged crime has been committed. Therefore, impunity for a particular crime cannot encourage or enable that very crime itself, which will have already been committed by the time of any impunity for it. Impunity for one crime can only potentially encourage future crimes. The Gambia does not identify which specific crimes it alleges were encouraged by impunity for which earlier crimes. Nor does The Gambia establish any link of causation between the failure to punish the earlier crimes and the commission of the later crimes in question.
- 12.122 Although the arguments in Chapter 8 of the Reply of The Gambia are not relevant, they have, without prejudice to this position of Myanmar, been addressed above. The Gambia has not established a failure to punish genocide.

²⁰²⁵ RG, para. 8.2.

PART FIVE

CHAPTER 13

GENOCIDE HAS NOT BEEN ESTABLISHED

A. Introduction

- 13.1 In these proceedings, the burden of proof is on The Gambia.²⁰²⁶ The Gambia must meet the very high standard of proof that applies in cases alleging breaches of the Genocide Convention.²⁰²⁷
- 13.2 Chapter 13 of the Counter-Memorial of Myanmar demonstrates that the evidence presented in the Memorial of The Gambia fails to prove to that very high standard either:
- (1) that Bengali Muslims in Rakhine State are a protected group for purposes of Article II of the Convention;
 - (2) that acts were committed that constituted the *actus reus* of genocide; or
 - (3) that any such acts were committed with the requisite *mens rea*, that is to say, with the specific intent physically or biologically to destroy the claimed group as such.
- 13.3 The present Chapter of this Rejoinder will demonstrate that nothing in the Reply of The Gambia changes that conclusion.

B. The existence of a protected group has not been proved

1. General

- 13.4 The Gambia states that “both Parties know exactly what group is being identified when referring to the Rohingya, as does the Court”.²⁰²⁸ That is not in fact correct. The

²⁰²⁶ See CMM, paras. 5.1-5.10, and this Rejoinder, paragraphs 5.1-5.20 above.

²⁰²⁷ See CMM, paras. 5.11 to 5.18 above, and this Rejoinder, paragraphs 5.21-5.40 above.

²⁰²⁸ RG, para. 2.3 first sentence.

Gambia has not stated unambiguously which people it says are comprised within the term “Rohingya”.

13.5 Myanmar understands The Gambia’s position to be that the term “Rohingya” comprises all people, regardless of religion, who speak what The Gambia says is a language called “Rohingya”.²⁰²⁹

(1) Myanmar understands The Gambia’s position to be that the term “Rohingya” *excludes* those who do not speak that language, such as the Kaman, who are Muslims in Rakhine State who speak the Rakhine language.²⁰³⁰ This appears to be necessarily implied by The Gambia’s statement that “the Rohingya share a common language”.²⁰³¹

(2) Myanmar further understands The Gambia’s position to be that the term “Rohingya” *includes* those who speak that language but who are not Muslim. This is because The Gambia (1) says that “Rohingya of northern Rakhine State are ‘overwhelmingly’ Muslim”,²⁰³² (2) quotes a statement by Myanmar, without denying it, that “part of the group referred to by The Gambia as ‘Rohingya’ are *not* Muslim”,²⁰³³ and (3) relies on a statement that refers to “Rohingya Hindus”.²⁰³⁴

However, it is not entirely clear that this is The Gambia’s position, since The Gambia also refers to a statement in a report of the UN Human Rights Council that “Rohingya *Muslims* ... self-identify as a distinct ethnic group”,²⁰³⁵ and to a statement in a

²⁰²⁹ RG, para. 2.5.

²⁰³⁰ See CMM, paras. 2.14, 2.156, 2.161 and 2.166.

²⁰³¹ MG, para. 3.6; also RG, para. 2.5.

²⁰³² RG, para. 2.12.

²⁰³³ RG, para. 2.13.

²⁰³⁴ RG, footnote 1005, quoting a Legal Action Worldwide witness statement that refers to “Rohingya Muslims and Rohingya Hindus”.

²⁰³⁵ UN GA, Human Rights Council, Situation of human rights of Rohingya Muslims and other minorities in Myanmar, Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/32/18, 29 June 2016, para. 3 (emphasis added), MG, Vol. II, Annex 28.

UNHCR report that “In Rakhine State there were around 21,000 Hindu who ... speak the same dialect as the Rohingya but usually do not self-identify as Rohingya”.²⁰³⁶

- 13.6 The Gambia suggests that Myanmar’s sole objection is in reality to the use of the name “Rohingya” to describe a protected group, rather than the existence of the protected group as such.²⁰³⁷ That is not correct. It is true that authorities in Myanmar do not officially use or recognise the term “Rohingya”, for reasons given in the Counter-Memorial.²⁰³⁸ However, that is not the reason why Myanmar contends that The Gambia has not established the existence of a protected group.
- 13.7 The question whether or not a defined set of people satisfies the legal requirements for being a protected group for purposes of the Genocide Convention needs to be determined according to the evidence. In this case, The Gambia has not established this.
- 13.8 It is agreed by both parties that the only groups that are protected groups for purposes of the Genocide Convention are “national”, “ethnic”, “racial” and “religious” groups, within the meaning of Article II of the Convention. The Gambia does not claim that the “Rohingya” are a “national” group, and it is therefore unnecessary to consider this category of protected groups.
- 13.9 There appear to be two main issues that still divide the parties.
- 13.10 The first main issue is whether The Gambia must prove the existence of a protected group in accordance with the very high standard of proof that applies in genocide cases. The position of Myanmar is that The Gambia must do so (see paragraphs 13.12 to 13.19 below).

²⁰³⁶ UNHCR, *Culture, Context and Mental Health of Rohingya Refugees: A review for staff in mental health and psychosocial support programmes for Rohingya refugees*, 2018, p. 16, MG, Vol. II, Annex 31, referred to in RG, footnote 35.

²⁰³⁷ RG, para. 2.3 second sentence.

²⁰³⁸ CMM, paras. 2.107-2.167.

13.11 The second main issue is whether The Gambia has established by evidence that the set of people it identifies as the alleged target of genocide is a protected group *in its own right*.

(1) The Gambia does not put its case on the basis that the “Rohingya” are a “part” of a protected group that includes others in the region, such as those in the Chittagong Division of Bangladesh. Nor does The Gambia put its case on the basis that the “Rohingya” are a number of different protected groups.

(2) Accordingly, The Gambia will fail to establish an essential element of its case unless it proves that the set of people that it refers to as “Rohingya” is a protected group *in its own right*.

The position of Myanmar is that The Gambia has not established this (see paragraphs 13.20 to 13.55 below).

2. The very high standard of proof applies

13.12 The Gambia apparently accepts that it has the burden of proving the existence of a protected group within the meaning of Article II of the Convention. However, The Gambia apparently disputes that it must do so in accordance with the very high standard of proof that applies in genocide cases, which is set out in paragraphs 5.11 to 5.18 of the Counter-Memorial of Myanmar and paragraphs 5.21 to 5.40 above of this Rejoinder.

13.13 The Gambia argues that the Court did not apply this very high standard of proof when it determined the existence of the protected group in the *Bosnia Genocide case*.²⁰³⁹ However, there is in fact nothing in the Court’s judgment in that case to suggest that the very high standard of proof does not apply to the determination of this question, in cases where the answer is not agreed between the parties.

13.14 In the *Bosnia Genocide case*, there does not appear to have been any particular issue between the parties as to whether Bosnian Muslims were a protected group. Rather, the issue in that case was whether certain other people, together with Bosnian Muslims, constituted a larger protected group, defined as the “non-Serb” population.

²⁰³⁹ RG, para. 2.2.

The Court determined that this was not the case, finding as a matter of law that a protected group must be defined positively, rather than negatively. That case therefore proceeded on the basis that the protected group was to be defined as Bosnian Muslims.²⁰⁴⁰

- 13.15 Similarly, in the *Croatia Genocide* case, there was no dispute as to the existence of a protected group. In relation to Croatia's claim, the Court noted that "Croatia defines that group as the Croat national or ethnical group on the territory of Croatia, which is not contested by Serbia".²⁰⁴¹ In relation to Serbia's counterclaim, the Court noted that it was "not disputed between the parties, and may be regarded by the Court as settled", that "the Serbs living in Croatia at the time of the events in question ... constitute[d] a 'national [or] ethnical' 'group' within the meaning of Article II of the Genocide Convention".²⁰⁴²
- 13.16 Thus, in the *Bosnia Genocide* case and *Croatia Genocide* case, the Court did not have to deal with the standard of proof for determining the existence of a protected group, in circumstances where this is not agreed by the parties.
- 13.17 In the *Bosnia Genocide* case, the Court made a clear finding that the very high standard of proof applies generally (1) to allegations that the crime of genocide or other acts enumerated in Article III have been committed, (2) to allegations of failure to prevent genocide, and (3) to allegations of failure to punish genocide.²⁰⁴³ Thus, allegations of breaches of *any* of the obligations under the Genocide Convention are subject to the very high standard of proof.
- 13.18 In the *Bosnia Genocide* case, the Court further stated that an element of genocide is the requirement that the proscribed acts be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such", and that the existence of a protected group is a part of that element.²⁰⁴⁴ If the existence of a protected group is part of one of the elements of genocide itself, the determination of the existence of

²⁰⁴⁰ *Bosnia Genocide* case, pp. 124-126, paras. 191-196.

²⁰⁴¹ *Croatia Genocide* case, p. 80, para. 205.

²⁰⁴² *Ibid.*, p. 130, paras. 447-448.

²⁰⁴³ *Bosnia Genocide* case, pp. 129-130, paras. 209-210.

²⁰⁴⁴ *Ibid.*, p. 124, para. 191.

a protected group must be subject to the very high standard of proof that applies generally to the determination of each of the elements of genocide.²⁰⁴⁵ There is no rational basis for applying any lower standard of proof to such an integral element of the definition of genocide.

- 13.19 Accordingly, the burden of proof is on The Gambia to “clearly establish”, by “proof at a high level of certainty appropriate to the seriousness of the allegation”,²⁰⁴⁶ that the set of people it identifies as the alleged target of genocide is a protected group within the meaning of the Genocide Convention.

3. The Gambia has not established the existence of a protected group in its own right

a. A protected group must be distinct

- 13.20 In order to be an “ethnic”, “racial” or “religious” group for purposes of the Genocide Convention, a set of people must have “ethnic”, “racial” or “religious” characteristics that make it distinct from the rest of the world’s population, or at least, from the rest of the population living in proximity with it.
- 13.21 It is self-evident that this must be the case. A set of people sharing particular “ethnic”, “racial” or “religious” characteristics will *not* be a protected group for purposes of the Convention if it is a sub-set of a larger set of people sharing all of the same characteristics identically. In such a situation, the *larger* set of people might well be a protected group, of which the members of the sub-set would be members. However, the sub-set itself would not be a protected group in its own right.
- 13.22 In this situation, the sub-set might potentially constitute a “part” of the protected group, within the meaning of Article II of the Convention, if the necessary requirements for this were met.²⁰⁴⁷ However, the sub-set would not be a protected

²⁰⁴⁵ See paragraphs 5.34-5.40 above.

²⁰⁴⁶ *Bosnia Genocide* case, pp. 129-130, paras. 209-210.

²⁰⁴⁷ For instance, the sub-set would need to be a significant enough part of the protected group that its targeting would have an impact on the protected group as a whole. See *Bosnia Genocide* case, p. 126, para. 198: “... the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole.”

group in its own right unless the generality of its members have particular “ethnic”, “racial” or “religious” characteristics that make the sub-set, as a group, distinct from the larger group.

- 13.23 If the position were otherwise, the result would be that members of a particular ethnic group in a particular locality would constitute a protected group in its own right, even if there are many other neighbouring localities in which people with identical characteristics are living. That is obviously not the case. Thus, in the *Bosnia Genocide* case, Bosnian Muslims in Srebrenica were not found to be a protected group in their own right. Rather, they were found to be “part” of a protected group that was defined as all Bosnian Muslims.²⁰⁴⁸
- 13.24 Where the area in which a protected group lives is divided by an international border, the border will not of itself have the effect of dividing the protected group into two separate protected groups. In particular, the mere presence of the international border would not of itself mean that those living on either side of it must respectively form two different “national” groups.²⁰⁴⁹
- 13.25 If the authorities of a State were to target only those members of the protected group who are on its side of the international border, then the existence of the border might be a relevant consideration in determining whether those members of the group on that State’s side of the border form a “part” of the protected group for purposes of Article II of the Convention. As the Court said in the *Bosnia Genocide* case, in determining the existence of a “part” of a protected group, “[t]he area of the perpetrator’s activity and control are to be considered”, and “the opportunity available to the perpetrators is significant”.²⁰⁵⁰
- 13.26 However, it remains the case that those living on one side of the international border will not be a protected group in their own right, unless they have “national”,

²⁰⁴⁸ *Bosnia Genocide* case, p. 127, para. 297.

²⁰⁴⁹ Jennings and Watts, *Oppenheim’s International Law* (9th edn, 1996), Vol. II, p. 856, RM, Vol. II, Annex 37: “‘Nationality’ in the sense of citizenship of a certain state, must not be confused with ‘nationality’ as meaning membership in a certain nation in the sense of race.” In any event, The Gambia does not put its case on the basis that the “Rohingya” are a “national” group.

²⁰⁵⁰ *Bosnia Genocide* case, pp. 126-127, para. 199.

“ethnic”, “racial” and/or “religious” characteristics that make them relevantly distinct from those living on the other side of the border.

- 13.27 The Gambia appears to argue that it need only show that members of the set of people it identifies share a common culture, and that it does not need to show that that shared culture is different to the culture of those living across the border in Bangladesh.²⁰⁵¹ That is incorrect, for the reasons given above. For The Gambia to establish that the set of people it identifies constitutes a protected group in its own right, The Gambia must establish in accordance with the applicable very high standard of proof that its members have “national”, “ethnic”, “racial” and/or “religious” characteristics that make them relevantly distinct from those living on the other side of the border.
- 13.28 Myanmar does not argue that every “national”, “ethnic”, “racial” and/or “religious” characteristic of a protected group must be unique. For instance, the members of two different protected groups may well speak the same language identically, and have identical “ethnic” and “racial” characteristics, but the two groups may nonetheless be distinct from each other due to their different “religious” characteristics.²⁰⁵²
- 13.29 However, a protected group must have characteristics that make it distinct from other groups, and the distinguishing characteristics must be “national”, “ethnic”, “racial” and/or “religious” characteristics, within the meaning of Article II of the Convention.
- 13.30 The Gambia says that it need only show that the set of people it identifies have “shared cultural characteristics”, and appears to suggest that it is irrelevant if all these cultural characteristics are shared equally by all other Chittagonian- or Bengali-speaking Muslims in the region as a whole.²⁰⁵³ That is incorrect, for the reasons given above. If The Gambia relies on a particular characteristic, or combination of characteristics, to establish that the particular set of people it identifies is a protected group in its own

²⁰⁵¹ RG, paras. 2.8-2.9.

²⁰⁵² CMM, para. 13.9 states that “The Gambia provides insufficient evidence to prove its claim that the ‘Rohingya’ have a language and a culture that is distinct from any other language or culture in the world”. Myanmar does not thereby suggest that every protected group must have a language and a culture that are distinct from any other in the world. (Compare RG, para. 2.2 first sentence). Rather, Myanmar understands the Memorial of The Gambia to be contending that the “Rohingya” *do* have a language and a culture that are unique in the world, and which are in particular distinct from the language and culture of those living immediately across the border in Bangladesh. This paragraph of the Counter-Memorial of Myanmar is stating that The Gambia has not proved this.

²⁰⁵³ RG, para. 2.8.

right, then The Gambia needs to establish that the characteristic or combination of characteristics distinguishes that set of people from other Chittagonian- or Bengali-speaking Muslims.

- 13.31 The Gambia ultimately appears to acknowledge this. It refers to “distinguishing ... characteristics”,²⁰⁵⁴ and argues that “Rohingya is ... a distinct language or dialect”,²⁰⁵⁵ and that certain characteristics “define the Rohingya as a distinct group”.²⁰⁵⁶
- 13.32 In fact, however, The Gambia’s case is built on the mere assumption, without any further evidence, that the international border between Bangladesh and Myanmar of necessity divides Chittagonian-speaking Muslims in the Chittagong Division of Bangladesh and those in Myanmar into two separate groups. The Gambia says that “The Rohingya’s historic ties to Rakhine State and their presence therein is an obvious differentiating factor from Bangladeshis”.²⁰⁵⁷ As explained above, that is not the case.

b. “Ethnical” group

- 13.33 The Gambia’s primary argument is that the set of people it identifies as the alleged target of genocide constitutes an “ethnical” group in its own right.
- 13.34 The Gambia cites the *Bosnia Genocide* case in support of the proposition that “international jurisprudence accepts a combined subjective-objective approach” for defining a group.²⁰⁵⁸ In fact, what the Court actually said in that case was that “The Parties essentially agree that international jurisprudence accepts a combined subjective-objective approach”, but that “The issue is not in any event significant on the facts of this case and the Court takes it no further”.²⁰⁵⁹ The Court itself thus expressed no view on this question, and there is in fact at present no case law of the Court on the approach for defining the existence of a group.

²⁰⁵⁴ RG, para. 2.1.

²⁰⁵⁵ RG, para. 2.6.

²⁰⁵⁶ RG, para. 2.9.

²⁰⁵⁷ RG, para. 2.17.

²⁰⁵⁸ RG, para. 2.1, citing *Bosnia Genocide* case, para. 191.

²⁰⁵⁹ *Bosnia Genocide* case, p. 124, para. 191.

- 13.35 The other case law cited by The Gambia consists of judgments of the ICTY and ICTR.²⁰⁶⁰ These cases are concerned with the definition of genocide in the Statutes of the ICTY and ICTR respectively, and are not reliable guides to the interpretation of the Genocide Convention.²⁰⁶¹
- 13.36 However, even assuming for purposes of argument that the approach contended for by The Gambia is correct, Myanmar notes the following.
- 13.37 The Gambia argues that under a combined subjective-objective approach, “objective factors include distinguishing, well-established or immutable characteristics, like citizenship, language, hereditary physical characteristics or religion”.²⁰⁶² However, The Gambia does not establish that any of these factors distinguish the set of people it identifies as the alleged target of genocide from others living across the border in Bangladesh.
- (1) As to the reference to “citizenship”, this appears to be taken from the *Akayesu* Trial Judgment of the ICTR.²⁰⁶³ In that case, it was said that a “*national*” group is defined as “a collection of people who are perceived to share a legal bond based on common citizenship coupled with the reciprocity of rights and duties”.²⁰⁶⁴ Given that The Gambia does not contend that the “Rohingya” are a “*national*” group, this factor is not relevant to the present case. In any event, The Gambia does not establish that the set of people it identifies share a “citizenship”, which in this context does not mean the nationality of a particular State, but refers instead to membership in a certain nation.²⁰⁶⁵ Nor does The Gambia establish that any relevant “citizenship” is not shared identically by

²⁰⁶⁰ See MG, para. 3.3; cited in RG, para. 2.1.

²⁰⁶¹ CMM, paras. 4.5 to 4.7; and see paragraphs 4.3 to 4.17 above.

²⁰⁶² RG, para. 2.1.

²⁰⁶³ International Criminal Tribunal for Rwanda, *Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 512, RM, Vol. II, Annex 9, cited in MG, para. 3.3.

²⁰⁶⁴ *Ibid.*

²⁰⁶⁵ Jennings and Watts, *Oppenheim's International Law* (9th edn, 1996), vol. II, p. 857, RM, Vol. II, Annex 37: “‘Nationality’ in the sense of citizenship of a certain state, must not be confused with ‘nationality’ as meaning membership in a certain nation in the sense of race.”

others in Bangladesh. Given the evidence presented in the Counter-Memorial,²⁰⁶⁶ this cannot be simply presumed.

- (2) As to “language”, The Gambia does not establish that the set of people it identifies speak a language that is not shared also by others in the Chittagong Division of Bangladesh (see paragraphs 2.7 to 2.14 above and paragraphs 13.39 to 13.42 below).
- (3) As to “hereditary physical characteristics”, The Gambia does not establish that the generality of the set of people it identifies share common hereditary physical characteristics that are not identically shared with others in the region, including others in the Chittagong Division of Bangladesh. Indeed, The Gambia has not presented any evidence at all that there is any meaningful distinction in this respect. The evidence indicates that the Bengali population in northern Rakhine State has its origins predominantly in migrations from the territory of present-day Bangladesh and other parts of British India during the British colonial period, and since the independence of Burma in 1948.²⁰⁶⁷ Evidence presented in the Counter-Memorial of Myanmar indicates that members of the set of people identified by The Gambia are indistinguishable from those living in the neighbouring region of Bangladesh.²⁰⁶⁸ A distinctiveness of hereditary physical characteristics cannot simply be assumed.
- (4) As to “religion”, The Gambia does not establish that the religion of the set of people it identifies is distinguishable from that of others in the neighbouring Chittagong Division of Bangladesh. Nor indeed does The Gambia establish that the generality of the members of the set of people it identifies themselves share the same religion. (See paragraphs 13.47 to 13.51 below).

13.38 The Gambia further argues that under a combined subjective-objective approach, “[s]ubjective factors include the socio-historic context, self-identification, and perceived characteristics”.²⁰⁶⁹ However, The Gambia does not establish that any of

²⁰⁶⁶ See for instance CMM, paras. 2.11, 2.18-2.22, 2.38-2.39, 2.46-2.49.

²⁰⁶⁷ CMM, paras. 2.37-2.40, 2.108, 2.124, 2.129.

²⁰⁶⁸ See CMM, paras. 2.18-2.22.

²⁰⁶⁹ RG, para. 2.1.

these factors distinguish the group it identifies from others living across the border in Bangladesh, or that particular distinguishing characteristics are shared by the generality of the members of the set of people it identifies.

- (1) As to “the socio-historic context”, the evidence shows that members of the group identified by The Gambia trace their histories to separate migrations from Bengal in different periods,²⁰⁷⁰ that it was reported in 1921 that the pre-colonial era Muslim communities “do not associate ... at all” with the communities resulting from colonial-era migrations,²⁰⁷¹ and that in 1978 a UNHCR memorandum stated that “The Muslim populations of Arakan are loosely referred to as Rohingyas when in fact they are of three, possibly four, distinct origins”.²⁰⁷² The Gambia does not explain how the generality of the members of the group that it identifies share a common “socio-historic context”, or how any such common “socio-historic context” makes them distinct from others across the border in Bangladesh.
- (2) As to “self-identification”, The Gambia says that a protected group is “a collection of people who have a particular group identity”.²⁰⁷³ However, The Gambia does not specify any self-identity or group identity other than “Rohingya”. Evidence presented in the Counter-Memorial of Myanmar in fact shows that despite efforts by some politicians and political and student organisations since the 1940s to create a shared identity under the name “Rohingya”, the majority of the members of the set of people identified by The Gambia do *not* self-identify by that name.²⁰⁷⁴ The Gambia presents no evidence of its own to contradict this evidence. Furthermore, evidence presented in the Counter-Memorial of Myanmar indicates that the name “Rohingya” is a *political* identity rather than an ethnic identity,²⁰⁷⁵ and political groups are not protected groups within the meaning of Article II of the Genocide Convention.

²⁰⁷⁰ CMM, paras. 2.36-2.65.

²⁰⁷¹ CMM, para. 2.125.

²⁰⁷² CMM, para. 2.146.

²⁰⁷³ RG, para. 2.1.

²⁰⁷⁴ CMM, paras. 2.155-2.158.

²⁰⁷⁵ CMM, paras. 2.159-2.164.

The Gambia does not present evidence that all or a significant majority of the members of the set of people that it identifies consider themselves to have a common identity that makes them distinct from others living in the Chittagong Division of Bangladesh by reason of “ethnic”, “racial” and/or “religious” characteristics.

- (3) As to “perceived characteristics”, The Gambia does not explain whose perceptions are said to be relevant, or explain what are the perceived characteristics that are said to be relevant. The Gambia argues that Myanmar treats Bengalis in Rakhine State as a distinct racial group by referring to them as “Bengalis”,²⁰⁷⁶ but does not explain how this is said to amount to recognition of a distinction between Bengalis in Rakhine State and those in Bangladesh.

- 13.39 The Gambia maintains that the group that it identifies has its own language, which is different to the language spoken in the Cox’s Bazar District in Bangladesh. However, the evidence does not establish this.
- 13.40 There is evidence that indicates that the set of people identified by The Gambia speak the same dialect of Chittagonian that is spoken across the border in the Cox’s Bazar District of Bangladesh.²⁰⁷⁷ Other evidence suggests that Chittagonian is a continuum of dialects that extends from the north of Chittagong District in Bangladesh to southern Rakhine State in Myanmar.²⁰⁷⁸
- 13.41 As has been noted above,²⁰⁷⁹ if each variation on this continuum were to be treated as a relevantly different language, then Bengalis in different parts of northern Rakhine State would *not* “share a common language”, but if the entire continuum were to be

²⁰⁷⁶ RG, para. 1.12 last sentence.

²⁰⁷⁷ CMM, paras. 2.16-2.23, and see this Rejoinder, paragraphs 2.6-2.13 above. See also M. Tanha *et al.*, “Rohingya refugees and its impact on informal economy: Cox’s Bazar, Bangladesh”, *Journal of Governance and Accountability Studies*, vol. 3 (2023), pp. 63-83, at p. 67, RM, Vol. II, Annex 48, citing M. Mukta, “Radio in the Lives of Rohingyas in Camps in Bangladesh”, *Citizenship, Nationalism and Refugeehood of Rohingyas in Southern Asia* (2020), 189-196: “The native dialect spoken in Cox’s Bazar area resembles the Rohingya language, which facilitates seamless communication and integration with the local population”.

²⁰⁷⁸ CMM, para. 2.17.

²⁰⁷⁹ See paragraphs 2.11-2.13 above.

treated as a single language, then Bengalis in northern Rakhine State speak the same language as others in the neighbouring region of Bangladesh.²⁰⁸⁰

13.42 The Gambia says that it established in paragraphs 3.6 and 3.7 of its Memorial that “the Rohingya language has been spoken in what is now Myanmar for at least the last two centuries”.²⁰⁸¹ The Gambia thereby simply ignores all of what is stated in paragraphs 2.107 to 2.167 of the Counter-Memorial of Myanmar. For the reasons there given, and in paragraphs 2.7 to 2.14 above of this Rejoinder, the evidence does *not* establish that any of the Muslim communities in northern Arakan historically self-identified by the name “Rohingya”, or spoke a language of their own.

13.43 The Reply of The Gambia claims that “The Gambia has already established that ‘*tarana*’ and ‘*hawla*’ are part of the Rohingya’s common culture”.²⁰⁸² In fact, it has not.

(1) As Myanmar pointed out in its Counter-Memorial, the word “*hawla*” does not even appear in the source cited by The Gambia.²⁰⁸³ Despite this, the Reply of The Gambia contends, without providing any further evidence, that it “has already established that ... ‘*hawla*’ [is] part of the Rohingya’s common culture”.²⁰⁸⁴ It has not.

(2) The Gambia has not presented evidence either that poems and songs known as “*tarana*” and “*hawla*”, or the concept of a “*shomaz*”, are part of the culture of *all* Bengalis in Rakhine State (or even all Bengali Muslims in Rakhine State). The Gambia cites three sources. One deals with “the creation of music and art by Rohingya refugees in Bangladesh as a symbol of social resistance and

²⁰⁸⁰ See para. 2.12 above.

²⁰⁸¹ RG, footnote 18 and accompanying text. See also RG, footnote 37 and accompanying text, contending that “historical accounts going back centuries show references to the Rohingya language and identity”.

²⁰⁸² RG, para. 2.8.

²⁰⁸³ CMM, footnote 2287.

²⁰⁸⁴ RG, para. 2.8.

identity”.²⁰⁸⁵ Another appears to be about *political* identity.²⁰⁸⁶ A third, published by the International Organization for Migration in Bangladesh, states that “It has often been cited that little is known about the Rohingya as a cultural group”, and that “This consultation in no way makes claim to correcting a larger collective ignorance about the Rohingya”.²⁰⁸⁷ These sources are insufficient to discharge The Gambia’s burden of proof.

13.44 The Gambia contends that “[t]here is ... an international consensus” that the Rohingya are an ethnic group. However, as examples of this claimed “international consensus”, The Gambia cites only a single judicial decision from each of only three States: Japan, France and Australia.²⁰⁸⁸ These judicial decisions do not necessarily represent the views of the Governments of the States concerned, nor are they even decisions of the highest-level courts of those States. It does not appear that any of these judicial decisions was concerned with the Genocide Convention, or the definition of a protected group for purposes of its Article II. In any event, it does not appear that it was an issue in dispute in any of these judicial decisions whether the “Rohingya” are a distinct ethnic group in their own right, as opposed to a portion of a larger ethnic group, or a collection of several different ethnic groups. As such, these decisions do not deal with the issues in dispute in this case.

(1) The decision of the Nagoya High Court in Japan is not annexed to The Gambia’s Reply, which relies instead merely on a press release of Human Rights Watch describing that decision.²⁰⁸⁹ According to that press release, the Nagoya High Court found that “the Myanmar military had ‘committed ethnic cleansing against the Rohingya’ since the February 2021 military coup”. There is no

²⁰⁸⁵ K. F. Farzana, “Music and Artistic Artefacts: Symbols of Rohingya Identity and Everyday Resistance in Borderlands”, *ASEAS - Austrian Journal of South-East Asian Studies*, vol. 4 (2015), pp. 215-236, at p. 215, MG, Vol. VIII, Annex 224, cited in MG, para. 3.9.

²⁰⁸⁶ K. F. Farzana, “Boundaries in Shaping the Rohingya Identity and the Shifting Context of Borderland Politics”, *Studies in Ethnicity and Nationalism*, vol. 15 (2015), pp. 292-314, at p. 292, MG, Vol. VIII, Annex 227, cited in MG, para. 3.9: “... Burma ... and Bangladesh ... continue to deny the Rohingyas their *political* identity. ... This article argues that the true *political* identity of the displaced Rohingya refugees can be located in their social memory and their life-politics in the borderlands” (emphasis added).

²⁰⁸⁷ D. Coyle *et al.*, “Clan, Community, Nation: Belonging Among Rohingya Living in Makeshift Camps”, (Bangladesh International Organization for Migration, 2020), p. 5 (not included in the extract at MG, Vol. X, Annex 333), RM, Vol. V, Annex 162.

²⁰⁸⁸ RG, para. 2.11.

²⁰⁸⁹ RG, para. 2.11 footnote 39.

suggestion that the Nagoya High Court found that those described as “Rohingya” necessarily form a distinct protected group in their own right for purposes of the Genocide Convention.

(2) The decision of the National Asylum Court (*Cour nationale du droit d’asile*) in France states that the applicant was “persecuted for his or her ethnic or religious background”.²⁰⁹⁰ It does not state that the “Rohingya” form a distinct protected group in their own right for purposes of the Genocide Convention.

(3) The decision of the Administrative Appeals Tribunal in Australia found at paragraph 41 that “the applicant is from the Rohingya ethnic group (race)”.²⁰⁹¹ However, the question whether the “Rohingya” form a distinct protected group in their own right for purposes of the Genocide Convention was not as such an issue in the case.

13.45 The Gambia claims that the FFM, the UN High Commissioner for Human Rights, and UNHCR “recognize the Rohingya as a distinct ethnical group”.²⁰⁹² However, the three documents cited by The Gambia are hardly sufficient to discharge The Gambia’s burden of proof in this respect. One of the documents cited by The Gambia is a report of the FFM,²⁰⁹³ which applied a lower standard of proof to that applicable in the present proceedings,²⁰⁹⁴ and which merely made a bare finding in a single paragraph that the FFM was “satisfied” that the “Rohingya” are a protected group, without any detailed consideration of the law and the evidence.²⁰⁹⁵ The other two documents cited by The Gambia are not even concerned with the Genocide Convention.²⁰⁹⁶ In any event, in these proceedings, this must be a question for the Court to decide for itself, on the basis of the evidence.²⁰⁹⁷

²⁰⁹⁰ RG, para. 2.11 footnote 40.

²⁰⁹¹ RG, para. 2.11 footnote 41.

²⁰⁹² RG, para. 2.11.

²⁰⁹³ *Ibid.*, referring to 2018 FFM Detailed Findings, para. 1391, MG, Vol. II, Annex 40.

²⁰⁹⁴ CMM, paras. 6.19(2), 6.41-6.47, 13.66-13.71, 13.211.

²⁰⁹⁵ 2018 FFM Detailed Findings, para. 1391, MG, Vol. II, Annex 40.

²⁰⁹⁶ RG, para. 2.11 footnotes 34 and 35, referring to two documents of, respectively, the UN High Commissioner for Human Rights and the UN High Commissioner for Refugees.

²⁰⁹⁷ See, *mutatis mutandis*, CMM, paras. 5.40-5.61, and this Rejoinder, paragraphs 5.49-5.84 above.

13.46 Finally, The Gambia claims that “Myanmar itself previously recognized the Rohingya as an ethnic group, as publicly acknowledged in 1961 by the then Deputy Chief of Defence, Brigadier General Aung Gyi”.²⁰⁹⁸ The Gambia refers in this respect to a speech given by Brigadier-General Aung Gyi, Vice Chief of Staff (Army), in 1961.²⁰⁹⁹ That speech was given on the occasion of the surrender of Mujahidin rebels, and used the term “Rohingya” to satisfy the demands of Mujahidin insurgents and enhance the government’s authority over the border areas.²¹⁰⁰ However, that speech did not state that the Rohingya are an ethnic group that is separate or distinct from others in neighbouring regions of Bangladesh. On the contrary, the speech noted that Mayu District (northern Rakhine State) was not the only part of Myanmar where the same ethnic group existed on both sides of the border between Myanmar and a neighbouring State. He referred to similar examples, such as the Lisu, the Ei Kaw and the Lawa, all of which exist in both Myanmar and China, as well as the “tai”, the Mon and the Karen, all of which exist in both Myanmar and Thailand. The speech also notes that there is a single ethnic group that is known as the Shan in Burma and as the Dai in China. The speech indicates that there was similarly one ethnic group that existed both in Pakistan and in Burma, the members of which who lived in Burma were called “Rohingya”.²¹⁰¹ The point made in the speech was that where a single ethnic group

²⁰⁹⁸ RG, para. 2.11, citing MG, para. 3.24.

²⁰⁹⁹ MG, para. 3.24, citing the Official Address delivered by Brigadier General Aung Gyi, Vice Chief of Staff (Army), The Union of Burma Armed Forces, Mujahid Insurgents’ Surrender Ceremony, Maung Daw [Maungdaw] Town, 4 July 1961, MG, Vol. VI, Annex 143. The Memorial of The Gambia annexes only an English translation of this document, and does not provide the original. This speech was reported at the time in the *Myanmar Alinn Daily Newspaper*, “Mayu District as a Minority in the Union”, 8 and 9 July 1961, RM, Vol. V, Annex 188 (original and English translation). In relation to the surrender of the Mujahidin in 1961 and the formation of the Mayu Frontier District, see also CMM, paras. 2.50-2.51 and this Rejoinder, paragraph 10.12 above.

²¹⁰⁰ See paragraph 10.12 above.

²¹⁰¹ In the version of the speech found in RM, Vol. V, Annex 188, the relevant passage reads at p. 1 of the English translation: “First, I would like to talk about the matter concerning all the residents in Mayu District. Our Mayu District shares border with Pakistan (now Bangladesh) on its west. Because of sharing the boundary, there exist communities of Islamic faith living along both east and west sides of the border line. The people in the west side are called Pakistani (now Bengali) and those who reside in Myanmar in the east are called Rohingya. I want to tell you a few more that it has been not a unique case of one single ethnic group residing in two separate countries. There are inter-related ethnic groups in the adjoining region adjacent to China. For instance, in Kachin State, there is an ethnic group called Lisu. Lisu are residing in both Myanmar and China. Ei Kaw [Kaw (Akhar – E – Kaw)] are also in both Myanmar and China. Lawa (Wa) are also in China and Myanmar. Likewise, there exist Shan in Myanmar and also in China in the name of Dai. Those people are speaking the same languages and having the same religions. Similarly, if we look at the *Yodaya* (Thai) border, there exist Tai race people and so are in Myanmar. Likewise, ethnic Mon people are in both Myanmar and *Yodaya* [Thailand]. Ethnic Karen people also are in Myanmar and in *Yodaya* [Thailand]. In the same way, this region, adjacent to Pakistan, while there are the people with the same religion in Pakistan side, there have a community called Rohingya in this region of Myanmar.”

straddles the border between Myanmar and a neighbouring State, those of its members who live in Burma should have allegiance to Burma and that those living in the neighbouring country should have allegiance to that neighbouring country. Thus, the speech stated:

The people of this border region have relatives and families on both sides. Nevertheless, people on the other side must be Pakistani. Those who are in this side must be the people of the Union of Burma. The people residing in the border regions must have strong determination in this spirit unequivocally and irreversibly. As an instance, if you look at Kachin State, some relatives of local ethnic Kachin people are residing inside China. However, ethnic Kachin people on the other side are Chinese (citizens) while the same ethnic Kachin people in our side are Myanmar (citizens). Some are related as mothers-in-law and daughters-in-law. Some are related as sons-in-law or nephews. Despite such ties and belonging to the same ethnicity naturally, their countries are different. We must acknowledge that fact clearly and categorically. In the same way, it will be quite logical only when the so-called Rohingya people in our land pledge allegiance to the Union of Burma and those who are on the west side (of the border) pledge their allegiance to Pakistan. I would like to tell you, local elders and comrades, you may have relatives, parents-in-law, sons or daughters in Pakistan, on the west. Let it as it is that relatives are relatives. However, as the people living in the Union of Burma, I urge you to make up your mind resolutely to retain your allegiance and loyalty to the Union. Likewise, your relatives, who may be either in East or West Pakistan, shall be loyal to Pakistan even though they may have relatives in our side. So that it will be naturally correct.²¹⁰²

This speech in fact makes clear that those referred to as the “Rohingya” in Myanmar are in fact the same ethnic group as others living in neighbouring areas of Bangladesh.

In the version of the speech found in MG, Vol. VI, Annex 143, the relevant passage reads: “On its west, our Mayu District borders with East Pakistan. Because of the interconnected nature of borders, we have ethnic groups of Islamic faith that line the two countries’ (modern) borders. The ethnic group that reside on the west of Mayu District boundaries are Pakistani. And the people who reside on the east side of this border are called Rohingya. Continuing on with this point, I want to state that it is not like one single racial or ethnic group saddles the two countries’ boundaries. Our country’s regions that border with China also have ethnic groups that interface with one another. To give an example, in (Burma’s) Kachin State, we have Lisu as an ethnic group. In Burmese region, we also have Lisu. On the Chinese side of the borders, they have Lisu. Likewise, we have Ei-kaw (ethnic group), on the other side of the Burmese-Chinese borders, they also have Ei-kaw. On our Burmese side, we have La-Wa ethnic group. On the Chinese side, they also have La-Wa ethnic group. Similarly, we have Shan ethnic people in Burma. On the Chinese side they are called Tai. They all share one language. They adhere to one religion. Again if you look at the Thai-Burmese border areas, they have ‘tai’ ethnic people. We also have the same ethnic people. The same is true of Mon ethnic people: Thailand has the Mons and so does Burma. There are also Karen ethnic people in Thailand and Karen ethnic people in Burma. Likewise, on the (East) Pakistani side, there are Muslims who share the same faith with Rohingyas ethnic people who are on the Burmese side.”

²¹⁰² Translation at RM, Vol. V, Annex 188, at pp. 1-2.

The speech also emphasised multiple times that “We will consider the Mayu District to be a minority group within the Union” and that “those who live in Mayu District must regard yourselves as a minority”.²¹⁰³ This meant that they were not considered as one of the ethnic national races.²¹⁰⁴

c. “Religious” group

- 13.47 Contrary to what The Gambia may be suggesting, it is not the position of Myanmar that all the Muslims in the world constitute a single protected group, such that no smaller group of Muslims could ever be a protected group in its own right.²¹⁰⁵
- 13.48 Myanmar accepts, for instance, that a particular branch or denomination of a major world religion could be a protected group in its own right.
- 13.49 Myanmar also accepts that a particular set of people could be a protected group in its own right due to a combination of religious and other characteristics that make it distinct from others. For instance, a group that has ethnicity A and religion X could potentially be a protected group in its own right, on the basis that it is distinct from other members of ethnicity A who have a different religion, and distinct from other members of religion X who have a different ethnicity.
- 13.50 However, although The Gambia says that the set of people it identifies is “overwhelmingly” Muslim, it does not establish that all members of that set of people have the same religion. Indeed, if the set of people that The Gambia identifies includes also Hindus and Christians, then by definition the members of the set of people identified by The Gambia do not share the same religion.
- 13.51 If, contrary to Myanmar’s understanding, the set of people that The Gambia identifies excludes Hindus and Christians, then religious characteristics would distinguish

²¹⁰³ *Ibid.*, p. 2. See also at p. 2 (“those of you in the Mayu region must see yourselves as people of the Union of Burma, adopt loyalty to the Union of Burma and assume as a minority”), p. 3 (“we will work together with you as a minority in the Union”), and p. 5 (“Because we recognize them as a minority group and are doing for the development of this minority”). The very title of the article reporting the speech is “Mayu District as a Minority in the Union”.

²¹⁰⁴ In Myanmar, the word ethnic is used to refer to members of one of the ethnic national races of Myanmar referred to in Section 5 of its Citizenship Law, 1982 (the Kachin, Kayah, Karen, Chin, Bamar, Mon, Rakhine and Shan ethnic groups): see CMM, para. 1.38. See also paragraph 10.12 above.

²¹⁰⁵ RG, para. 2.14.

members of the group that The Gambia identifies from others in Myanmar and Bangladesh who are not Muslim. However, The Gambia does not establish that members of the set of people that it identifies is in any way distinguishable on the basis of religious characteristics from others in the region, including others in the Chittagong District of Bangladesh.

d. “Racial” group

- 13.52 The Gambia itself defines “racial ... group” for purposes of Article II of the Genocide Convention as “one that is ‘based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors’”.²¹⁰⁶
- 13.53 The evidence presented by The Gambia does not establish that the generality of the members of the set of people it identifies all share common hereditary physical traits.
- 13.54 Nor does the evidence presented by The Gambia establish that any common hereditary physical traits that may be shared by the generality of the members of the set of people it identifies make them distinct from others living in the region, such as those in the Chittagong Division of Bangladesh. Indeed, The Gambia itself refers to them as having a skin colour “more like that of the South Asian people of neighbouring Bangladesh”.²¹⁰⁷
- 13.55 The Gambia claims that the set of people it identifies as the alleged target of genocide is *subjectively perceived* by the authorities in Myanmar as a distinct racial group in its own right.²¹⁰⁸ The Gambia gives no valid basis for that claim.
- (1) The Gambia cannot claim that Myanmar demonstrates such a subjective perception by excluding this set of people from the list of “national races”. The Panthay (of Chinese descent) and Gurkhas (of Nepalese descent) are also not included in the list of “national races”. It can hardly be suggested that the set of people that The Gambia identifies as the alleged target of genocide belong to

²¹⁰⁶ RG, para. 2.15.

²¹⁰⁷ MG, para. 3.18.

²¹⁰⁸ MG, para. 3.17; RG, para. 2.15.

the same “racial” group as the Panthay and the Gurkhas. A protected group for purposes of the Genocide Convention cannot be defined negatively as “all those not included in the list of ‘national races’”.²¹⁰⁹

- (2) The Gambia says that “Myanmar ignores the fact that Myanmar itself previously recognized the Rohingya as an ethnic group, as publicly acknowledged in 1961 by the then Deputy Chief of Defence, Brigadier General Aung Gyi”.²¹¹⁰ This has already been dealt with in paragraph 13.46 above.
- (3) As Myanmar observed in its Counter-Memorial,²¹¹¹ The Gambia’s claim that Myanmar’s authorities have considered Bengalis in Rakhine State to be part of the same racial group as other Bengalis living in Bangladesh²¹¹² hardly establishes that Bengalis in Rakhine State are a *distinct* racial group for purposes of the Genocide Convention.
- (4) The Gambia claims that “[t]he Rohingya’s historic ties to Rakhine State and their presence therein is an obvious differentiating factor from Bangladeshis”.²¹¹³ However, the evidence presented in the Counter-Memorial of Myanmar, which has not been contradicted by The Gambia, is that by 1931, about 79% of the Muslims in the territory of present-day northern Rakhine State originated in migrations during the British colonial era from the territory of present-day Bangladesh (or other parts of then-British India)²¹¹⁴ and that since

²¹⁰⁹ See paragraph 13.14 above.

²¹¹⁰ RG, para. 2.11, referring to MG, para. 3.24.

²¹¹¹ CMM, para. 13.26.

²¹¹² RG, para. 2.17.

²¹¹³ *Ibid.*

²¹¹⁴ CMM, paras. 2.37-2.44 and 2.120-2.134, especially para. 2.132. See also, for instance, United Kingdom, Arakan Commissioner’s Office, Monthly Report of the Commissioner, Arakan Division, for August 1947, 13 September 1947, National Archives, FO/643/74, RM, Vol. IV, Annex 110 (written three and a half months before the independence of Burma on 4 January 1948): “[T]he Deputy Commissioner has reported as follows: ‘The month witnessed a most daring and brutal murder of U Tun U, Sub divisional Officer, Maungdaw, by the Muslims. ... The assassins who committed the murder were suspected to be employed by the Muslim Police Officers who have been organizing strong Muslim feeling and dominating the whole area. This is a direct affront and open challenge to the lawful authority of the Burma Government by the Muslim community of Buthidaung and Maungdaw Townships whose economic invasion of this country was fostered during the British regime. Unless this most dastardly flouting of the Government is firmly and severely dealt with this alien community will try to annex this territory or instigate the Pakistan to annex it. There are about 200,000 Muslims in Buthidaung and Maungdaw Townships, thousands of whom are purely new comers from the starving millions of Bengal who followed the wake of the British reoccupation. ... At present there is little doubt that all these Muslims in the Maungdaw Subdivision are

the independence of Burma in 1948, there has been a significant amount of illegal immigration into northern Rakhine State from East Pakistan / Bangladesh.²¹¹⁵ The Gambia does not establish that the descendants of these people have now become a separate race.

- (5) The Gambia’s claim that “Myanmar’s targeting of this specific group as such demonstrates its perception of the group as a separate racial group” is a *non sequitur*.²¹¹⁶ If the area in which a racial group lives is divided by an international border, and if a State were to “target” only that part of the group that is on its side of the border, that of itself would not mean that those on that State’s side of the border are a separate racial group, or that they are perceived by the State to be a separate racial group. That of itself would also not mean that those “targeted” formed part of a single racial group, as opposed to several different racial groups.

C. The *actus reus* of genocide has not been proved

1. General

- 13.56 For the reasons given in Myanmar’s Counter-Memorial,²¹¹⁷ The Gambia’s evidence fails to prove, to the requisite high standard of proof, that acts of the kinds specified in sub-paragraphs (a), (b), (c) or (d) of Article II of the Convention have been committed.²¹¹⁸ Nothing in The Gambia’s Reply alters this fact.²¹¹⁹ The Gambia merely repeats arguments that have already been shown to be wrong, and avoids addressing matters for which it has no answer.

heavily armed. Unless sufficiently large forces of military are stationed all over this Subdivision, the risk of another communal slaughter will always remain great. The spark that this disloyal community may light may eventually lead to a war with Pakistan. Government of Burma will therefore have to take great care about this problem’.”

²¹¹⁵ CMM, paras. 2.52-2.58, 2.65, and 2.68.

²¹¹⁶ RG, para. 2.17.

²¹¹⁷ See *inter alia* CMM, paras. 13.36–13.63.

²¹¹⁸ The Gambia does not allege that acts falling within Article II (e) have been committed.

²¹¹⁹ See especially RG, paras. 9.7-9.24.

13.57 The position remains that the evidence fails to establish conclusively, *or at all*, the commission of any of the kinds of *actus reus* alleged by The Gambia.

2. Article II (a): Killing

13.58 The Gambia simply repeats its vague and highly generalised assertion that “Myanmar deliberately killed thousands of Rohingya during the ‘clearance operations’”.²¹²⁰ The Gambia’s claim under Article II (a) is primarily founded upon the “evidence as established by the UN Fact-Finding Mission” in addition to various “UN entities”, “non-governmental organizations” and “accounts of both victims and perpetrators”.²¹²¹ For the reasons given in Chapters 6, 7, 8 and 9 of the Counter-Memorial of Myanmar and Chapters 6, 7, 8 and 9 of this Rejoinder, this evidence is neither credible, reliable or sufficiently probative to meet the high standard of proof that applies in these proceedings. The individual elements of evidence do not, either individually or collectively, establish that the *actus reus* of killings within the meaning of Article II (a) were committed. The allegation of killings constituting the *actus reus* and *dolus generalis* of Article II (a) of the Genocide Convention is disputed. The Tatmadaw conducted the counter-terrorism operations under its existing laws, based on the situation. The counter-terrorism operations were conducted in accordance with local laws and regulations, including the Rules of Engagement (ROE), Penal Code, and Anti-terrorism Law. Legal action is taken under the military justice system where there is evidence of unlawful activities such as unlawful harming of people and property.

13.59 Two critical aspects of the evidence relied upon by The Gambia remain systematically unaddressed throughout its Memorial and Reply. First, the evidence upon which The Gambia relies is drawn almost exclusively from one side of the conflict. The evidence relied upon by The Gambia is neither impartial nor balanced. Second, the statements and purported accounts upon which The Gambia relies “implausibly and inexplicably ... omit any references to ARSA activity in their accounts of events during the counter-terrorism operations”.²¹²² This casts an obvious shadow over the reliability

²¹²⁰ RG, para. 9.8.

²¹²¹ RG, para. 9.8.

²¹²² CMM, para. 13.40.

and credibility of all such accounts, and deprives this Court of the ability to assess the *lawfulness* of, or *justification* for, any deaths that were caused during the counter-terrorism operations.

- 13.60 The Gambia repeats the unsubstantiated claim that the “overall death count is at least 10,000”.²¹²³ This figure is addressed in the Counter-Memorial of Myanmar.²¹²⁴ Even if this figure could be assumed to be correct (*quod non*), it is of no probative value, since it does not seek to quantify the number of casualties who are said to have been civilians *not* participating in ARSA’s activities who were deliberately targeted by the Myanmar security forces, as opposed to being participants in the attacks, collateral casualties of the fighting, or casualties of conduct of ARSA. The bare fact that The Gambia labels this figure as being the product of “credible fact-finding efforts”²¹²⁵ (*quod non*), does not make it so. It is patently *not* the result of any credible analysis.
- 13.61 The Gambia also incorrectly asserts that Myanmar “admits to targeting civilians because it says that the operations targeted ARSA’s ‘supporters’, which Myanmar defines as the entire civilian population”.²¹²⁶ This is a misrepresentation of Myanmar’s position and the evidence.²¹²⁷ It is indubitably the case that thousands of Bengali civilians were prepared to, and did, join and lend support to the attacks which were organised, directed and prosecuted by ARSA and its members. While the total number of Bengalis involved in ARSA’s attacks numbered approximately 18,000, drawn from many villages across Rakhine State, Myanmar categorically did *not* “target... the entire civilian population”, as the totality of the evidence demonstrates.
- 13.62 The Second Expert Report of Michael Newton is more fully addressed below, particularly insofar as his opinion is entirely predicated on the basis that what The Gambia alleges is established fact (*quod non*), but it suffices to note here that his erroneous opinions on the conduct of the counter-terrorism operations also derive

²¹²³ RG, para. 9.11.

²¹²⁴ CMM, paras. 13.122-13.138 and 13.149-13.152; see also this Rejoinder, paragraphs 13.86(6)-(7), 13.128-13.134 and 13.140 below.

²¹²⁵ RG, para. 9.11.

²¹²⁶ RG, para. 9.10.

²¹²⁷ RG, para. 9.10, citing Second Expert Report of Michael A. Newton, paras. 11-18, RG, Vol. IV, Annex 67, which itself refers to CMM, paras. 13.214 and 13.216.

from his failure to consider the evidence properly, or at all, where it does not align with his opinions.

- 13.63 The Gambia falsely alleges that Myanmar provided “no warnings to the civilian population as would be standard in genuine ‘counter-terrorism’ operations”,²¹²⁸ echoing Professor Newton’s own erroneous and selective view of the evidence that “nothing in the Counter-Memorial or its Annexes describes efforts to warn” Bengalis of the imminent use of force. There is, in fact, a wealth of such evidence in the Counter-Memorial, its Annexes and, *inter alia*, from the Annexes to The Gambia’s own pleadings, all of which is ignored by The Gambia and Professor Newton.²¹²⁹

3. Article II (b): Causing serious bodily or mental harm

- 13.64 Contrary to what The Gambia claims,²¹³⁰ Myanmar’s counter-terrorism operations were not “characterised by extreme brutality and pervasive sexual violence”.²¹³¹
- 13.65 The Gambia claims that “reliable estimates indicate that over 100,000 Rohingya suffered serious bodily harm”²¹³² during the operations. This is a gross misrepresentation of the underlying evidence. It is neither a credible nor a “reliable estimate[]”. This figure is derived from a report produced by a group of individuals, which states that its authors extrapolated that figure from the results of a survey of 3,300 households living in the camps in Cox’s Bazar in Bangladesh.²¹³³ It cannot be considered reliable.
- (1) Those interviewed are said to come from 1,306 villages across 23 different townships in Myanmar²¹³⁴ (and therefore not merely the three townships of Maungdaw, Buthidaung and Rathedaung in northern Rakhine State).

²¹²⁸ RG, para. 9.10.

²¹²⁹ See the evidence cited at CMM, paras. 8.41, 8.44, 8.45, 8.101, 9.155, and 9.260, and in this Rejoinder, at paragraphs 8.73, 8.118, 9.25, 9.42, and 9.77.

²¹³⁰ RG, para. 9.15.

²¹³¹ See CMM, Chapters 6, 7, 8 and 9, and this Rejoinder, Chapters 6, 7, 8 and 9.

²¹³² RG, para. 9.15, citing RG, para. 3.19 and M. Habib *et al.*, *Forced Migration of Rohingya: the Untold Experience* (Ontario International Development Agency 2018) (“*Habib*”), p. 68, RG, Vol. III, Annex 34.

²¹³³ Habib, p. vii.

²¹³⁴ *Ibid.*, p. 25.

- (2) The combined figure given in the report for alleged physical assault and rape is 3,331,²¹³⁵ but this is merely the number of respondents who answered “yes” to the question: “were you or family members victims of crime in Myanmar prior to travelling to Bangladesh” (see the title to Table 28 of the report).²¹³⁶ Thus, multiple respondents to the survey who answered “yes” may have been different family members of the same claimed victim, and their responses may all relate to a single incident involving that one claimed victim.
- (3) There is no indication of when or where these incidents in Table 28 are said to have taken place (such that many may not have occurred in northern Rakhine State in 2016 or 2017), and no indication is given of who is said to have been responsible for them (such that many may not have been incidents for which the Myanmar security forces are said to be responsible).
- (4) The circumstances of each alleged incident are not given, such that it is not possible to determine how many of the incidents described in the table as “beaten” were of sufficient severity to amount to “serious bodily or mental harm” within the meaning of Article II (b) of the Convention.
- (5) The report is based on interviews with people in camps in Bangladesh. The pervasive influence, and fear, of ARSA in the camps has been dealt with elsewhere.²¹³⁷ It is claimed in the report that interviewees were selected at random,²¹³⁸ but the report then reveals that “members of the research team contact[ed] the Rohingya leaders (known as Majhi) in each zone where they live, who are responsible for coordinating other fellow Rohingya people for communication, translation services or, to some extent, supporting the Bangladesh Government or other international agencies for relief coordination”, and that “These 33 Majhis (Rohingya leaders in 33 different zones) assisted the researchers to approach Rohingya households for participation on a voluntary

²¹³⁵ *Ibid.*, p. 68, Table 28 (2,886 + 445).

²¹³⁶ *Ibid.*

²¹³⁷ See especially CMM, paras. 3.108-3.145, and this Rejoinder, Section D of Chapter 3 and paragraphs 7.33-7.34, 8.77-8.79, 8.161 and 9.72 above.

²¹³⁸ Habib, p. 17.

basis in interviews”.²¹³⁹ The risk that such intermediaries may have influenced the choice of respondents is obvious.²¹⁴⁰

- (6) The authors of the report did not gather the data in the camps in Bangladesh themselves, but relied on local researchers to do this for them.²¹⁴¹ Despite the claim in the report that these local researchers were “meticulous”, their identities and exact qualifications and experience are unknown.
- (7) The report itself acknowledges that “The limitations of the estimates need to be acknowledged given that the population of families is estimated, as well as the potential that reporting of the sample incidents may not be representative of the population, and the possibility that the responses from different household heads refer to the same incident, and that some crimes are counted twice”.²¹⁴²
- (8) The report was funded by the Ontario International Development Agency, part of the Government of Canada, which is an intervener in the case, and for reasons given elsewhere in the Rejoinder, is not impartial.²¹⁴³

In the context of these proceedings and the applicable standard of proof, this report carries very little, if any weight. It does not establish that over 100,000 persons suffered serious bodily or mental harm within the meaning of Article II (*b*) of the Genocide Convention at the hands of the Myanmar security forces during the counter-terrorism operations of 2016 and 2017.

- 13.66 The Gambia also relies on “mental health” data which records that 88.7% of respondents to a small data-set survey “reported symptoms *indicative* of depression”, “84% reported symptoms *indicative* of emotional distress”, and 61.2% reported “symptoms *indicative* of PTSD [post-traumatic stress disorder]”.²¹⁴⁴ This does not

²¹³⁹ *Ibid.*

²¹⁴⁰ See paragraph 7.34 above.

²¹⁴¹ Habib, p. ix: “researchers, graduates from Cox's Bazar International University and Chittagong University who meticulously followed instructions and collected a large dataset in a most challenging environment”.

²¹⁴² *Ibid.*, p. 65.

²¹⁴³ See paragraph 7.76 above.

²¹⁴⁴ RG, para. 9.16, citing Fortify Rights, “*The Torture In My Mind*”: *The Right to Mental Health for Rohingya Survivors of Genocide in Myanmar and Bangladesh* (December 2020), p. 10 (“**Fortify Rights, Torture In My Mind**”) (not annexed by The Gambia to its Reply), RM, Vol. V, Annex 163.

assist The Gambia's case. It has no meaningful probative value. The existence of symptoms "indicative of" depression or emotional distress does not mean that a person *has* depression or emotional distress, much less *serious* depression or *serious* emotional distress, and it certainly does not mean that any depression or emotional distress was necessarily caused by intentional conduct on the part of the Myanmar security forces. The Gambia does not even attempt to establish how such reported information proves that the Myanmar security forces inflicted "*serious*" mental harm within the meaning of Article II (b) of the Convention on a scale that was capable of contributing to the physical or biological destruction of the Bengali population of northern Rakhine State, as such.²¹⁴⁵

- 13.67 The Gambia appears to accept that Article II (b) "does not extend to bodily harm inflicted by combatants ... in armed conflict", or to "unintentional collateral casualties in the course of" a "legitimate counter-terrorism operation".²¹⁴⁶ However, The Gambia claims that Myanmar cannot rely on this proposition in this case, since the operations were a "deliberate assault on the unarmed and innocent Rohingya civilian population".²¹⁴⁷ This claim fails for the simple reason that the evidence does not show that there was a "deliberate assault" on any group, and certainly does not show that the operations conducted in northern Rakhine State were directed at "unarmed" civilians. The evidence amply demonstrates that the counter-terrorism operations were responsive and legitimate military operations directed against the lethal armed violence of ARSA and its supporters.

4. Article II (c): Deliberately inflicting conditions of life

- 13.68 The Gambia now states that its claim under Article II (c) is *not* limited to (1) the alleged destruction of villages and (2) the alleged appropriation and destruction of livestock and agricultural lands.²¹⁴⁸ The Gambia's claim is now said to be that the alleged discriminatory laws and policies addressed in Chapter 6 of its Memorial and Chapter 5 of its Reply, to which Myanmar responds in Chapter 10 of its Counter-

²¹⁴⁵ *Croatia Genocide* case, p. 70, para. 157.

²¹⁴⁶ RG, para. 9.16, read with CMM, para. 13.47.

²¹⁴⁷ RG, para. 9.16.

²¹⁴⁸ RG, para. 9.21.

Memorial and Chapter 10 of this Rejoinder, were also of themselves acts of genocide under Article II (c) and (d) of the Convention.²¹⁴⁹ The Gambia should not be permitted to make this additional claim,²¹⁵⁰ but even if it is, The Gambia does not prove the adoption of any measures falling within these provisions of the Convention. Myanmar relies on Chapter 10 of its Counter-Memorial and Chapter 10 of this Rejoinder, in addition to the paragraphs below.

- 13.69 The Gambia states that “deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes”, are measures recognised by this Court as falling within Article II (c), and that this has been established in this case.²¹⁵¹ It has not. Moreover, The Gambia misrepresents the applicable law.
- 13.70 First, for measures to fall within Article II (c), they must be measures “whereby the perpetrator ultimately seeks the death of the members of the group”.²¹⁵² The Gambia fails to show, *at all*, how any of the particular measures in question had as its ultimate goal the death of any person, let alone members of the group generally.
- 13.71 Second, this Court has clarified that restrictions on, or deprivation of, food must be more than “occasional denials of food supplies”, but must be “of a systematic or general nature”,²¹⁵³ “calculated to bring about the physical destruction in whole or in part” of the group.²¹⁵⁴ Again, The Gambia fails to establish that any deliberate restrictions on food, even if they occurred (*quod non*), were either systematic or of a general nature, or calculated to bring about the physical destruction of members of the Bengali (or Bengali Muslim) population. Indeed, the evidence shows that Myanmar ensured ongoing access to food despite the disruption caused by ARSA’s attacks.²¹⁵⁵
- 13.72 Third, The Gambia again fails to identify any evidence of deliberate deprivation of medical care, let alone any restriction on medical care that comes close to falling

²¹⁴⁹ RG, paras. 9.17 and 9.21.

²¹⁵⁰ See paragraph 1.12 above.

²¹⁵¹ RG, para. 9.19, citing *Croatia Genocide* case, pp. 70-71, para. 161.

²¹⁵² *Croatia Genocide* case, p. 70, para. 161.

²¹⁵³ *Ibid.*, p. 110, para. 366.

²¹⁵⁴ *Ibid.*, p. 111, para. 367.

²¹⁵⁵ CMM, paras. 10.55, 10.176-10.178, 10.197-10.208, 10.210-10.213, 10.232-10.245, 13.115-13.116.

within Article II (c). There is no evidence of any deprivation of medical care that was “of a systematic or general nature”,²¹⁵⁶ such that it could be concluded that it was “imposed with the intention of causing the physical destruction, in whole or in part”²¹⁵⁷ of the Bengali (or Bengali Muslim) population.

- 13.73 Fourth, The Gambia fails to acknowledge that “the forced displacement of a population does not, as such, constitute the *actus reus* of genocide within the meaning of Article II (c)”.²¹⁵⁸ While there was a large movement of Bengali Muslims from northern Rakhine State to Bangladesh, The Gambia does not establish that the purpose of the counter-terrorism operations was to displace those persons from northern Rakhine State. The fact that Myanmar has entered into agreements with Bangladesh for their repatriation contradicts such an intention.²¹⁵⁹ So does the evidence that villagers, when en route to Bangladesh, were instructed by soldiers to return to their villages.²¹⁶⁰ Mass movement of Bengali Muslims was rather the consequence of armed clashes with ARSA in the region. In any event, even if for the sake of argument it were to be assumed that The Gambia could prove that the displacement of these people was forced by the authorities of Myanmar (*quod non*), The Gambia still has not proved that this was “carried out in circumstances calculated to result in the total or partial physical destruction of the group”.²¹⁶¹ As previously noted,²¹⁶² there is no evidence that the number of Bengali Muslims who remained in Rakhine State following the counter terrorism operations has declined, or that the numbers of those who went to Bangladesh has declined, or that the circumstances of life pertaining in northern Rakhine State either before or since the counter-terrorism operations have led to the physical or biological destruction of any individual, much less of the Bengali population generally.

²¹⁵⁶ *Croatia Genocide* case, p. 112, paras. 369-371.

²¹⁵⁷ *Ibid.*, p. 112, para. 371.

²¹⁵⁸ *Ibid.*, p. 114, para. 376.

²¹⁵⁹ See CMM, paras. 2.94-2.106, and this Rejoinder, paragraphs 2.19-2.33 above.

²¹⁶⁰ See paragraph 13.144 below.

²¹⁶¹ *Croatia Genocide* case, p. 114, para. 376.

²¹⁶² CMM, para. 13.57.

- 13.74 Fifth, while The Gambia claims that Bengali Muslims were exposed to “extensive restrictions on movements,”²¹⁶³ it fails to acknowledge that this Court has previously stated that while “restrictions on freedom of movement may undermine the social bond between members of the group, and hence lead to the destruction of the group’s cultural identity”, such restrictions nevertheless “cannot be regarded as calculated to bring about the group’s physical destruction, which is the sole criterion in Article II (c) of the Convention.”²¹⁶⁴ The Court has found this to be so even if the restrictions form part of the “creation of a climate of coercion and terror”.²¹⁶⁵
- 13.75 So far as The Gambia’s remaining claims of “extensive restrictions on ... citizenship; on marriage and birth, ... education... and livelihoods”²¹⁶⁶ are concerned, The Gambia fails to address how any of these claimed measures even comes close to being measures calculated to bring about the physical or biological destruction of the Bengali Muslim population as such. The evidence in fact shows that Bengali Muslims have readily been able to marry, procreate, and earn a living.²¹⁶⁷
- 13.76 Finally, The Gambia claims that the IDP camps in Rakhine State amount to “forcible confinement in inhospitable internment camps”.²¹⁶⁸ This is incorrect, as Myanmar has already demonstrated.²¹⁶⁹

5. Article II (d): Imposing measures intended to prevent births within the group

- 13.77 The Gambia repeats the same oft-cited, yet unsubstantiated and inaccurate, descriptors to allege “pervasive”, “massive”, “voluminous” sexual violence and genital mutilation.²¹⁷⁰ Myanmar has comprehensively rebutted the claims of such alleged

²¹⁶³ RG, para. 9.17.

²¹⁶⁴ *Croatia Genocide* case, p. 115, para. 380.

²¹⁶⁵ *Ibid.*

²¹⁶⁶ RG, para. 9.17.

²¹⁶⁷ See CMM, Chapter 10, and Chapter 10 of this Rejoinder.

²¹⁶⁸ RG, para. 9.20.

²¹⁶⁹ See CMM, paras. 13.146-13.148. See also this Rejoinder, paragraphs 10.91-10.98 above, and 13.144

²¹⁷⁰ RG, paras. 9.21, 9.23, 9.24.

widespread sexual violence.²¹⁷¹ Although The Gambia still makes exorbitant claims of sexual violence, its Reply now revises substantially the claimed number of incidents, stating that the military “raped and sexually mutilated *hundreds* of Rohingya women and girls.”²¹⁷² The Gambia does not specify exactly when or where these particular alleged incidents are said to have taken place, nor does The Gambia establish an evidential nexus between any alleged incident of sexual violence and the prevention of any births. The Gambia just *presumes*, without justification, that any and all alleged incidents of sexual assault bore such an intention and had such a result. This plainly is not sufficient. If it were, it would mean that every sexual assault would *per se* constitute the *actus reus* of genocide under Article II (d) of the Convention, which is obviously not the case.

13.78 In order for rape and other acts of sexual violence to fall within Article II (d), “it is necessary that the circumstances of the commission of those acts, and their consequences, are such that the capacity of members of the group to procreate is affected”, and in determining whether this is the case, “the systematic nature of such acts has to be considered”.²¹⁷³ The Gambia fails to establish by probative evidence that the *circumstances* and *consequences* of any alleged rape or act of sexual violence was such that the capacity of members of the group to procreate was affected. Further, The Gambia fails to prove that the *circumstances* and *consequences* of any such alleged acts of rape or sexual violence were of such a *systematic nature* so as to fall within Article II (d).

13.79 The Gambia also fails to establish by evidence that acts of rape or sexual violence were carried out on such a scale that it can be said that they inflicted conditions of life on the group that were capable of bringing about its physical destruction in whole or in part, or that rape or sexual violence was committed in order to prevent births within the group, within the meaning of Article II (d).²¹⁷⁴

²¹⁷¹ CMM, paras. 13.59-13.63, 13.139-13.141, and this Rejoinder, paragraphs 8.41, 8.99-8.110, 8.131-8.140, 8.166-8.171, 9.8-9.10, 9.26-9.39, 9.45-9.49, 9.55-9.59, 9.67-9.68, 9.80-9.83, 9.97-9.100, 9.134, 9.164, 9.185, 9.189, 9.194-9.195 above.

²¹⁷² RG, para. 3.19 (emphasis added).

²¹⁷³ *Croatia Genocide* case, p. 73, para. 166.

²¹⁷⁴ See *ibid.*, p. 118, paras. 397-400.

- 13.80 The Gambia merely *asserts* that “sexual violence experienced by the Rohingya had a profound effect on the group’s ability to perpetuate itself.”²¹⁷⁵ In short, however, there is simply *no support whatsoever* in the evidence cited by The Gambia for this claim.
- 13.81 Notwithstanding this, The Gambia then claims that this unsupported assertion of a “profound effect” upon the capacity to procreate is “confirmed by a long-term study” which documents damage to the “structure and fabric of the group”.²¹⁷⁶
- (1) The source of this “study” is the advocacy organisation Legal Action Worldwide (“LAW”), whose lack of impartiality and evidential rigour is self-evident from the materials it has provided for use in these proceedings. Its reporting must be viewed with scepticism.²¹⁷⁷
 - (2) The conclusions of this “study” are based on a miniscule data-set involving just “30 psychological evaluations [‘semi-structured interviews’] with SGBV [sexual and gender-based violence] survivors” who appear to have been drawn from “four focus group discussions with 34 survivors and witnesses”.²¹⁷⁸
 - (3) The conclusions of this “study” wrongly presuppose that the conclusions of the FFM and other organisations are correct as to the prevalence of sexual violence more generally. LAW states that its interviewees “were not asked to recount all events that took place in Myanmar ... as these events were already widely documented by various fact-finding efforts, including the [FFM]”.²¹⁷⁹
 - (4) This “study” by LAW confirms that “this research applies a ‘reasonable grounds to believe’ standard used in the preliminary stage of criminal investigations”,²¹⁸⁰ which falls far below the standard applicable in these proceedings.

²¹⁷⁵ RG, para. 9.23, citing 2018 FFM Detailed Findings, para. 1410, MG, Vol. II, Annex 40.

²¹⁷⁶ RG, para. 9.23.

²¹⁷⁷ See CMM, paras. 7.48-7.81, and this Rejoinder, paragraphs 7.64-7.83 above, especially paragraphs 7.68, 7.76-7.77, and 7.80-7.81.

²¹⁷⁸ Legal Action Worldwide, “*Every Day, I Remember They Destroyed My Life*”: Long-Term Physical and Psychosocial Consequences of Genocidal Sexual and Gender-Based Violence the Myanmar Military Committed against the Rohingya in its 2017 ‘Clearance Operations’ (November 2023), pp. 8, 10 and 71, RG, Vol. II, Annex 16.

²¹⁷⁹ *Ibid.*, p. 71.

²¹⁸⁰ *Ibid.*

In sum, this document produced by LAW provides no meaningful support for The Gambia's claim²¹⁸¹ that sexual violence had a "profound effect", or any effect at all, on the ability of the Bengali population in northern Rakhine State to perpetuate itself.

- 13.82 In relation to Regional Order 1/2005 and the other alleged measures intended to prevent births within the group that predate the counter-terrorism operation, Myanmar has already provided a response to the arguments of The Gambia.²¹⁸²

D. The *mens rea* of genocide (*dolus specialis*) has not been proved

1. General

- 13.83 This section of this Chapter responds to **Section B of Chapter 9** (paragraphs 9.25 to 9.35) of The Gambia's Reply, entitled, "The *Mens Rea* of Genocide", and **Section C of Chapter 9 (paragraphs 9.36 to 9.84)** of The Gambia's Reply, entitled "The Only Reasonable Inference That Can Be Drawn".
- 13.84 Chapter 12 of The Gambia's Memorial (paragraphs 12.25 to 12.127) sets out its initial case that six alleged indicators of genocidal intent establish that genocidal intent is "the only reasonable inference that can be drawn" in this case.
- 13.85 Chapter 13 of the Counter-Memorial of Myanmar responds to this claim. It begins by noting that The Gambia's arguments concerning the six claimed indicators of genocidal intent are dependent on the conclusions in the 2018 FFM Detailed Findings, which applied the much lower standard of proof of "reasonable grounds", rather than the very high standard of proof that applies in the present case.²¹⁸³
- 13.86 Chapter 13 of the Counter-Memorial of Myanmar then addresses in detail The Gambia's six adopted indicators of alleged genocidal intent, and discusses seven

²¹⁸¹ RG, para. 9.23.

²¹⁸² CMM, paras. 10.109-10.175, and this Rejoinder, paragraphs 10.45-10.84 above.

²¹⁸³ CMM, paras. 13.66-13.71.

further features of the evidence that all squarely point away from a finding of genocidal intent. In particular, the Counter-Memorial shows the following:

- (1) There is no direct evidence of genocidal intent at all,²¹⁸⁴ despite the fact that, according to The Gambia, thousands of people must have been involved in the execution of an alleged genocidal project perpetrated over years.
- (2) The alleged “existence of discriminatory plans and policies”, “exclusionary utterances of Myanmar officials and others”, tolerance of “public rhetoric of hatred and contempt”, and “failure to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law”, do not remotely come close to supporting an inference of genocidal intent.²¹⁸⁵ These factors are specifically addressed at length in Chapters 10, 11 and 12 of the Counter-Memorial of Myanmar.
- (3) The role of ARSA²¹⁸⁶ is pivotal to understanding the context, nature and purpose behind the use of military force by the Myanmar Defence Services during the counter-terrorism operations. That purpose was plainly directed at confronting the serious threat to life of civilian and security personnel and to protecting the sovereignty of Myanmar.
- (4) The timing and duration²¹⁸⁷ of the counter-terrorism operations were such that the use of military force was undoubtedly centred upon responding proportionately and only necessarily to the widespread deadly violence of ARSA and its supporters, and neutralising its threat.
- (5) The nature and purpose of military activities and the “build-up of military capacity in northern Rakhine State” prior to August 2017 was manifestly a response to the increasing threat and violence of ARSA and its supporters in the region. These activities included the confiscation of the very kinds of weapons

²¹⁸⁴ CMM, paras. 13.72 and 13.80-13.84.

²¹⁸⁵ CMM, para. 13.87.

²¹⁸⁶ CMM, paras. 13.90-13.98.

²¹⁸⁷ CMM, paras. 19.99-13.108.

ARSA and its supporters had used in the past, and would again use in the future, to carry out deadly attacks.

- (6) The geographical locations of the counter-terrorism operations demonstrate a tight correlation with ARSA's presence and activities. The operations were directed at confronting ARSA's deadly violence and the threat that ARSA and its supporters posed to civilians and Myanmar Defence Services personnel and infrastructure. Conversely, many *hundreds* of Bengali villages were untouched by counter-terrorism operations for the simple reason that ARSA and its supporters were neither present nor active in those locations.
- (7) The scale and number of crimes even *alleged* by The Gambia falls far short of its groundless claim of genocide. The Gambia claims that "more than 10,000 deaths" resulted from the counter-terrorism operations. This figure is wholly unsubstantiated. However, even if it could be proved to the very high standard of proof applicable in this case that this figure is correct (*quod non*), and that all of those killed were innocent civilians not taking part in the ARSA attacks (*quod non*), this number of alleged victims would still be "small in relation to the size to the targeted part of the group".²¹⁸⁸ This Court, on the basis of (coincidentally) remarkably similar figures in the *Croatia Genocide* case, declined to find a genocidal intent on the basis that "Croatia has failed to show that the perpetrators of the acts which form the subject of the principal claim availed themselves of opportunities to destroy a substantial part of the protected group."²¹⁸⁹
- (8) The allegations of sexual violence are not supported by credible or reliable evidence, either in relation to their nature or scale.²¹⁹⁰ The Gambia repeatedly, and baselessly, refers to the "massive scale" and "enormity" of sexual violence. The Gambia alleges that there were "*up to* 1,834 victims of rape" (emphasis added) over an unspecified time-frame.²¹⁹¹ Even if it could be proved to the very

²¹⁸⁸ *Croatia Genocide* case, p.127, para. 437.

²¹⁸⁹ CMM, paras. 13.122-13.138 and 13.149-13.152, citing *Croatia Genocide* case, p.127, para. 437.

²¹⁹⁰ CMM, paras. 13.139-13.141.

²¹⁹¹ 2018 FFM Detailed Findings, para. 1006, MG, Vol. II, Annex 40.

high standard of proof applicable in this case that the figure of 1,834 is correct (*quod non*), this figure for non-fatal violence would still represent a “tiny fraction of the overall population”, from which it would be impossible to draw an inference of an intent to destroy the Bengali population of northern Rakhine State as such.

- (9) The evidence demonstrates that Myanmar eschewed a vast array of opportunities²¹⁹² to harm or kill Bengalis which it would not conceivably have done had it ever held an intent to destroy the Bengali population, as such.
- (10) Myanmar carried out a large number of arrests and detentions of Bengalis, and thereafter either released or put suspected persons on trial, resulting in convictions and acquittals of defendants. Such wide-spread recourse to arrest, detention and criminal justice processing is incongruent with an alleged genocidal intent, particularly given the time, effort and resources involved in undertaking such steps.
- (11) Myanmar did not engage in deliberate “targeting of Rohingya leaders” on account merely of their status, but rather arrested community leaders in an effort to locate ARSA members or gather information about their activities. “Local religious leaders” from villages were subject to arrest due to the fact that ARSA members and supporters were “mostly led by young Islamic clerics (known as ‘Mullahs’ or ‘Maulvis’) or scholars (‘Hafiz’) from those villages”.²¹⁹³
- (12) Damage caused to cultural or religious objects and symbols during the counter-terrorism operations was not shown to be more than minimal.²¹⁹⁴
- (13) The organised nature of the counter-terrorism operations is not only undisputed by Myanmar but it is entirely coherent with a responsible military entity that was necessarily and proportionately responding to the increasing threat posed by ARSA’s activities in the months leading up to August 2017. The organised

²¹⁹² CMM, paras. 13.142–13.154.

²¹⁹³ CMM, paras. 13.165–13.173, especially para. 13.171.

²¹⁹⁴ CMM, paras. 13.174– 3.175.

nature of the counter-terrorism operations and the manner in which they were conducted is in no way indicative of a genocidal intent.

- (14) The available evidence shows that multiple parties, including ARSA and its supporters, and ethnic Rakhine, were responsible for fire-damage. The evidence does not establish that the Myanmar Defence Services were responsible for fire-setting to the extent alleged or that such fire-setting took place at a time when villages were inhabited.

2. There is no direct evidence of genocidal intent

- 13.87 The Counter-Memorial of Myanmar notes that The Gambia provides no direct evidence of genocidal intent.²¹⁹⁵ The Reply of The Gambia provides no response to these paragraphs of the Counter-Memorial. The Reply of The Gambia contains one bare statement that “direct evidence” has been provided,²¹⁹⁶ but no claimed direct evidence is identified.²¹⁹⁷ It remains the case that there is no direct evidence of a genocidal intent.

3. An inference of genocidal intent cannot be drawn

a. General

- 13.88 The Gambia’s Reply states that “Myanmar argues, *predictably*, that the evidence does not meet the standard of proof required to establish genocidal intent”.²¹⁹⁸ It is, of course, entirely predictable that Myanmar argues this, because The Gambia’s evidence so obviously does not meet the requisite standard of proof.
- 13.89 The Gambia misunderstands where the burden of proof lies. The Gambia states that “Myanmar *fails to establish* the existence of any other reasonable inference to be drawn from its pattern of conduct”.²¹⁹⁹ However, Myanmar bears no burden

²¹⁹⁵ CMM, paras. 13.80-13.84.

²¹⁹⁶ RG, para. 9.25.

²¹⁹⁷ RG, paras. 9.25-9.35 do not identify any claimed direct evidence, but merely discuss the burden and standard of proof. From RG, para. 9.36, The Gambia presents arguments as to the “only reasonable inference”.

²¹⁹⁸ RG, para. 9.26 (emphasis added).

²¹⁹⁹ RG, para. 9.26 (emphasis added).

whatsoever to “mak[e] its case that its attacks against the Rohingya population constituted ‘counter-terrorism’, such that it would be reasonable to infer that this was the intention behind these attacks”.²²⁰⁰ Rather, the burden of proof is on The Gambia to establish the existence of a genocidal intent, and therefore the burden is on The Gambia to prove its claim that the existence of a genocidal intent is the only inference that could reasonably be drawn from the acts in question.

- 13.90 The Gambia claims that it “cannot be right” that The Gambia “is required to disprove the existence of every other hypothetical intention on Myanmar’s part”, for example, “like ethnic cleansing”.²²⁰¹ That is also a misunderstanding of the burden and standard of proof. In the *Bosnia Genocide* case and the *Croatia Genocide* case, the Court did not suggest that the *claimant* State must specifically identify and then *disprove* every possible hypothetical alternative intent. Nor did the Court suggest that the *respondent* State had to identify and *prove* some alternative intent. Rather, the burden is simply on the applicant State to prove, in accordance with the applicable high standard of proof, that the existence of a genocidal intent is the only reasonable inference that can be drawn. If any explanation for the evidence that does not involve the existence of a genocidal intent is reasonably possible, then the claimant State will not have discharged that burden. Whether or not any possible alternative explanation is the correct explanation is not a matter that the Court needs to determine. Indeed, if a possible alternative explanation involves a violation of international law other than the Genocide Convention, this is a matter that the Court *cannot* determine, since the jurisdiction of the Court is confined to alleged breaches of the Genocide Convention.²²⁰² In the *Bosnia Genocide* case and the *Croatia Genocide* case, the Court did not require the respondent State to plead, let alone prove, an alternative explanation of the evidence. In those cases, the respondents to the claims and counter-claim did not plead or seek to prove that they had engaged in ethnic cleansing rather than genocide, or that they engaged in the collective punishment of the civilian population rather than genocide, and the Court made no finding as to whether or not this is what had occurred. The Court simply found that the applicant State had not

²²⁰⁰ RG, para. 9.26.

²²⁰¹ RG, para. 9.33.

²²⁰² CMM, paras. 13.73–13.79.

proved that a genocidal intent was the only reasonable inference, since alternative explanations not involving a genocidal intent were a reasonable *possibility*.

13.91 In order to infer the existence of the *dolus specialis* for genocide from surrounding circumstances, this must be *the only inference that could reasonably be drawn from the acts in question*.²²⁰³ Where the *dolus specialis* for genocide is said to be established by a general plan, the alleged general plan must be “convincingly demonstrated to exist”.²²⁰⁴ These principles are agreed between the parties. The Gambia’s argument in its Reply that genocidal intent is “the only reasonable inference that can be drawn” is set out in its Chapter 9, Section (C), paragraphs 9.36 to 9.84. Overwhelmingly, it fails to address the arguments in paragraphs 13.85–13.225 of Myanmar’s Counter-Memorial.

13.92 This section of this Rejoinder now sets out Myanmar’s arguments in respect of twelve aspects of the evidence. It will be demonstrated that The Gambia not only fails to prove that the existence of a genocidal intent is the only reasonable inference, but, more fundamentally, fails to prove that the existence of a genocidal intent is a reasonable inference *at all*.

b. The role of ARSA

13.93 Having avoided mention of ARSA almost entirely throughout its Memorial, The Gambia’s Reply now provides a mere six paragraphs²²⁰⁵ in response to what is stated about the role of ARSA in Myanmar’s Counter-Memorial in its Chapter 3 (paragraphs 3.1–3.145), Chapter 8 (paragraphs 8.1–8.111), Chapter 9 (paragraphs 9.1–9.306) and Chapter 13 (paragraphs 13.90–13.121; 13.155–13.173; and 13.176–13.225).

13.94 Chapters 3, 8 and 9 of the Counter-Memorial of Myanmar, and Chapters 3, 8 and 9 of this Rejoinder, dispose of The Gambia’s untenable assertion that “ARSA was a small, poorly organized group that used mostly sticks and knives and did not have real

²²⁰³ CMM, para. 5.15; *Croatia Genocide* case, p. 67, para. 148, explaining *Bosnia Genocide* case, pp. 196-197, para. 373. See also *Croatia Genocide* case, pp. 118-119, 120, 122, 125, 128, paras. 404, 407-410, 417-418, 428-429, 440.

²²⁰⁴ *Bosnia Genocide* case, pp. 196-197, para. 373.

²²⁰⁵ RG, paras. 9.41–9.46.

firearms with which to train.”²²⁰⁶ Myanmar has already exposed the fallacious arguments of The Gambia so far as it contends that ARSA was small and poorly organized.²²⁰⁷

13.95 According to the International Crisis Group, by 2016 ARSA had evolved into a professional, well-organised and trained group.²²⁰⁸ Even the FFM, which downplays the significance of ARSA, defined it as a non-state armed organisation.²²⁰⁹ Myanmar designated it as a proscribed terrorist organisation.²²¹⁰ The objective of this well-established and organised terrorist group was to attack Myanmar security apparatus with a view to gaining “complete control” over northern Rakhine State.²²¹¹ Although The Gambia relies on certain witness statements provided to it by the IIMM, it does not refer to the IIMM witness statement describing the capabilities of ARSA, its recruitment, training and the coordination of action between regiments through WhatsApp messages.²²¹²

13.96 Similarly, the evidence contradicts The Gambia’s claim that “support for ARSA was very limited”.²²¹³ This assertion relies on the FFM’s conclusion that “overall membership and support for ARSA represented a *minority* of the total population.”²²¹⁴ Contrary to The Gambia’s denial that “ARSA’s threat was significant and involved the mobilization of many thousands”,²²¹⁵ there is a significant body of evidence to support this contention. The Gambia’s own witness, Andrew Riley, an aid worker in

²²⁰⁶ RG, para. 9.41.

²²⁰⁷ CMM, paras. 3.6 and 3.16-3.99; and this Rejoinder, Chapter 3 above.

²²⁰⁸ International Crisis Group, *Myanmar’s Rohingya Crisis Enters a Dangerous New Phase*, Asia Report No. 292, 7 December 2017, p. 2, CMM, Vol. VII, Annex 297: “In the months following the October 2016 attacks, ARSA set about consolidating its authority in Rohingya villages in northern Rakhine and preparing for the next round of attacks. It did this through the targeted killings of dozens of Rohingya men with links to the authorities (such as village heads, other local administrators and suspected informers), ramped up training in the hills as well as IED production in safe houses. The authorities were aware of these developments, with the state media reporting many of the killings as well as the discovery of IED factories. For them, the next ARSA attacks were seen as a matter of when, not if.”

²²⁰⁹ 2018 FFM Detailed Findings, paras. 55-59, CMM, Vol. VI, Annex 239.

²²¹⁰ CMM, para. 3.66.

²²¹¹ CMM, para. 3.24. See also 2018 FFM Detailed Findings, paras. 1009-1013, MG, Vol. II, Annex 40.

²²¹² IIMM, Witness Statement No. IIMM0028503937, paras. 30-74 and 100-166, RM, Vol. IV, Annex 149.

²²¹³ RG, para. 9.41.

²²¹⁴ RG, para. 9.41; 2018 FFM Detailed Findings, para. 1022 (emphasis added) (not included in MG, Vol. II, Annex 40), CMM, Vol. VI, Annex 239.

²²¹⁵ RG, para. 9.41.

northern Rakhine State, noted from his work with the Bengalis in Maungdaw that 95% of the population supported ARSA.²²¹⁶ Maungdaw Township alone was estimated by one ARSA member to have 10,000 ARSA members²²¹⁷ and was also active in the villages of Buthidaung and Rathedaung Townships. It is not possible to know precisely the membership of the organisation, in part due to the secrecy which shrouded it. However, it is a reasonable estimate there were in the region of 17,600 members.²²¹⁸ After October 2016, a fatwa gave religious legitimacy to the actions of ARSA which increased the level of support.²²¹⁹

- 13.97 The Gambia misrepresents the witness accounts obtained by Fortify Rights as supporting the FFM’s report that support for ARSA was limited.²²²⁰ Twenty-two statements are footnoted of which thirteen of the interviewees from a number of diverse villages stated that they were aware of the activities of insurgents variously described as ARSA, RSO or fighters in the areas where they lived.²²²¹ In addition, another fifteen interviewees described the activities of ARSA/RSO within their locations.²²²² This demonstrates the extent to which ARSA had embedded itself within local communities.
- 13.98 As regards access to, and use of, “real firearms”, The Gambia fails to accurately represent ARSA’s access to weapons through its selective citation of an IIMM report on ARSA’s weapons possession and use.²²²³ The Gambia provides the Court with only the first 10 out of 48 pages of this IIMM report, and (tellingly) does not provide the Court with the sections entitled: “Witness evidence of ARSA weapons and IEDs”;

²²¹⁶ IIMM, Witness Statement No. IIMM0001557475 (Andrew Riley), para. 120, RG, Vol. IV, Annex 48.

²²¹⁷ Fortify Rights, “First-hand Testimonies from August-September ‘Clearance Operations’ in Myanmar”, August-September 2017 (“**Fortify Rights Document**”), #24, p. 41, RG, Vol. III, Annex 43.

²²¹⁸ See CMM, para. 3.65.

²²¹⁹ CMM, paras. 3.18 and 3.37.

²²²⁰ RG, para. 9.41.

²²²¹ Fortify Rights Document, #12, #13, #14, #15, #20, #29, #30, #32, #33, #38, #40, #48 and #49, RG, Vol. III, Annex 43.

²²²² Fortify Rights Document, #1, #11, #17, #18, #19, #24, #25, #26, #27, #31, #35, #39, #41, #43 and #44, RG, Vol. III, Annex 43.

²²²³ United Nations Independent Investigative Mechanism for Myanmar, *Evidence of ARSA Weapons Possession and Use* (29 April 2024) (the “**IIMM Weapons Report**”), RG, Vol. II, Annex 9.

“Availability of firearms”; “IED construction and materials”; “Weapons used in ARSA attacks”; and “Wider access to weapons and their distribution”.²²²⁴

- 13.99 Three self-declared former members of ARSA provided details to the IIMM regarding the construction and/or use of IEDs by ARSA members, including “‘pipe bomb’-type IEDs operated both by command wire and remote control”.²²²⁵ Another person from Buthidaung township told the IIMM that he saw ARSA members constructing IEDs, assembling bombs with wires and batteries.²²²⁶ A former ARSA commander from Maungdaw township described “mine bombs” which were received from an ARSA regional commander.²²²⁷
- 13.100 As addressed in Chapter 3 of this Rejoinder, The Gambia claims repeatedly yet erroneously that Myanmar used “ARSA as a pretext to attack the entire Rohingya population”.²²²⁸ This is simply not borne out by the evidence.²²²⁹ It is indisputable that ARSA represented a significant threat to the sovereignty of Myanmar. The response by the Myanmar Defence Services to this threat was to engage in counter-terrorism operations at the locations where the threat was taking place. The evidence demonstrates that the locations affected were those proximate to the security infrastructure and civilian settlements which had been subjected to *widespread* and *coordinated* deadly attacks by ARSA. The great majority of the Bengali population of northern Rakhine State were unaffected by the violence and the *entire* Bengali population of the area were not targeted. There is no evidence of Bengalis living in the camps for internally displaced persons being subjected to violence from the Myanmar Defence Services. The Gambia has failed to produce reliable evidence as to the numbers killed in October/November 2016 and August 2017; nor has The Gambia made any attempt to numerically distinguish combatants and supporters of ARSA who were killed, as opposed to others.

²²²⁴ IIMM *Weapons Report*, extracts not provided by The Gambia, RM, Vol. IV, Annex 145.

²²²⁵ *Ibid.*, para. 51.

²²²⁶ *Ibid.*, para. 53.

²²²⁷ *Ibid.*, para. 55.

²²²⁸ RG, para. 9.42.

²²²⁹ See Chapters 3, 8 and 9 above.

- 13.101 The Gambia fails to appreciate the nature of a terrorist organisation. It embeds itself within the villages from where it derives its support and, due to its adherence to secrecy, it is not easy to identify those who belong to and support the terrorist organisation. There is no evidence that ARSA members or supporters in the community routinely wore identifying uniforms. On the contrary, they sought to conceal their allegiance to the organisation. There is a considerable body of evidence to confirm that when the Myanmar Defence Services went into the villages close to the locations attacked by ARSA, they were seeking the “bad people”, that is ARSA members and supporters, and not the Bengali population as a whole.²²³⁰
- 13.102 The Gambia accepts that Myanmar provided Rules of Engagement to its personnel in advance of the operations, the purpose of which was to ensure that the Myanmar Defence Services were clear as to the Rules under which they operated. The Rules of Engagement required rules of armed conflict to be followed, including the requirement to distinguish between civilians and combatants, to minimise collateral damage to civilians and property through the proportionate use of force when military targets are among civilians and property, to give advance warning before attack to the extent possible, to use force only when necessary to obtain the military objectives, to ensure respect for humanitarianism, to not take or destroy property owned by civilians, and to ensure special protection for children and women.²²³¹ The Rules of Engagement also made clear that the mission objective was to counter attacks by the Arakan Army and ARSA.²²³² Rules of Engagement pocket cards were distributed in their thousands to members of the Myanmar Defence Services.²²³³ No sensible purpose was served by this unless it was to ensure that those engaged in combat were aware of the limitations on their conduct as set out in the Rules of Engagement. If, which is not accepted, there are examples of a failure to comply with the Rules of Engagement by soldiers, this cannot be held to have been a deliberate instruction or policy.
- 13.103 In its Reply, The Gambia cites an IIMM witness statement in which a person claims to have overheard a soldier saying “there must have been a big mistake. Why is the

²²³⁰ See paragraphs 3.14, 3.52, 3.54, and 3.74-3.76 above.

²²³¹ Rules of Engagement for Counter-terrorism Operations against AA and ARSA, paras. 15, 18 and 19, CMM, Vol. V, Annex 152.

²²³² *Ibid.*, para. 1.

²²³³ CMM, para. 3.86.

government making us do this? We didn't find any bad guys here.”²²³⁴ This statement is not consistent with The Gambia's case: its sense is that the soldiers were indeed looking for “bad guys” (ARSA), not Bengalis as a group.

c. Timing and duration of the counter-terrorism operations

- 13.104 Paragraphs 9.47 to 9.49 of The Gambia's Reply, which respond to paragraphs 13.99 to 13.108 of Myanmar's Counter-Memorial, provide no answer to the obvious conclusion to be drawn from the facts concerning the timing and duration of the counter-terrorism operations. It is demonstrated beyond question that the operations were *responsive*, confined to a matter of days in respect of each of the periods of ARSA's attacks in October 2016, November 2016 and August 2017, and were proportionate to the level of threat posed by ARSA. Even The Gambia's own expert witness, Professor Newton, now concedes that the counter-terrorism operations were indeed responsive.²²³⁵
- 13.105 It has now been more than seven years since the counter-terrorism operations ended on 5 September 2017. The Gambia has not adduced any evidence of any unlawful killings or other acts of violence which amount to demonstrations of genocidal intent by the Myanmar Defence Services against Bengali Muslims since that date. The Gambia has no explanation for how or why the alleged genocidal intent, if it existed as claimed by The Gambia (*quod non*), simply evaporated overnight. It is no coincidence that counter-terrorism operations immediately ceased as soon as ARSA no longer presented a threat to life and limb, and the sovereignty of Myanmar.
- 13.106 In three paragraphs of its Reply, The Gambia merely repeats the arguments in its Memorial about the alleged sinister “planning” of military operations, the significance of the removal of fences and the confiscation of weapons used by ARSA and its supporters.²²³⁶ This is comprehensively refuted in Chapter 3 of the Counter-Memorial of Myanmar and in Chapter 3 of this Rejoinder.²²³⁷ The Gambia similarly repeats its

²²³⁴ RG, para. 9.46.

²²³⁵ See paragraphs 13.177-13.178 below; and Second Expert Report of Michael A. Newton, para. 10, RG, Vol. IV, Annex 67.

²²³⁶ RG, paras. 9.47-9.49.

²²³⁷ See paragraphs 3.58-3.105 above.

baseless claim of the “low level of threat that ARSA posed”.²²³⁸ Tellingly, here, The Gambia now concedes (as it obviously must) that the counter-terrorism operations *were* responses to ARSA’s “attacks on border and police posts”.²²³⁹ While The Gambia claims that there was also “a much broader intention to destroy once and for all the Rohingya group”,²²⁴⁰ The Gambia fails to explain what happened to that alleged “broader intention” after 5 September 2017.

13.107 The Gambia claims, without justification, that the “timing [of the counter-terrorism operations] was completely in the military’s hands”. This is absurd. The Gambia appears to suggest that the Myanmar Defence Services required precisely the time period between the October / November 2016 ARSA attacks and ARSA’s August 2017 attacks to prepare its genocidal campaign because the military “needed that time to pre-position troops and prepare the villages to finally resolve ‘the unfinished job’”.²²⁴¹ It would be an extraordinary coincidence if the period of time required by the Myanmar Defence Services to prepare for the alleged genocidal counter-terrorism operations of August 2017 just happened to end at exactly the same time that ARSA, for example, murdered 105 Hindus at Kha Maung Seik, an incident that The Gambia refuses to address throughout its Memorial or Reply.²²⁴² Unless The Gambia contends that the Myanmar Defence Services should not have sought to prevent further mass murder by ARSA, it is unanswerable that the *timing* of the counter-terrorism operations was very much dictated by, and in the “hands” of, ARSA.

13.108 Finally, The Gambia claims that “The 2017 ‘clearance operations’ may have been timed to ‘derail’ the work of the [Annan] Commission [on Rakhine State], which had recommendations on sensitive questions like citizenship for the Rohingya”.²²⁴³ It is telling that The Gambia elects to believe, and rely upon, a statement issued by ARSA, a proscribed terrorist organisation, as the evidential basis for its submission (not least

²²³⁸ RG, para. 9.48.

²²³⁹ RG, para. 9.48.

²²⁴⁰ RG, para. 9.48.

²²⁴¹ RG, para. 9.49.

²²⁴² CMM, paras. 3.108-3.119. See further contemporaneous corroborating evidence: Witness Statement of Ma Pu Jar, 1 November 2017, pp. 1-2, RM, Vol. III, Annex 98; Witness Statement of Ma Phaw Mi Lar, 1 November 2017, pp. 1-3, RM, Vol. III, Annex 97.

²²⁴³ RG, para. 9.49.

given ARSA’s track record for disinformation).²²⁴⁴ As noted by the FFM, “The final report of the [Annan] Commission set out solutions for peace and development in Rakhine State and included a series of recommendations, for example on citizenship for the Rohingya. The ARSA attacks commenced hours after the release of the Commission’s final report in Yangon on 24 August 2017.”²²⁴⁵ It is beyond doubt who was, in fact, responsible for seeking to “derail” the work of the Commission.

d. Measures preceding the counter-terrorism operations

- 13.109 The Gambia claims that “there is no evidence to support” Myanmar’s assertion that “there was a legitimate security rationale for the measures preceding” the counter-terrorism operations that included the removal of fences, and confiscation of knives and other weapons.²²⁴⁶ This is incorrect and is contradicted by material more recently provided by the IIMM, which The Gambia has elected not to place before the Court. A clear and justified evidential basis for such measures is set out in the Counter-Memorial of Myanmar.²²⁴⁷
- 13.110 This Rejoinder provides a dedicated section on the “**legitimate confiscation of multi-purpose tools**”²²⁴⁸ in light of ARSA’s express aim to arm itself with such dual-purpose tools to be used for offensive purposes.²²⁴⁹ The kinds of items that were confiscated were exactly what ARSA and its supporters *did* subsequently use to carry out multiple deadly attacks upon Myanmar security personnel and the civilian population. It is noted that the police in Bangladesh have apparently similarly seized

²²⁴⁴ 2018 FFM Detailed Findings, para. 1044 (not included in the extract at MG, Vol. II, Annex 40), CMM, Vol. VI, Annex 239.

²²⁴⁵ 2018 FFM Detailed Findings, para. 1044 (not included in the extract at MG, Vol. II, Annex 40), CMM, Vol. VI, Annex 239.

²²⁴⁶ RG, para. 9.50.

²²⁴⁷ CMM, paras. 13.109–13.116; 13.185–13.187.

²²⁴⁸ See paragraphs 3.68–3.70 above.

²²⁴⁹ In a similar vein, see the Statement of U Ye Htut, the District Administrator (Maungdaw), who describes how, following ARSA’s attacks, his administration issued “declarations of section 144 and issuance of local order not to go outside by holding sticks, swords and weapons” because “there had been incidents leading to undermine security of local people and impair rule of law”. Statement of U Ye Htut, District Administrator (Maungdaw), 29 October 2017, RM, Vol. III, Annex 96.

knives brought into the camps in Cox’s Bazar by a British NGO,²²⁵⁰ presumably to prevent them from being used as weapons.

13.111 This Rejoinder also provides a dedicated section entitled “**The legitimate removal of fences**”.²²⁵¹ As explained therein, Bengalis interviewed by the IIMM contradict The Gambia’s narrative about the purpose underlying this measure. Two of the interviewees describe how, after an ARSA attack on a security headquarters, the military were concerned that those responsible for the violence were being harboured locally, so the villagers were asked to take away the fences as people were able to hide behind them.²²⁵² Yet another person interviewed by the IIMM describes how after the October 2016 ARSA attacks they were told to remove fences and *they understood*, without doubt, that it was to allow the Myanmar Defence Services “to see clearly, so that enemies could not make a sneak attack”,²²⁵³ and so people could not hide behind them.²²⁵⁴ Villagers were allowed to retain fencing around the toilets.²²⁵⁵ Yet another person interviewed by the IIMM confirms the same.²²⁵⁶

13.112 The Gambia’s Reply also suggests that “other measures” undertaken by Myanmar in the weeks and months preceding the counter terrorism operations lacked a “legitimate security rationale”.²²⁵⁷ The Gambia, however, leaves it to Myanmar and the Court to

²²⁵⁰ “রোহিঙ্গা আমাদের জন্য একটা ক্যান্সারের মত হবে: সাবেক পররাষ্ট্রমন্ত্রী মোমেন: Rohingya will be like a cancer for us: Former Foreign Minister Momen”, *Daily Jugantor*, 18 May 2024, available at <https://www.youtube.com/watch?v=13EV1naQ0k4>, original video and English transcript at RM, Vol. V, Annex 205. In this video, the Chairman of the Standing Committee on Ministry of Foreign Affairs of the Bangladesh National Parliament, and former Foreign Minister of Bangladesh, stated: “It was seen that a British NGO bought 7,000 knives, cutters like this tools. When the police inquired about why they are needed, they said they are aimed at cutting trees, cleaning up bush trimming and digging like that. We do not know what they are actually doing. Now, our police are active and much better than earlier as they have got it so they seize what it is. They should be stopped.” In relation to this interview, see further paragraph 2.32 above.

²²⁵¹ See paragraphs 3.71–3.85 above.

²²⁵² IIMM, Witness Statement No. IIMM0028059653, para. 60, RM, Vol. IV, Annex 139; IIMM, Witness Statement No. IIMM0027992306, para. 105, RM, Vol. IV, Annex 137.

²²⁵³ IIMM, Witness Statement No. IIMM0028050361, para. 62, RM, Vol. IV, Annex 140.

²²⁵⁴ IIMM, Witness Statement No. IIMM0027992990, paras. 5, 116, 119, RG, Vol. IV, Annex 51.

²²⁵⁵ IIMM, Witness Statement No. IIMM0027971404, para. 32, RG, Vol. IV, Annex 55.

²²⁵⁶ IIMM, Witness Statement No. IIMM0027995869, para. 62, RM, Vol. IV, Annex 138.

²²⁵⁷ RG, para. 9.50.

guess what The Gambia might be referring to, as it fails to indicate what “other measures” are being referred to.

13.113 If The Gambia is referring to the imposition of curfews, this is addressed in the Counter-Memorial,²²⁵⁸ and is the subject of dedicated analysis (“**The legitimate imposition of curfews**”)²²⁵⁹ in this Rejoinder, which sets out the clear evidential basis justifying their imposition. Newly available statements of Bengalis that have been provided by the IIMM, which The Gambia has chosen not to place before the Court, presumably because they undermine The Gambia’s arguments, note that “Rakhine and Rohingya” *alike* were “not allowed to leave their respective areas or to enter restricted areas”²²⁶⁰ due to increased security concerns, particularly Bengalis burning down Rakhine houses, and vice versa.²²⁶¹ Curfews were not imposed in a discriminatory manner, but also affected Maramagyi communities in addition to those from Rakhine and Bengali settlements.²²⁶²

13.114 Finally, The Gambia makes the baseless claim that Myanmar “used starvation as a means of weakening Rohingya and preparing them for destruction”.²²⁶³ This is nothing more than empty rhetoric. It is, notably, a claim that does not direct the Court to any evidential support. That is because there is none. The Gambia does not point to a single instance where any Bengali died of starvation, or was even physically weakened by Myanmar policies with a view to “preparing them for destruction”. Given its otherwise heavy reliance upon the FFM, it is significant, as has already been noted,²²⁶⁴ that The Gambia elected to omit from the extracts of the 2018 FFM Detailed Findings annexed to its Memorial the section dedicated to “Access to food and malnutrition”.²²⁶⁵ Suffice to note, the 2018 FFM Detailed Findings do not conclude

²²⁵⁸ CMM, para. 13.114.

²²⁵⁹ See paragraphs 3.78–3.85 above.

²²⁶⁰ IIMM, Interview Screening Note of P3408, IIMM0028131404, Interview 21 and 28 March 2024, para. 5, RM, Vol. IV, Annex 144.

²²⁶¹ *Ibid.*

²²⁶² Independent Rakhine Initiative, “Freedom of Movement in Rakhine State”, March 2020, MG, Vol. V, Annex 129, p. 127.

²²⁶³ RG, para. 9.51.

²²⁶⁴ CMM, para. 13.115.

²²⁶⁵ 2018 FFM Detailed Findings, pp. 129-130 (not included in the extract at MG, Vol. II, Annex 40), CMM, Vol. VI, Annex 239.

that Myanmar deliberately limited supplies of food to Bengalis “preparing them for destruction”, or at all. The Gambia’s claim that the Myanmar authorities “in effect instituted a policy of forced starvation”²²⁶⁶ is categorically denied and untrue. In any event, The Gambia fails to note that the basis for this claim is said to arise out of the necessary and proportionate restrictions on movement “in the *aftermath* of the 25 August [ARSA] attacks”,²²⁶⁷ and therefore does not support The Gambia’s argument of weakening Bengalis in “preparation for their destruction” during the counter-terrorism operations.

- 13.115 The issue of “**Humanitarian assistance**” is addressed in a dedicated section within this Rejoinder.²²⁶⁸ It provides a detailed picture of the extensive collaboration between Myanmar and international aid agencies precisely to ensure that food and health care was available to all affected communities irrespective of their ethnicity.

e. Geographical profile of the counter-terrorism operations

- 13.116 In its response to the analysis in Myanmar’s Counter-Memorial²²⁶⁹ of the geographical profile of the counter-terrorism operations, the primary argument in The Gambia’s Reply²²⁷⁰ is dependent on the self-certifying correctness of its earlier claim in Chapter 7 of its Reply that “a significant number of the Rohingya villages where Myanmar accepts that it did not carry out counter terrorism operations were destroyed as part of the ‘clearance operations’”.²²⁷¹ This argument fails entirely for a number of reasons.
- 13.117 First, at paragraphs 7.49 to 7.52 of its Reply, The Gambia sets out what it claims to be “extreme brutality, sexual violence and destruction” in four villages where allegedly “Myanmar admits there was no ARSA attacks”.²²⁷² As is demonstrated in Chapter 8

²²⁶⁶ RG, para. 7.29.

²²⁶⁷ Amnesty International, *Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya, as Ethnic Cleansing Continues* (February 2018), p. 1, MG, Vol. IV, Annex 111.

²²⁶⁸ See paragraphs 3.88–3.105 above.

²²⁶⁹ CMM, paras. 13.117–13.121.

²²⁷⁰ RG, para. 9.52.

²²⁷¹ RG, para. 9.52.

²²⁷² RG, Chapter 7, Section B, Sub-Section 1.

of this Rejoinder,²²⁷³ this assertion by The Gambia is fundamentally flawed, and arises out of a serious misrepresentation of the relevant underlying evidence. In short, there *were* ARSA attacks in the vicinity of all of these five specific locations. Furthermore, the material relied upon by The Gambia does not even contain any suggestion of violence by the Myanmar Defence Services against any person in three of these five locations. In a fourth of these locations, the material refers to the sexual assault of a single victim. In the fifth, it refers to the death of a single person in a fire, which is not said to have been an intentional killing. All of these villages are said to have been destroyed or damaged by fire to some extent, but the evidence does not indicate who was responsible for this, or that the fire in any of the locations other than one occurred at a time when the villages were still inhabited.

13.118 Second, The Gambia profoundly misunderstands the evidence upon which it bases its erroneous claim that Figure 1.2 of the Reply shows that a significant number, said by The Gambia to be 188 out of 329 villages, were partially or completely destroyed “as part of the ‘clearance operations’”.²²⁷⁴ The Gambia fails to realise that the satellite imagery upon which it relies (MG Figure 1.3) depicts villages that underwent fire-damage over the period from 31 August 2017 to March 2018 (a period of seven months). The counter-terrorism operations concluded on 5 September 2017 and The Gambia fails to show the number of villages affected by fire-damage during the first 12 days of the period commencing on 31 August 2017. Equally, The Gambia presents no evidence (only mere groundless assumption) that the destruction of what must have been (in many instances) abandoned villages was carried out by the Myanmar Defence Services.

13.119 The Gambia points to the 2018 FFM Detailed Findings which claims, *inter alia*, that there was “remarkable similarity in timing of the operations, the sequence of events, the types of weapons used ... The *modus operandi* of these attacks was recognisable and consistent throughout.”²²⁷⁵ Given that these were military operations undertaken at the time of terrorist attacks, in response to those attacks, it is hardly surprising that they all had a similarity in “timing” and “types of weapons”. The timing was in fact

²²⁷³ See paragraphs 8.34-8.64 above.

²²⁷⁴ RG, para. 9.52.

²²⁷⁵ RG, para. 9.53 citing 2018 FFM Detailed Findings, para. 1429, MG, Vol. II, Annex 40.

entirely dictated by ARSA.²²⁷⁶ Such similarities provide no support to The Gambia's case whatsoever. The Gambia's case is that there was a common *modus operandi* of *violence against civilians*. The Gambia claims that Chapter 7 of its Reply "draws upon no fewer than 30 villages to establish a pattern of deliberate and indiscriminate killing of Rohingya civilians, extreme brutality and sexual violence, and the burning of homes."²²⁷⁷ The Gambia claims that this "*modus operandi* was generally the same in villages where there was no alleged ARSA presence as in those where there was".²²⁷⁸ Chapters 8 and 9 of the Counter-Memorial of Myanmar and Chapters 8 and 9 of this Rejoinder show that this central argument of The Gambia's is plainly wrong.

13.120 Given that the FFM overwhelmingly, indeed almost exclusively, only took witness accounts from one side of the conflict, it is unsurprising that its analysis does not reflect the reality of what took place. As demonstrated above, the *timing* of the operations, and *the sequence of events* (i.e. what precipitated the counter-terrorism operations) were a direct result of the activities of ARSA, of which hundreds of FFM witnesses systematically refused to speak. The very fact that the FFM elects to characterise the counter-terrorism operations as "attacks" rather than as responsive counter-terrorism activity is a product of the deliberately misleading and one-sided witness accounts that it received.

13.121 Contrary to The Gambia's argument, it is clear from the evidence analysed that what took place in a small number of localities was not representative of "*generally* similar conduct" elsewhere.²²⁷⁹ There was no "consistent pattern of killing, extreme brutality and sexual violence perpetrated by the Tatmadaw during the 'clearance operations' across villages in different parts of northern Rakhine State."²²⁸⁰

13.122 The Gambia suggests that it "is not required to show that the same level of brutality and killing took place in each of the 37 villages discussed in Chapter 9 of Myanmar's Counter-Memorial."²²⁸¹ The truth, of course, is that The Gambia refuses to provide

²²⁷⁶ See CMM, paras. 13.99-13.108. See also this Rejoinder, paragraphs 13.106-13.110 above.

²²⁷⁷ RG, para. 9.55.

²²⁷⁸ RG, para. 9.53.

²²⁷⁹ As incorrectly claimed in RG, para. 9.54 (emphasis in original).

²²⁸⁰ As incorrectly claimed in RG, para. 9.57.

²²⁸¹ RG, para. 9.57.

any meaningful engagement, or any engagement at all, with the evidence in respect of 30 out of the 43 locations analysed in Chapters 8 and 9 of the Counter-Memorial of Myanmar. This is because The Gambia has no answer, or none that stands up to any scrutiny. Accordingly, The Gambia falls back on unsubstantiated assertion, claiming that “*in many such villages*, members of the Rohingya group had fled before and during the ‘clearance operations’ and therefore avoided the Tatmadaw’s atrocities.”²²⁸² The Gambia fails to direct the Court to a single piece of evidence relating to a single village to support this, let alone to evidence more generally justifying its claim that it applied to “*many such villages*”.

13.123 The result is that The Gambia has presented evidence in its Reply in respect of only 13 locations, notwithstanding that its entire case is founded upon the claim that in *all* locations where counter-terrorism operations took place, they were conducted according to the same *modus operandi*. The Gambia presents no evidence that this is the case.

13.124 Finally, The Gambia refers to the village tracts of Kun Thee Pyin, Tha Man Thar, Kha Maung Seik, Pa Da Ga Day Wa Na Li / Net Chaung, and Kyein Chaung. According to The Gambia, it is said by the FFM that there were “serious human rights violations against Rohingya” in these locations,²²⁸³ involving a “similar pattern of conduct”. However, there is not a single account that provides any detail about any specific alleged human rights violation. No details are given of when such violations are said to have taken place, what the facts of those violations are said to be, what the circumstances are in which they are said to have occurred, or whether the anonymous interviewee is said to be reporting events witnessed first-hand or merely to be relaying second-hand information or summary gossip. This statement in the FFM report is devoid of evidential value for the purpose of any judicial proceedings.

²²⁸² RG, para. 9.57 (emphasis added).

²²⁸³ RG, para. 9.55 citing 2018 FFM Detailed Findings, para. 880, MG, Vol. II, Annex 40.

13.125 Myanmar's Counter-Memorial sets out dedicated analyses in respect of Kun Thee Pyin,²²⁸⁴ Tha Man Thar,²²⁸⁵ Kha Maung Seik,²²⁸⁶ Pa Da Kar Ywar Thit / Net Chaung,²²⁸⁷ and Kyein Chaung.²²⁸⁸

f. Scale and number of the alleged crimes

13.126 In paragraphs 13.122 to 13.138 of its Counter-Memorial, Myanmar provides detailed analysis of the alleged number of deaths in the counter-terrorism operations. As noted, The Gambia has uncritically repeated²²⁸⁹ the unreliable and unverified claim by the FFM that “more than 10,000 deaths” were a direct result of the operations. The Gambia's Reply makes no meaningful attempt to respond to Myanmar's analysis. Instead, it resorts to generalised allegations and plainly untrue, hyperbolic rhetoric, that “everyone was a target and no one was spared”.²²⁹⁰ Such rhetoric is devoid of any evidential value in the context of this analysis.

13.127 Neither the FFM nor The Gambia provides any assessment of how many alleged deaths were the result of unjustified or unlawful killings of innocent civilians as a result of the activities of the Myanmar Defence Services, as opposed to legitimate killings of ARSA members or mobilised local supporters involved in the attacks, legitimate collateral casualties, or deaths caused by actions of ARSA and its supporters. The failure of The Gambia to demonstrate the number of alleged deaths that were the result of unjustified or unlawful killings of innocent civilians as a result of the activities of the Myanmar Defence Services is important. The Gambia thereby fails to prove that this number was more than “small in relation to the size of the targeted part of the group”.²²⁹¹ This number is obviously material to the Court's analysis as to whether alleged perpetrators “availed themselves of opportunities to

²²⁸⁴ CMM, paras. 9.284–9.287.

²²⁸⁵ CMM, paras. 9.289–9.300.

²²⁸⁶ CMM, paras. 3.108–3.119 and 8.24–8.25.

²²⁸⁷ CMM, paras. 8.26–8.37, 8.50–8.52 and 3.77 (Pa Da Ga Day Wa Na Li/Net Chaung and Pa Da Kar Ywar Thit are immediately adjacent settlements).

²²⁸⁸ CMM, paras. 9.201–9.216.

²²⁸⁹ MG, para. 12.2.

²²⁹⁰ RG, para. 9.61.

²²⁹¹ *Croatia Genocide* case, p. 127, para. 437.

destroy a substantial part of the protected group”, and as to whether an inference of genocidal intent can be drawn.²²⁹²

13.128 It is true, as The Gambia notes, that “killings are only one potential *actus reus* for genocide”.²²⁹³ However, The Gambia’s claims about the alleged “scale” of other alleged genocidal acts is confused and starkly unsubstantiated by any credible evidence. The Gambia asserts that it “has presented extensive and credible evidence that Myanmar inflicted extremely brutal violence, including sexual violence, on members of the Rohingya group, from which reliable estimates indicate that over 100,000 Rohingya suffered serious bodily harm”.²²⁹⁴ The support for this statement is said to be found at paragraph 3.19 of the Reply of The Gambia. In fact, in that paragraph of its Reply, The Gambia alleges only that the Tatmadaw has “inflicted serious bodily and mental harm on tens of thousands of Rohingya”. The discrepancy is obvious.

13.129 The claim that “over 100,000 Rohingya suffered serious bodily harm”²²⁹⁵ is in any event a gross misrepresentation of the underlying evidence, as analysed above.²²⁹⁶

13.130 Furthermore, The Gambia fails to explain how any acts other than killings would establish the existence of the *dolus specialis* of genocide in this case. The Gambia simply states that alleged acts other than killings reflect a “deep-seated hatred from (sic) the Rohingya encouraged by the State, and the execution of a deliberate plan to destroy them”.²²⁹⁷ This is mere assertion. Even if the commission of such other alleged acts on a large scale could be established (*quod non*), and even if it could be established that such other alleged acts were committed out of “deep-seated hatred” (*quod non*), this of itself would not mean that such acts were committed with intent to destroy a group, as such. Without more, such an intent would not be the only

²²⁹² *Ibid.*

²²⁹³ RG, para. 9.62.

²²⁹⁴ RG, para. 9.15.

²²⁹⁵ RG, para. 9.15, citing *ibid.*, para. 3.19, which in turn cites to M. Habib *et al.*, *Forced Migration of Rohingya: the Untold Experience* (Ontario International Development Agency 2018), p. 68, RG, Vol. III, Annex 34; 2018 FFM Detailed Findings, para. 1397, MG, Vol. II, Annex 40.

²²⁹⁶ See paragraph 13.65 above.

²²⁹⁷ RG, para. 9.62.

reasonable inference that could be drawn. In any event,²²⁹⁸ the fact that the counter-terrorism operations concluded on 5 September 2017, and have not resumed since, suggests that the operations were not conducted out of any “deep-seated hatred”.

13.131 The Gambia argues that “Myanmar omits important contextual information” when referring to a survey by Xchange.²²⁹⁹ It is, however, The Gambia that simply ignores the implication of that survey. It indicates that 78% of the persons surveyed in Cox’s Bazaar after their arrival in the camps in September and October 2017 stated they would willingly return to Myanmar “if the situation improves”, and that 6% said that they would be willing to return unconditionally.²³⁰⁰ There is no indication that any respondents said that they would return only if those responsible for the counter-terrorism operations were no longer in power. In 2019, the position was even clearer: 93% of respondents said they would return “in the event that the Myanmar Government would provide the Rohingya with their rights”.²³⁰¹ It is unlikely that they would have expressed such willingness, if they considered that the Government in question had an ongoing genocidal intent.

13.132 The Gambia’s recitation of Xchange’s 2017 summary conclusion²³⁰² does not assist its case. It provides highly generalised and unspecific anonymous data about the number or scale of alleged crimes. It notes, *inter alia*, that “testimonial data ... varied in quality, particularly due to the variable levels of English fluency of the data collection team.”²³⁰³ Predictably, for a survey of exclusively Bengali camp residents, not a single person was prepared to indicate that ARSA or any Bengali was involved in any violence in northern Rakhine State. While 96% identified the Myanmar military as perpetrators of violence, “[a] few respondents mentioned the involvement of

²²⁹⁸ See paragraph 13.106 above.

²²⁹⁹ RG, para. 9.58.

²³⁰⁰ See CMM, paras. 13.136-13.137, citing Xchange, Research on Migration, *The Rohingya Survey 2017*, p. 35, CMM, Vol. VII, Annex 317.

²³⁰¹ See CMM, paras. 13.136-13.137, citing Xchange, Research on Migration, *The Rohingya Survey 2019*, p.35/46, CMM, Vol. VII, Annex 318.

²³⁰² RG, para. 9.58.

²³⁰³ Xchange, Research on Migration, *The Rohingya Survey 2017*, p. 11, RG, Vol. II, Annex 11.

civilians from other ethnic groups, including Mro, Daingnet, and Hindu people, alongside Rakhine civilians.”²³⁰⁴ The bias in reporting is self-evident.

g. Nature and scale of sexual violence

- 13.133 Paragraphs 13.139 to 13.141 of the Counter-Memorial of Myanmar deal with the nature and scale of alleged sexual violence. The Counter-Memorial notes that even if a figure of “up to 1,834 victims of rape”²³⁰⁵ were proven to the requisite very high standard of proof (*quod non*), this number would still represent a “tiny fraction of the overall population”, and it could not be inferred from this that the alleged perpetrators intended to destroy the Bengali population as such. Notably, The Gambia has now had to revise its claim even further downwards to allege that the military “raped and sexually mutilated *hundreds* of Rohingya women and girls.”²³⁰⁶ Even this reduced figure is unsubstantiated by The Gambia.
- 13.134 In reality, the evidence comes nowhere near to establishing such a claimed figure for victims of serious sexual assault. The Gambia fails to prove, to the requisite very high standard of proof, that a single instance of serious sexual violence was committed. The Gambia has no answer to this. Instead, it resorts to repetition of its oft-cited descriptors such as “massive”, “extensive” and “widespread” that bear no relationship with either the underlying evidence or reality.
- 13.135 It should be noted that crimes under Myanmar’s Penal Code include the use of criminal force to any woman, intending to outrage or knowing it to be likely that her modesty will thereby be outraged (Section 354), rape (Section 376), and insulting the modesty of any woman (Section 509).²³⁰⁷ Personnel of the Myanmar Defence Services committing such offences may be tried by the military justice system, by virtue of Sections 3 (*e*), 71, 72 and 128-129 of the Defence Services Act, 1959.²³⁰⁸ Members of the Tatmadaw will never be recognised as having any immunity for crimes which violate the rights of civilians, and legal action will be taken without

²³⁰⁴ *Ibid.*, pp. 21-22, CMM, Vol. VII, Annex 317.

²³⁰⁵ CMM, paras. 13.141, citing 2018 FFM Detailed Findings, para. 1006, MG, Vol. II, Annex 40.

²³⁰⁶ RG, para. 3.19 (emphasis added).

²³⁰⁷ Myanmar, Penal Code, Sections 354, 376 and 509, RM, Vol. II, Annex 56.

²³⁰⁸ Myanmar, Defence Services Act, 1959, Sections 3 (*e*), 71, 72 and 128-129, RM, Vol. II, Annex 55.

delay in respect of any such crimes, with a policy of zero-tolerance. Sexual violence is a grave crime, and is strictly prohibited by law.

h. Opportunities to “destroy... the protected group”

- 13.136 The Gambia suggests that Myanmar has a “fixation on numbers and [that] opportunities for higher death counts is misplaced”.²³⁰⁹ It makes this claim in the face of Myanmar’s arguments,²³¹⁰ to which it provides no answer that withstands any scrutiny.
- 13.137 Myanmar has no undue “fixation” on the number of persons said to have been unlawfully or illegitimately killed, nor on the opportunities to destroy members of the Bengali population. It is this Court itself that has recognised this as a relevant indicator when determining whether the *dolus specialis* is proved.²³¹¹
- 13.138 Even assuming that The Gambia’s claimed figure of some 10,000 fatalities could be proved (*quod non*), such a figure would be considered “small in relation to the size of the targeted part of the group”, constituting 0.7% of the total, and would not demonstrate that “opportunities to destroy a substantial part of the protected group” were taken.²³¹²
- 13.139 The Gambia attempts to side-step the issue of the number of deaths by stating that “killing is not the only *actus reus* of genocide”.²³¹³ However, while that is true, killing is the pre-eminent and obvious *actus reus* of genocide.²³¹⁴ The Gambia itself has given emphasis to killings in this case: for instance, the title of Section III of Chapter 7 of its Reply states that the counter-terrorism operations were “Characterized by ... Massive and Indiscriminate Killing”. In any event, if The Gambia does not now place reliance of the alleged scale of killings, it would need to prove that other acts were of

²³⁰⁹ RG, para. 9.66.

²³¹⁰ CMM, paras. 13.142–13.154.

²³¹¹ *Croatia Genocide* case, pp. 126-127, paras. 431–437.

²³¹² CMM, para. 13.151, citing *Croatia Genocide* case, p.127, para. 437.

²³¹³ RG, para. 9.66.

²³¹⁴ *Croatia Genocide* case, pp. 69-70, para. 157.

a kind, and occurred on such a scale, that the existence of a genocidal intent would be the only inference that could reasonably be drawn. The Gambia has not proved this.

13.140 The Gambia does not dispute that there was not a single killing of any of the 126,000 Bengali residents of IDP camps across Rakhine State during the counter-terrorism operations. Nor does The Gambia suggest that any such killing ever occurred over the course of the further 7 years since the counter-terrorism operations ended. As previously noted by Myanmar, this is “inexplicable if viewed through The Gambia’s genocide narrative”.²³¹⁵ Simultaneously, measures taken in Myanmar to protect the Bengali population have been reported in Myanmar’s periodic Provisional Measures Reports, including for instance, the COVID-19 vaccination programme,²³¹⁶ and the taking of steps to protect the Bengali population from the effects of Cyclone Mocha in 2023.²³¹⁷ The Gambia persists in providing no explanation for how the “genocidal hatred” it alleges fits with this picture.

13.141 In the absence of a single allegation of killing or, indeed, any physical assault *at all*, by any person for whose acts Myanmar is internationally responsible upon a person residing in an IDP camp, The Gambia instead suggests that the conditions in the IDP camps would meet the threshold to satisfy Article II (c) of the Genocide Convention, namely conditions calculated to bring about the physical destruction of those residing there. The Gambia relies upon the generalised statement of UN Assistant Secretary-General for Humanitarian Affairs Ursula Mueller, who describes conditions in the IDP camps as “beyond the dignity of any people”.²³¹⁸ However, the question as to whether conditions in IDP camps are such as to fall within Article II (c) of the Genocide Convention must be determined by the Court based on evidence, and the opinion of Ms Mueller is not evidence. In any event, she does not even express the opinion that

²³¹⁵ CMM, paras. 13.146–13.147.

²³¹⁶ See Second Provisional Measures Report, paras. 134-146; Third Provisional Measures Report, paras. 85-91; Fourth Provisional Measures Report, paras. 124-135; Fifth Provisional Measures Report, paras. 104-113; Sixth Provisional Measures Report, paras. 101-108; Seventh Provisional Measures Report, paras. 84-88; Eighth Provisional Measures Report, paras. 136-139; Ninth Provisional Measures Report, paras. 102-103.

²³¹⁷ See Eighth Provisional Measures Report, paras. 140-167; Ninth Provisional Measures Report, paras. 104-113; Tenth Provisional Measures Report, paras. 83-87.

²³¹⁸ RG, para. 9.67, citing Ursula Mueller, UN Assistant Secretary-General for Humanitarian Affairs, “Reflections from my field visit today in #Rakhine State in #Myanmar”, *Twitter* (4 April 2018) (not annexed to the Reply of The Gambia as required by Article 50, paragraph 1, of the Rules of Court).

conditions in the IDP camps are such as to fall within Article II (c). This is denied. The video clip on which The Gambia relies has not been annexed to its Reply. In any event, even if the Court were to consider it, neither the footage, nor the narrative content, nor even the opinion of Ms Mueller, could possibly be described as conditions calculated to bring about the physical destruction of a group.²³¹⁹

13.142 The Gambia also refers to the untimely deaths of four young children for unknown reasons in one of the camps in December 2018. It is unexplained by The Gambia on what basis these deaths are said to be relevant to its case on genocide and, more specifically, how this possibly sheds any light upon, or assists, The Gambia's case on specific intent (*dolus specialis*). Equally unclear is how The Gambia's reliance on Human Rights Watch's unwarranted description of the IDP camps as "*de facto* detention camps" advances its case on specific intent (*dolus specialis*).²³²⁰ Conditions in the IDP camps and in Aung Mingalar have been addressed in paragraphs 10.179 to 10.221 of the Counter-Memorial of Myanmar and in paragraphs 10.91 to 10.102 above of this Rejoinder. As regards daily life in Aung Mingalar, this is depicted in video-footage²³²¹ and in an interview with Kyaw Tin Hlaing,²³²² which details freedom of movement, access to commercial life, food, sanitary water supply, health care, education, telecommunication services and unfettered religious freedom. Such evidence stands in stark contrast to the exaggerated or unfounded statements upon which The Gambia relies.

13.143 Finally, with respect to the issue of the opportunity to destroy, Myanmar points to a large body of material that completely undermines The Gambia's case and which The Gambia has predictably avoided in its Reply. According to this material, during the movement of Bengalis from northern Rakhine State to Bangladesh in 2016 and 2017, the Myanmar Defence Services not merely eschewed opportunities to destroy

²³¹⁹ *Ibid.*, particularly time-counter 00:32–00:55.

²³²⁰ RG, para. 9.67.

²³²¹ Documentary video of the daily activities of residents in Aung Mingalar ward, produced by the Rakhine State Government, RM, Vol. III, Annex 81.

²³²² Interview with Kyaw Tin Hlaing, resident at Aung Mingalar Ward, produced by the Rakhine State Government, RM, Vol. III, Annex 82.

members of this population, but in fact manifested a clear intention not to harm Bengalis who did not pose a threat.

13.144 In particular, following the events of 25 August 2017, hundreds of thousands of Bengalis left their villages and made their way to Bangladesh, often in very large groups, and over the course of several days. They were highly visible and frequently encountered personnel from the Myanmar Defence Services.²³²³ The Gambia relies on material provided by the IIMM, yet this material shows that armed soldiers, time and again, did not attack or harm Bengali civilians when they had the opportunity to do so.²³²⁴

²³²³ See for instance the following. **(1) P1496** walked from Maung Nu in a group of 2,000 to 3,000 villagers. Confronted by military personnel en route, the soldiers simply directed the group to where it should cross a river. (IIMM, Witness Statement No. IIMM0019628625, paras 115 and 120, RM, Vol. IV, Annex 131.) **(2) P2892** from Maung Nu walked through several villages, including Zay Di Pyin, Dar Paing Sar Yar and Nga Yant Chaung, eventually forming a group of thousands of Bengalis. The group encountered military personnel on two occasions. On the first occasion, the soldiers “gestured we should keep walking ... They said they would do nothing if we kept walking.” On the second occasion, at Ful Mahal river, there were thousands of Bengalis on both sides of the river, and the soldiers did not speak to them but merely indicated to them to move to where other Bengalis were crossing the river. (IIMM, Witness Statement No. IIMM0028048879, paras 72, 73, 79 and 81, RM, Vol. IV, Annex 141.) **(3) P2499** from Zo Parang (Tha Pyay Taw) in Rathedaung travelled in a group with Bengalis from eight villages when they encountered armed soldiers. Members of the group explained that they were heading to “our country” and the soldiers allowed to them to continue unimpeded. (IIMM, Witness Statement No. IIMM0027999848, paras. 101-102, RG, Vol. IV, Annex 59.) **(4) P1548** from Gu Dar Pyin describes being part of a very large group when it was stopped by about one hundred armed military and police personnel. The group was told to return from where it had come. The soldiers separated the men, women and children into groups, photographed them, and then allowed them all to leave. (IIMM, Witness Statement No. IIMM0027997604, paras. 118-123, RG, Vol. IV, Annex 60.) **(5) P1492** from Maung Nu travelled in a large family group and encountered many thousands of others making the same journey. Military personnel prevented the group from crossing a bridge and directed them along the bank of the river. (IIMM, Witness Statement No. IIMM0027995869, paras. 126, 130-131, RM, Vol. IV, Annex 138.) **(6) P1495** describes his journey to Bangladesh, having walked past military bases and seen soldiers who made no effort to approach or confront them. (IIMM, Witness Statement No. IIMM0027992867, para. 99, RM, Vol. IV, Annex 136.) **(7) P0806** started his journey from Hsin Daung to Sain Dee Prang before arriving in Daung Khali. About 500 to 600 Bengalis were there at that time. The military stopped them, took photos of them in groups according to the village tract they came from. “After that, the soldiers told us to return to our villages”. Around 2,230 people returned to Gu Dar Pyin after a year. (IIMM, Witness Statement No. IIMM0019627993, paras. 76 and 80, RM, Vol. IV, Annex 129.)

²³²⁴ See also for instance the following. **(1) P2334** describes being part of a large group and repeatedly walking past armed soldiers who did not shoot at them. “Whenever we saw them, we raised hands in the air and sat down so soldiers would not harm us. They waved us on.” In one encounter with four truckloads of soldiers, they simply asked “why we were leaving.” The soldiers let them go and left. (IIMM, Witness Statement No. IIMM0027971404, paras. 113, 118, 122 & 132, RG, Vol. IV, Annex 55.) **(2) P2101** describes passing through many villages in Buthidaung and did not see any injured people nor did he notice anything in particular. He further encountered armed military personnel along the road who threatened his group not to proceed any further along the main road. Instead, they were directed to take a different road through the mountains. In a further encounter, he came across 3 Border Guard Police who simply “watched us pass”. (IIMM, Witness Statement No. IIMM0019915259, paras. 142, 155, RM, Vol. IV, Annex 151.) **(3) P1622**’s journey also passed through Kyauk Pan Du, where there was a military and Na Sa Ka joint camp. The security forces were stationed on the bridge and had weapons pointed at the group of 150 families as they

13.145 The Gambia has no answer to the implication of this body of material - that the Myanmar Defence Services had no intent to destroy the Bengali population. The Gambia therefore simply ignores this evidence.

i. Mass arrests and detentions

13.146 Myanmar's Counter-Memorial demonstrates that arrests, detention and criminal justice processing of Bengalis by the Myanmar authorities during 2016-2017 were within the rule of law, and were reasonable and proportionate measures to confront the threat posed by ARSA and its supporters to national security and civilians, and were not congruent with an alleged genocidal intent.²³²⁵ The Gambia's Reply fails entirely to grapple with the implication of the evidence. The Gambia remarkably even relies upon evidence from the IIMM that contradicts its own case and is consistent with Myanmar's case, stating that: "the 2016 "clearance operations" were characterized by widespread arrests and detentions of Rohingya, mostly men, alleged involved in [ARSA's] attack. Children as young as 11-years old were arrested together with adults."²³²⁶ That is the point. This was not indiscriminate targeting of *any* Bengalis, but only those reasonably suspected of participation in, and/or support for, ARSA's terrorist violence. This, exceptionally, included young persons who are documented to have been involved with ARSA's activities.²³²⁷

13.147 The Gambia relies upon a grossly generalised, and erroneous, assertion made by the FFM that "*in many cases*, the arrests were without legal or factual basis".²³²⁸ This

passed. The soldiers did nothing to them. At Al Lel Than Kyaw P1622's group (now 250 families) were stopped at a security checkpoint. They were told by the military personnel "you can go wherever you wish, go go go". (IIMM, Witness Statement No. IIMM0019922078, paras. 69 and 71-72, RM, Vol. IV, Annex 133.) (4) P1547 and her large group exited the mountains and were stopped by armed soldiers who started asking questions of them. The soldiers then said to the men, "Don't go. You won't be killed. There will be no harm to you". Then the soldiers left and the group continued walking. (IIMM, Witness Statement No. IIMM0019629302, paras. 77- 82, RM, Vol. IV, Annex 134.) (5) Fortify Rights Document, p. 9, RG, Vol. III, Annex 43, contains a description by a person from Kun Thee Pyin of how the Border Guard Police blocked a group of about 1,200 at the border, and then, after 2 days, said "we could go where we liked".

²³²⁵ CMM, paras. 13.155–13.164, especially para. 13.163.

²³²⁶ RG, para. 9.70, citing United Nations Independent Investigative Mechanism for Myanmar, *Evidence Related to Detention of Rohingya in Buthidaung Prison and Other Locations* (15 May 2024), para. 8, RG, Vol. II, Annex 10.

²³²⁷ CMM, paras. 3.39, 3.48, 3.128, 8.60, 8.64, 9.160, 9.230, 9.260, 9.294, 9.298, 13.156, 13.158 and 13.214.

²³²⁸ RG, para. 9.69 citing UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1104, MG, Vol. II, Annex 40.

claim appears not only to be based on a very small and undefined data-set, but is wholly dependent on suspected ARSA members and supporters being truthful reporters (*quod non*) about their treatment during arrest and detention. Even if the Gambia could prove that isolated instances of ill-treatment occurred (and it has not done so), The Gambia has not proved, and Myanmar denies, that there was any wide-spread and grave ill-treatment as alleged. The Gambia does not establish anything that would come close to justifying the FFM's claim.

- 13.148 The Gambia's Reply further suggests that minors (plural) were subjected to serious bodily and mental harm in the form of torture and sexual violence.²³²⁹ This is denied. Such a sweeping claim is, upon examination, based upon a *single* uncorroborated allegation by one anonymous detainee at Buthidaung prison, said to have been 13-15 years-old at the time. The Gambia fails to show how this single unproven instance could support an allegation of genocidal intent against the Bengali population.
- 13.149 The Gambia refers to a report of the IIMM on detention-related issues, but ignores the relevant section of that report dealing with the "Conviction of Rohingya detained in connection with the 2016 and 2017 clearance operations",²³³⁰ which describes the trial and disposal of the cases of 416 defendants alleged to have been involved in the ARSA attacks of 9 October and 12 November 2016. Twenty-five defendants were acquitted and released. Those convicted under section 17(2) of the Unlawful Association Act, 1908 were sentenced to 3 years' imprisonment with hard labour. Such resort to criminal justice processing of Bengalis cannot be explained within the framework of The Gambia's narrative on genocidal intent. It is accordingly simply ignored by The Gambia.
- 13.150 Finally, The Gambia argues in its Reply that "such detention practices are a type of *actus reus* that falls within Article II (c)...[and] serious or mental harm under Article II (b) [of the Genocide Convention]".²³³¹ However, The Gambia does not explain how such alleged ill-treatment of a minuscule fraction of the Bengali population could

²³²⁹ RG, para. 9.71.

²³³⁰ United Nations Independent Investigative Mechanism for Myanmar, *Evidence Related to Detention of Rohingya in Buthidaung Prison and Other Locations* (15 May 2024), paras. 28-30, RG, Vol. II, Annex 10.

²³³¹ RG, para. 9.72.

possibly amount to “conditions calculated to bring about the physical destruction in whole or in part” of the Bengali population.

13.151 Moreover, this argument is directed solely to the issue of whether certain *conduct* might constitute the *actus reus* of genocide. The Gambia fails entirely to address how it could support a conclusion that the existence of a genocidal intent is the only inference that could reasonably be drawn from the arrests and detention of such a small proportion of the Bengali population.

j. Alleged targeting of leaders

13.152 The single paragraph dealing with this subject found in the Reply of The Gambia²³³² fails to provide any answer to the arguments in Myanmar’s Counter-Memorial.²³³³ The Gambia merely repeats the claim made in its Memorial.²³³⁴

13.153 Specifically, The Gambia has no answer to the fact that the “wealthy, educated and influential men” who are claimed to have been “often targeted” were in fact arrested “in an effort to locate ARSA members or gather information about their activities”,²³³⁵ and that the arrests of community leaders were an obvious and necessary consequence of the fact that ARSA members and supporters were mostly led, *inter alia*, by Muslim clerics and scholars who were responsible for the organisation of recruits to ARSA’s cause.²³³⁶

13.154 There is no reliable evidence of a single “Rohingya Leader” being killed by the military or authorities of Myanmar. The only evidence of this cited by The Gambia is tenuous, anonymous, summary (multiple) hearsay evidence found in the OHCHR Flash Report of February 2017 and a 2018 report by PILPG.²³³⁷ There is no indication

²³³² RG, para. 9.73.

²³³³ CMM, paras. 13.165–13.173.

²³³⁴ MG, paras. 10.36-10.40.

²³³⁵ CMM, para. 13.170.

²³³⁶ CMM, para. 13.171, citing International Crisis Group, *Myanmar: A New Muslim Insurgency in Rakhine State*, Asia Report No. 283, 15 December 2016, p. 13, CMM, Vol. VII, Annex 296.

²³³⁷ RG, para. 7.25, citing UN Office of the High Commissioner for Human Rights, Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT, 3 February 2017, p. 15, MG, Vol. II, Annex 30, and Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State: Factual Findings & Legal Analysis Report*, December 2018, pp. 34-35, MG, Vol. IV, Annex 121.

at all who or what were the source(s) of the information in the OHCHR Flash Report, nor of when, where nor how the incident(s) are said to have taken place. In short, this is worthless evidence for the purpose of judicial proceedings. The summarised anonymous multiple hearsay drawn from PILPG “Questionnaires”²³³⁸ is similarly flawed and of no probative value. Not a single signed witness statement supports The Gambia’s case on the alleged “targeting of Rohingya leaders”.

- 13.155 Furthermore, even if The Gambia’s contentions were credibly proven (*quod non*), the number of alleged leaders said to have been the subject of such targeting (and none of whom are said to have had a particular prominence) is minute in comparison to the size of the alleged targeted population and even against the likely number of persons who might be described as “leaders”, and would not support The Gambia’s contention that such targeting was indicative of a genocidal intent. It is noteworthy that The Gambia gives no explanation as to how it says that the alleged nature and scale of “targeting Rohingya leaders” could support a finding of genocidal intent on the part of Myanmar.

k. Alleged attacks on cultural and religious objects

- 13.156 The Gambia dedicates a single sentence in its Reply²³³⁹ to its claim that Myanmar’s alleged attacks on cultural and religious objects are an indicator of genocidal intent. That sentence merely refers back to two paragraphs in its Memorial,²³⁴⁰ which have already been comprehensively answered by Myanmar.²³⁴¹
- 13.157 In short, there is simply no evidence of any probative value that could plausibly substantiate The Gambia’s claims that Myanmar engaged in attacks upon cultural or religious objects.

²³³⁸ Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State: Factual Findings & Legal Analysis Report*, December 2018, pp. 34-35, MG, Vol. IV, Annex 121.

²³³⁹ RG, para. 9.74.

²³⁴⁰ MG, paras. 1.29 and 10.63.

²³⁴¹ CMM, paras. 13.174–13.175.

I. Organized nature of the operations

- 13.158 In its Memorial, The Gambia devoted a whole chapter to its claim that the organised nature of counter-terrorism operations was in some way indicative of a genocidal intent.²³⁴² It plainly was not, at all.²³⁴³ Myanmar has already provided its detailed arguments in response in its Counter-Memorial.²³⁴⁴
- 13.159 The Gambia's Reply now devotes only a single paragraph to this claim.²³⁴⁵ It focuses solely upon a speech given by Senior-General Min Aung Hlaing which it disingenuously mischaracterises.²³⁴⁶ Myanmar does not repeat here its response contained in the Counter-Memorial²³⁴⁷ and elsewhere in this Rejoinder.²³⁴⁸
- 13.160 The Gambia concludes by suggesting that Myanmar's soldiers "clearly interpreted" and understood the speech (which called for peace, prosperity and cooperation among *all* peoples of northern Rakhine State)²³⁴⁹ as a directive to "kill as many Rohingya as possible."²³⁵⁰ This is nothing short of nonsensical hyperbole, which is flatly contradicted by the evidence.

m. Destruction by fire

- 13.161 The Gambia claims that approximately 392 villages in northern Rakhine State²³⁵¹ were "completely, mostly or partially destroyed between August 2017 and March

²³⁴² MG, Chapter 10.

²³⁴³ CMM, paras. 13.176–13.197.

²³⁴⁴ *Ibid.*

²³⁴⁵ RG, para. 9.75.

²³⁴⁶ RG, para. 9.75, referring to CMM, paras. 13.177-13.179, which deal with "Entire government institutions and people must defend the country with strong patriotism", 2 September 2017, MG, Vol. VI, Annex 150.

²³⁴⁷ CMM, paras. 11.43-11.46 and 13.177-13.179.

²³⁴⁸ See paragraph 3.11(1) above.

²³⁴⁹ "Entire government institutions and people must defend the country with strong patriotism", 2 September 2017, MG, Vol. VI, Annex 150.

²³⁵⁰ RG, para. 9.75.

²³⁵¹ RG, paras. 1.10, 9.79, and MG Figure 1.3. The Gambia claims that there were 993 villages in Buthidaung, Maungdaw, and Rathedaung Townships at the time (*ibid.*, para. 9.79). The correct figure is in fact given in paragraphs 8.14 and 9.2 above.

2018”.²³⁵² As previously noted,²³⁵³ The Gambia appears simply to assume that all damage caused by fire to villages must necessarily have been caused by the authorities of Myanmar and only to Bengali settlements, and appears to categorise each village that has suffered any form of fire damage as having been subjected to a “clearance operation” even if the evidence does not support the conclusion that most of the fire-damage occurred before the counter-terrorism operations of 2017 had ended on 5 September 2017.²³⁵⁴

13.162 The Counter-Memorial of Myanmar has pointed out²³⁵⁵ the dearth of satellite imagery and graphics in The Gambia’s Memorial to substantiate its claim that fire-setting formed a significant part of the counter-terrorism operations. The Reply of The Gambia concedes that its Memorial only “included several examples”, but now boasts of having “added additional ones in the Reply”.²³⁵⁶ The Gambia has in fact included images from a further four locations in the Reply. The Gambia claims that providing the Court with “further imagery would be redundant”.²³⁵⁷ Such a statement is difficult to understand or reconcile with the burden of proof that The Gambia bears, and its exorbitant claims.

13.163 Even the principal document upon which The Gambia founds its claim of wide-spread fire-setting *during* the conduct of the counter-terrorism operations, Figure 1.3 of the Memorial, provides imagery that demonstrates the contrary. Not only does Figure 1.3 cover the broad period of “31 August 2017 to March 2018”, but even the two inset satellite images of Hpaw Ti Kaung (immediately adjacent to Kyein Chaung and Laung

²³⁵² RG, para. 1.10. The Gambia does not seek to allege that counter-terrorism operations occurred in any locations other than the 43 dealt with in the pleadings of the parties, since it specifically asserts in RG, para. 9.52 that there are “329 villages that Myanmar labelled with green dots (meaning they admit that there were no counter-terrorism operations there)”. The Gambia presents no evidence that there were counter-terrorism operations in those other locations. The Gambia, however, leaps to the conclusion that any fire damage in any of these other locations must have been caused by the Myanmar Defence Services and must have been in respect of Bengali structures. That is not the only inference that can be drawn from the evidence. Another reasonable inference, indeed, the more probable inference, is that if no counter-terrorism operations and clashes with ARSA took place in other locations, any fire damage would have been caused by someone other than the Myanmar Defence Services.

²³⁵³ Paragraph 8.16 above.

²³⁵⁴ RG, para. 9.57. See also RG, paras. 7.48 footnote 687, 9.18, 9.54 and 9.79.

²³⁵⁵ CMM, para. 13.207.

²³⁵⁶ RG, para. 9.81.

²³⁵⁷ RG, para. 9.81.

Don) show that the village remained intact until *at least* 16 September 2017, 11 days after the conclusion of the counter-terrorism operations.

13.164 The allegations concerning the burning of villages are primarily dealt with elsewhere.²³⁵⁸ The evidence relied on by The Gambia does not establish that villages suffered fire damage to the extent alleged, or that the Myanmar Defence Services were responsible for all fire damage, or that all fire damage was deliberate, or that all fire damage occurred *during* the counter-terrorism operations when villages were inhabited, or that fire damage only affected Bengalis and Bengali settlements. Figure 1.3 only indicates when fire-damage was *detected*, not when any such fire-damage took place.

13.165 The Gambia claims that it is “absurd” for Myanmar to suggest that Bengalis burned down structures in Bengali villages in northern Rakhine State, because it is “contradicted by extensive witness evidence presented *supra* at paragraph 7.86”.²³⁵⁹ Yet paragraph 7.86 of The Gambia’s Reply and the underlying evidence refer only to events in Chut Pyin²³⁶⁰ which, itself, is an instructive example of fire-setting of a Bengali village *by Bengalis*.

13.166 ARSA recruits Maw Go Lar Mauk²³⁶¹ and U Kay Phar Yad Aulla²³⁶² describe villagers at Chut Pyin burning the village, before running away. Bengali villager U Baw Shee Ullah likewise noted that “terrorists had torched Chut Pyin village.”²³⁶³

13.167 Reporting by the Myanmar National Human Rights Commission (“MNHRC”) likewise noted evidence from August 2017 that “Bengalis burned their own

²³⁵⁸ See CMM, paras. 13.198-13.208, and this Rejoinder, paragraphs 3.22, 3.41, 8.45, 8.114, 8.164, 9.3, 9.25, 9.95-9.96, 9.175-9.176, 12.108-12.118, and 13.115 above.

²³⁵⁹ RG, para. 9.77.

²³⁶⁰ RG, para. 7.86, citing Amnesty International, “*We Will Destroy Everything*”: *Military responsibility for crimes against humanity in Rakhine State*, 27 June 2018, p. 66, MG, Vol. IV, Annex 112.

²³⁶¹ Sworn Statement of Maw Go Lar Mauk, 24 February 2023, confirming his account given on 2 November 2017 (corrected translation of CMM, Vol. V, Annex 160), p. 1, RM, Vol. III, Annex 106.

²³⁶² Sworn Statement of U Kay Phar Yad Aulla, 24 February 2023, confirming his account given on 2 November 2017 (corrected translation of CMM, Vol. V, Annex 159), p. 1, RM, Vol. III, Annex 105.

²³⁶³ Witness Statement of U Baw Shee Ullah, 2 November 2017, RM, Vol. III, Annex 99.

villages”,²³⁶⁴ and that Bengalis burned down houses, including their own, and that Buddhist Pagodas were burned.²³⁶⁵ The District Administrator of the General Administration Department (Maungdaw District) also notes evidence of burning villages by ARSA.²³⁶⁶ Also of relevance are Myanmar’s arguments at paragraph 9.175 above, which show that ARSA and its supporters were responsible for burning villages, including Bengali settlements.²³⁶⁷ Hindu witnesses, similarly, confirm the burning of villages by ARSA and its supporters.²³⁶⁸

13.168 The Gambia compounds the error in its argument by then falsely claiming that Figure 8.1 of the Counter-Memorial of Myanmar “disproves Myanmar’s claim that “villages where ARSA was not active were not affected”.²³⁶⁹ The Gambia misrepresents Myanmar’s quoted argument by omitting Myanmar’s preceding sentence. Myanmar’s argument is that “the *counter-terrorism operations* were focussed both in time and geography on the very real threat directly presented by ARSA and its supporters. Villages where ARSA was not active were not affected.”²³⁷⁰ Figure 8.1 categorically does not show wide-spread destruction of Bengali villages *during* the counter-terrorism operations.

13.169 Having originally made the wild claim that the “clearance operations” involved “burning alive the members of the Rohingya group in *hundreds* of villages all across northern Rakhine State”,²³⁷¹ The Gambia is now forced to radically revise and attenuate its case because of what the evidence actually shows. The Gambia now

²³⁶⁴ Myanmar National Human Rights Commission, Report of the Additional Field Observation of the Commission Regarding the Terrorist Attacks Occurred in Maungdaw and Buthidaung Townships of Rakhine State, 20 December 2017, Letter No. 3/ 301 11 Report, para. 12, RM, Vol. III, Annex 65.

²³⁶⁵ Myanmar National Human Rights Commission, Field Visit Report by the Commission’s team on the terrorist attack incidents in Maungdaw and Buthidaung Townships in Rakhine State, 2 October 2017, paras 4, 5(d), 22 and 39, RM, Vol. III, Annex 62; ARSA, similarly, burnt Hindu shrines and religious paraphernalia: Witness Statement of Ma Phaw Mi Lar, 1 November 2017, p.1, RM, Vol. III, Annex 97.

²³⁶⁶ Statement of U Ye Htut, District Administrator (Maungdaw), 29 October 2017, p. 1, RM, Vol. III, Annex 96.

²³⁶⁷ See also CMM paras. 3.79-3.81, 8.33-8.34, 8.37-8.38, 8.49-8.51, 8.73, 9.187, 9.197-9.198, and this Rejoinder, paragraphs 8.114 above.

²³⁶⁸ Witness Statement of Ma Pu Jar, 1 November 2017, p. 1, RM, Vol. III, Annex 98; Witness Statement of Ma Phaw Mi Lar, 1 November 2017, pp. 1-2, RM, Vol. III, Annex 97.

²³⁶⁹ RG, para. 9.77.

²³⁷⁰ CMM, para. 13.216.

²³⁷¹ MG, para. 8.1 (emphasis added).

makes the contorted concession that the evidence “does not mean that *dozens* of Rohingya villages were not burned *during* the “clearance operations” (emphasis added).²³⁷² However, The Gambia declines to identify any villages that it now says *were* burned *during* the counter-terrorism operations, and how such fire-damage was caused.

13.170 The Gambia relies upon the generalised opinion of the FFM that “the majority of the destruction occurred in the first three weeks of the ‘clearance operations’, consistent with the timing of the most serious incidents”.²³⁷³ However, the counter-terrorism operations lasted only 12 days, until 5 September 2017. Such satellite imagery as is available first detected fire-damage from 16 September 2017²³⁷⁴ onwards and UNOSAT analysis does not indicate which settlements may have been subject to any fire-damage in the period of 25 August–5 September 2017.

13.171 None of the satellite imagery documented within the FFM reports demonstrates fire-damage to structures in northern Rakhine State prior to 16 September 2017, with the exception of the neighbouring villages of Hla Poe Kaung and Maung Hna Ma²³⁷⁵ in Maungdaw Township, which appear to show the presence of fire on 5 September 2017 itself, the day the counter-terrorism operations ended. The Gambia (and the FFM) do not allege that any violence took place in either of these particular villages during the conduct of the counter-terrorism operations. Moreover, there is no evidence that this particular fire-setting was undertaken by Myanmar Defence Services, but as previously noted, there is evidence that indicates that ARSA was responsible for engaging in such fire-setting across northern Rakhine State around this time.²³⁷⁶

13.172 Finally, The Gambia suggests that Myanmar has “misread[]” the FFM report when stating that the evidence indicates that “less than 6% of fire-affected villages were

²³⁷² RG, para. 9.78.

²³⁷³ RG, para. 9.78 citing 2018 FFM Detailed Findings, para. 960, RG, Vol. II, Annex 1 (additional excerpts to MG Vol. II, Annex 40).

²³⁷⁴ 2018 FFM Detailed Findings, paras. 960 and 971, RG, Vol. II, Annex 1 (additional excerpts to MG Vol. II, Annex 40).

²³⁷⁵ 2018 FFM Detailed Findings, paras. 960 and 971, RG, Vol. II, Annex 1 (additional excerpts to MG, Vol. II, Annex 40). The two images of Hla Poe Kaung and Maung Hna Ma in the 2018 FFM Detailed Findings are the only satellite images that in fact show the presence of fire during the period in which counter-terrorism operations took place, or at all.

²³⁷⁶ See paragraphs 13.165-13.167 above.

exclusively ‘Rohingya’, leaving 94% as either ‘mixed’ or non-‘Rohingya’ settlements affected by fire”.²³⁷⁷ There has been no “misreading” of the FFM report by Myanmar. It is beyond doubt that the FFM claims to have “*analysed*” the conduct of the operations in “hundreds of villages across Maungdaw, Buthidaung and Rathedaung Townships”,²³⁷⁸ a contention which is also expressly adopted by The Gambia itself.²³⁷⁹ Against this background, the FFM states, “in at least 22 locations *analysed*, only specific Rohingya settlements were affected, while other non-Rohingya settlements within the same village tracts remained untouched”.²³⁸⁰ Myanmar’s assessment of this evidence is undisturbed by The Gambia’s Reply.

4. The expert reports of Professor Newton

- 13.173 The Memorial of The Gambia annexed an expert report of Professor Michael A. Newton, dated October 2020.²³⁸¹ No evidential weight can be given to that expert report, for the reasons given in the Counter-Memorial of Myanmar.²³⁸² The Reply of The Gambia now annexes a second expert report of Professor Newton.²³⁸³ This second report provides little, if any, meaningful assistance to this Court in the determination of the issues.
- 13.174 This second expert report, like the first, simply assumes the correctness of statements of fact found in the FFM reports,²³⁸⁴ and in various reports of NGOs and other bodies relied on by The Gambia,²³⁸⁵ as well as in the witness statements and witness

²³⁷⁷ RG, para. 9.80, citing CMM, para. 13.204.

²³⁷⁸ 2018 FFM Detailed Findings, para. 751, MG, Vol. II, Annex 40.

²³⁷⁹ MG, paras. 1.29 and 12.87, specifically and exclusively citing 2018 FFM Detailed Findings, paras. 751, 761, 801, 806, 820, 846, 858, 866, 905, 959, 960, 1077 and 1085, MG, Vol. II, Annex 40.

²³⁸⁰ 2018 FFM Detailed Findings, para. 972, CMM, Vol. VI, Annex 239 (emphasis added).

²³⁸¹ Expert report of Professor Michael A. Newton, October 2020, MG, Vol. XI, Annex 359.

²³⁸² CMM, paras. 13.218-13.222.

²³⁸³ Second expert report of Michael A. Newton, May 2024, RG, Vol. IV, Annex 67.

²³⁸⁴ *Ibid.*, footnotes 10, 11, 12, 19, 21, 22, 23, 26, 28, 29, 30, 32, 34, 35, 36, 37, 40, 42, 45, 47, 48, 49, 50, 51, 53, 56, 57, 58, and 61 and accompanying text, referring to and assuming the correctness of facts stated in the FFM reports.

²³⁸⁵ *Ibid.*, footnotes 18, 31, 38, 41, 46, 52, 55, 59, and 60 and accompanying text, referring to and assuming the correctness of facts stated in these documents.

summaries provided by LAW.²³⁸⁶ This second report also assumes the correctness of facts stated in the Memorial of The Gambia.²³⁸⁷ The expert report itself purports to undertake no analysis of whether or not what is stated in these documents is factually correct. Thus, unless The Gambia first proves the facts that it alleges in this case, which it does not for the reasons given in the pleadings of Myanmar, this expert report is of no value. It is based on assumed facts that have not been proved.

- 13.175 The Counter-Memorial of Myanmar furthermore points out that the first report of Professor Newton demonstrates no awareness at all of the role of ARSA in the events.²³⁸⁸ Professor Newton's second report states that he has since "studiously reviewed Myanmar's Counter-Memorial", and that this has "expanded my knowledge of the relevant events".²³⁸⁹ As a result, his opinions have now evolved. He now acknowledges that, "To be sure, [an ARSA] insurgency existed, and Myanmar responded to it",²³⁹⁰ and that the Myanmar Defence Services "might also have been motivated by a desire to eliminate ARSA insurgents".²³⁹¹
- 13.176 This statement of course supports Myanmar's case. The counter-terrorism operations were a response to armed attacks by ARSA and its supporters. This statement also demonstrates how Professor Newton's reports are based on limited information. He accepts that his first report was written without knowledge of Myanmar's Counter-Memorial and its annexes, and that his views have since evolved. This indicates that the views expressed in his second opinion might also change if he became aware of the contents of the Reply of The Gambia and the Rejoinder of Myanmar.
- 13.177 Nevertheless, even with knowledge of what is contained in the Counter-Memorial of Myanmar, the second expert report of Professor Newton simply continues to assume that The Gambia's version of the facts is correct. The second expert report gives no explanation at all of the reasons for making this assumption. The opinions expressed

²³⁸⁶ *Ibid.*, footnotes 14, 15, 16, 17, 43, 44, and 54 and accompanying text, referring to and assuming the correctness of facts stated in these documents.

²³⁸⁷ *Ibid.*, footnotes 24 and 35 accompanying text.

²³⁸⁸ CMM, paras. 13.219-13.220.

²³⁸⁹ Second expert report of Michael A. Newton, May 2024, para. 3, RG, Vol. IV, Annex 67.

²³⁹⁰ *Ibid.*, para. 10.

²³⁹¹ *Ibid.*, para. 31.

by Professor Newton are based on the premise that during the counter-terrorism operations there was “burning of homes with entire families locked inside, ... mass executions of men and boys, ... wanton killing of children and infants, and ... pervasive sexual violence against women”.²³⁹² The fact that Professor Newton unquestioningly assumes this to be correct, without providing any reasons, despite purporting to have “studiously reviewed Myanmar’s Counter-Memorial and annexed documents”,²³⁹³ inevitably casts doubt on his objectivity, independence and impartiality.

- 13.178 Furthermore, the effect of Professor Newton’s report is to suggest that an operation will not be a genuine counter-terrorism/counter-insurgency operation (“COIN”) unless it complies with “NATO COIN doctrine”.²³⁹⁴ Although he claims that “These principles are not solely Western norms”,²³⁹⁵ that is hardly as basis for assuming that anything that does not comply with NATO doctrine cannot be a genuine counter-terrorism/counter-insurgency operation. It appears that Professor Newton has expertise in counter-insurgency operations as conducted by Western countries.²³⁹⁶ There is no suggestion that Professor Newton has sought to compare the counter-terrorism operations in northern Rakhine State in 2016 and 2017 with other counter-terrorism operations conducted elsewhere in Myanmar by the Myanmar Defence Services, or with other counter-terrorism operations conducted by other non-Western countries. This also casts doubt on his objectivity, and indicates his lack of expertise in counter-insurgency operations in Myanmar and other non-Western countries.

5. Conclusion

- 13.179 For the reasons above, The Gambia has not proved to the very high standard of proof applicable in this case either:

²³⁹² *Ibid.*, para. 10.

²³⁹³ *Ibid.*, para. 3.

²³⁹⁴ *Ibid.*, paras. 6-8.

²³⁹⁵ *Ibid.*, para. 6.

²³⁹⁶ *Ibid.*, para. 2.

- (1) that Bengali Muslims in Rakhine State are a protected group for purposes of Article II of the Convention;
- (2) that acts were committed that constituted the *actus reus* of genocide; or
- (3) that any such acts were committed with the requisite *mens rea*, that is to say, with the specific intent physically or biologically to destroy the claimed group as such.

CHAPTER 14

STATE RESPONSIBILITY IS NOT ESTABLISHED

A. Introduction

- 14.1 For the reasons given in the Counter-Memorial of Myanmar and in the preceding chapters of this Rejoinder, The Gambia has failed to prove that genocide within the meaning of the Genocide Convention was committed during the counter-terrorism operations of 2016 and 2017 or at any other time.²³⁹⁷
- 14.2 On this basis that genocide was not committed, Section B of Chapter 14 of the Counter-Memorial of Myanmar demonstrates as follows. The Gambia has not established that Myanmar is responsible for any breach of the Genocide Convention. If no acts of genocide within the meaning of the Convention have been proved to have been committed, then Myanmar cannot be internationally responsible for the commission of any such acts (Article III (*a*) of the Convention). The Gambia similarly fails to prove that Myanmar is responsible for any acts falling within Article III (*b*), (*c*), (*d*) or (*e*) of the Convention. Nor does The Gambia establish any breach of the duties to prevent genocide, to punish genocide, or to enact the necessary legislation to give effect to the Convention. **Section B of this Chapter** of this Rejoinder demonstrates that nothing in the Reply of The Gambia affects these conclusions.
- 14.3 Although The Gambia has failed to prove that genocide within the meaning of the Convention was committed, solely for the sake of completeness, section C of Chapter 14 of the Counter-Memorial of Myanmar demonstrates as follows. Even if The Gambia could establish, and the Court were to find, that acts of genocide have been committed for which Myanmar bears international responsibility (*quod non*), no further finding of international responsibility should be made by the Court. **Section C of this Chapter** of this Rejoinder demonstrates that nothing in the Reply of The Gambia affects this conclusion. The Reply of The Gambia addresses one further hypothetically possible situation, namely the situation where the Court finds that genocide has been committed, but that the acts of genocide are not attributable to

²³⁹⁷ See especially CMM, Chapter 13, and this Rejoinder, Chapter 13 above.

Myanmar. In that event, for the reasons also given in **Section C of this Chapter** of this Rejoinder, The Gambia has not established that Myanmar bears any responsibility for such acts.

- 14.4 Section D of Chapter 14 of the Counter-Memorial of Myanmar then demonstrates that no breach of the Provisional Measures Order has been established by The Gambia. **Section D of this Chapter** of this Rejoinder demonstrates that nothing in the Reply of The Gambia affects this conclusion.

B. No breaches of the Genocide Convention are established

1. Article III (a) of the Convention (genocide)

- 14.5 Myanmar cannot be internationally responsible for acts falling within Article III (a) of the Convention (“genocide”) if no acts of genocide have in fact been proved to have been committed. The Gambia does not, and cannot, dispute this. Given that The Gambia has not discharged its burden of proving its allegation that genocide has been committed, it has not established any breach of Article III (a) of the Convention for which Myanmar could be internationally responsible.

2. Article III (b) of the Convention (conspiracy)

- 14.6 The Counter-Memorial of Myanmar demonstrates that a State cannot be responsible for acts falling within Article III (b) of the Convention (“conspiracy to commit genocide”) unless genocide has in fact been committed.²³⁹⁸ The Reply of The Gambia does not seek to dispute this.²³⁹⁹
- 14.7 Given that The Gambia has not discharged its burden of proving its allegation that genocide has been committed, no question arises as to any breach of Article III (b) of the Convention for which Myanmar could be internationally responsible.

²³⁹⁸ CMM, paras. 14.6-14.8.

²³⁹⁹ See RG, para. 9.92, which states merely that The Gambia considers it unnecessary to address this question, given that The Gambia claims that genocide has been committed.

14.8 In any event, in order for there to be a conspiracy to commit genocide for purposes of Article III (b) of the Convention, the conspirators must have a genocidal intent.²⁴⁰⁰ The Reply of The Gambia accepts this.²⁴⁰¹

14.9 The Gambia has not proved that any person or entity whose acts are attributable to Myanmar acted with a genocidal intent.²⁴⁰² For this additional reason also, no question arises as to any breach of Article III (b) of the Convention for which Myanmar could be internationally responsible.

3. Article III (c) of the Convention (direct and public incitement)

14.10 The Counter-Memorial of Myanmar demonstrates that a State cannot be responsible for acts falling within Article III (c) of the Convention (“direct and public incitement to commit genocide”) unless genocide has in fact been committed.²⁴⁰³

14.11 The Gambia disputes this. However, the arguments of The Gambia are without merit.

14.12 First, The Gambia argues that Article III (c) is not mentioned in a paragraph of the judgment in the *Bosnia Genocide* case, which refers to other provisions of the Convention that will not give rise to State responsibility unless genocide has actually been committed.²⁴⁰⁴ However, the mere absence of an express reference to Article III (c) in this paragraph of this judgment does not establish that a State can be responsible for a breach of Article III (c) even if genocide has not been committed. In the relevant paragraph of the judgment in the *Bosnia Genocide* case, the Court did not state that it was giving an exhaustive list of those provisions of the Convention, breaches of which will not give rise to State responsibility unless genocide has actually been committed.²⁴⁰⁵ The Reply of The Gambia does not engage with paragraph 14.14 of the Counter-Memorial of Myanmar, which shows that in the *Bosnia Genocide* case,

²⁴⁰⁰ CMM, para. 14.10.

²⁴⁰¹ RG, para. 9.91.

²⁴⁰² See CMM, paras. 13.64-13.225, and this Rejoinder, paragraphs 13.83-13.180 above.

²⁴⁰³ CMM, paras. 14.13-14.14.

²⁴⁰⁴ RG, paras. 9.94-9.95, citing *Bosnia Genocide* case, p. 119, para. 180.

²⁴⁰⁵ *Bosnia Genocide* case, p. 119, para. 180.

the Court in fact proceeded on the basis that State responsibility for a breach of Article III (c) will only exist if genocide has been committed.²⁴⁰⁶

- 14.13 Secondly, The Gambia argues that “if responsibility for direct and public incitement to commit genocide could not be found in the absence of the commission of genocide, the prohibition of direct and public incitement under the Convention would be meaningless for lack of any preventive character”.²⁴⁰⁷ However, The Gambia itself expressly accepts that a State will not be responsible for a breach of the duty under Article I of the Convention to *prevent* genocide unless it is first established that genocide has in fact been committed.²⁴⁰⁸ If State responsibility for a failure to *prevent* genocide cannot exist in the absence of the actual commission of genocide, there is no logical reason why State responsibility for a breach of any other obligation under the Convention having a preventive character should be any different.
- 14.14 Thirdly, The Gambia argues that the Court has in one case indicated a provisional measure to the effect that the Respondent State should take “all measures within its power to prevent and punish the direct and public incitement to commit genocide”, even though at the time no legal determination had been made that genocide had occurred.²⁴⁰⁹ The Gambia apparently argues that this demonstrates that State responsibility for a breach of Article III (c) can exist even if no genocide has in fact been committed. This argument is fallacious. Provisional measures, by definition, are indicated in circumstances where there has not yet been any finding on the merits, and provisional measures are without prejudice to the merits of the case. The indication of

²⁴⁰⁶ In the *Bosnia Genocide* case, the only location in which genocide was found to have been committed was Srebrenica. At p. 216, para. 417, the Court said that it had to determine whether there had been conspiracy to commit genocide (Article III (b)), or direct and public incitement to commit genocide (Article III (c)), “if one considers, as is appropriate, only the events in Srebrenica”. This makes clear that Article III (c), like Article III (b), only gives rise to State responsibility if genocide has actually been committed. The Court reached the conclusion (*ibid.*) that “none of the information brought to the attention of the Court is sufficient to establish that organs of the Respondent, or persons acting on its instructions or under its effective control, directly and publicly incited the commission of the genocide in Srebrenica” (emphasis added). Although the Court went on to add that “nor is it proven, for that matter, that such organs or persons incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina”, this was an aside, that was stated only after the conclusion in relation to Article III (c) had already been reached based solely on the evidence in relation to Srebrenica.

²⁴⁰⁷ RG, para. 9.96 first two sentences.

²⁴⁰⁸ See MG, para. 4.68 first two sentences; see also CMM, paras. 14.27-14.29.

²⁴⁰⁹ See RG, para. 9.96 third sentence, referring to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, Order of 26 January 2024, para. 86(3).

a provisional measure is not a finding of State responsibility. The indication of a provisional measure in these terms is not a finding of law that a State can be responsible for a breach of Article III (c) even if at the merits stage no finding is made that genocide has in fact been committed.

- 14.15 Therefore, given that The Gambia has not discharged its burden of proving its allegation that genocide has been committed, no question arises as to any breach of Article III (c) of the Convention for which Myanmar could be internationally responsible.
- 14.16 The Counter-Memorial of Myanmar also demonstrates that, in order for there to be direct and public incitement to commit genocide under Article III (c) of the Convention, the inciters must act with a genocidal intent.²⁴¹⁰ The Reply of The Gambia accepts this.²⁴¹¹
- 14.17 The Gambia has not proved that any person or entity whose acts are attributable to Myanmar acted with a genocidal intent (or indeed, that any person whose acts are not attributable to Myanmar did so).²⁴¹² For this additional reason also, no question arises as to any breach of Article III (c) of the Convention for which Myanmar could be internationally responsible.
- 14.18 The Gambia apparently seeks to argue that direct and public incitement is itself proof of a genocidal intent.²⁴¹³ This is another example of the multiple instances of circular reasoning in the pleadings of The Gambia.²⁴¹⁴ If the existence of a genocidal intent is one of the elements that must be proved in order to establish direct and public incitement to commit genocide, this obviously means that it is necessary to prove the existence of a genocidal intent *before* there can be any finding that there has been direct and public incitement to commit genocide. The Gambia appears to suggest that a finding can be made that there has been direct and public incitement to commit genocide *without* first making any finding of genocidal intent, and that this finding

²⁴¹⁰ CMM, para. 14.17.

²⁴¹¹ RG, para. 9.96 second last sentence.

²⁴¹² See CMM, paras. 13.64-13.255, and this Rejoinder, paragraphs 13.83-13.180 above.

²⁴¹³ RG, para. 9.96 last two sentences.

²⁴¹⁴ See paragraph 1.9(5) above.

that there has been direct and public incitement to commit genocide will then of itself be proof of the genocidal intent. The effect of this argument would be that the element of genocidal intent would be “self-proving” or would not need to be proved at all. This reasoning is obviously fallacious and must be rejected.

14.19 Furthermore, and in any event, even if there could be State responsibility for direct and public incitement to commit genocide in the absence of the actual commission of genocide (*quod non*), and in the absence of a genocidal intent on the part of the inciters (*quod non*), The Gambia does not establish that there has in fact been any incitement to commit genocide: see paragraphs 14.15 to 14.20 of the Counter-Memorial of Myanmar, to which the Reply of The Gambia provides no response. In order to establish that direct and public incitement to commit genocide has occurred, “precise and incontrovertible evidence” is required.²⁴¹⁵ The Gambia does not establish that any statements, made by any persons or entities whose acts are attributable to Myanmar, called for the *physical destruction* of the Bengali population of northern Rakhine State, as such, or made any statements that would have been reasonably understood by those who heard them as calling for this.

14.20 The Gambia additionally contends that Myanmar is responsible for failing to prevent direct and public incitement by private actors.²⁴¹⁶ This argument must be rejected. First, The Gambia has failed to establish by evidence that private actors have engaged in direct and public incitement to *commit genocide*: The Gambia does not establish that any statements made by private actors called for the *physical destruction* of the Bengali population of northern Rakhine State, as such, or made any statements that would have been reasonably understood by those who heard them as calling for this. The Gambia thus also fails to establish that private actors acted with genocidal intent. Secondly, the obligation to prevent genocide in Article I of the Convention is only an obligation to prevent *genocide* (Article III (a) of the Convention), and is not an

²⁴¹⁵ *Bosnia Genocide case*, p. 216, para. 417 last sentence.

²⁴¹⁶ RG, para. 9.97.

obligation to prevent acts of the kind referred to in Article III (b) to (e) of the Convention.²⁴¹⁷

4. Article III (d) of the Convention (attempt)

14.21 The Gambia asserts that even if it has not proved the commission of acts of genocide, it has nonetheless proved an “attempt to commit genocide” within the meaning of Article III (d).²⁴¹⁸ However, The Gambia merely states this contention, without presenting any justification or explanation for it. In fact, if the material presented by The Gambia is insufficient to prove the commission of genocide, there is no obvious reason why it should be sufficient to prove an attempt to commit genocide. This argument should therefore be rejected.²⁴¹⁹

14.22 In any event, apart from anything else, the Counter-Memorial of Myanmar demonstrates that, in order for there to be an attempt to commit genocide under Article III (d) of the Convention, the person(s) committing the relevant act(s) must do so with a genocidal intent.²⁴²⁰ The Reply of The Gambia accepts this.²⁴²¹

14.23 The Gambia has not proved that any person or entity whose acts are attributable to Myanmar acted with a genocidal intent (or indeed, that any person whose acts are not attributable to Myanmar did so).²⁴²² For this additional reason also, no question arises as to any breach of Article III (d) of the Convention for which Myanmar could be internationally responsible.

5. Article III (e) of the Convention (complicity)

14.24 The Gambia accepts that for a State to be responsible for acts falling within Article III (e) of the Convention (“complicity in genocide”), it is necessary both

²⁴¹⁷ Tams/Berster/Schiffbauer, *Genocide Convention* (2nd edn., 2024), Art. I, margin no. 42, RM, Vol. II, Annex 49: “the duty to prevent imposed by Article I is a duty to prevent acts of genocide in the sense of Articles II, III lit. (a); not less, not more”.

²⁴¹⁸ RG, para. 9.98.

²⁴¹⁹ See CMM, paras. 14.21-14.24.

²⁴²⁰ CMM, para. 14.22.

²⁴²¹ RG, para. 9.98.

²⁴²² See CMM, paras. 13.64-13.255, and this Rejoinder, paragraphs 13.83-13.180 above.

(1) that genocide has in fact been committed;²⁴²³ and (2) that those who provide aid and assistance to the perpetrators have a genocidal intent.²⁴²⁴

- 14.25 Given that The Gambia has not established that genocide has been committed, nor that any person or entity whose acts are attributable to Myanmar acted with a genocidal intent,²⁴²⁵ no question arises as to any breach of Article III (*e*) of the Convention for which Myanmar could be internationally responsible.

6. The duties to prevent and punish

- 14.26 There can be no State responsibility for breach of either the duty to prevent, or the duty to punish, unless it is first established that genocide within the meaning of the Convention has in fact been committed.²⁴²⁶ The Gambia expressly accepts this.²⁴²⁷
- 14.27 Given that The Gambia has not established that genocide has been committed, no question arises as to any breach of the obligations under Article I of the Convention to prevent and punish genocide for which Myanmar could be internationally responsible.

7. The duty to enact legislation

- 14.28 The Reply of The Gambia contends that Article V of the Convention requires each Contracting State to establish in its municipal law a specific criminal offence of “genocide”, and that a State cannot discharge its obligation under Article V through reliance on its ordinary domestic criminal laws, such as those penalising murder, assault, and rape.²⁴²⁸ This argument of The Gambia is manifestly wrong, for the reasons already given in the Counter-Memorial of Myanmar,²⁴²⁹ with which The Gambia simply fails to engage. It is hardly “misguided” for Myanmar “to contend ...

²⁴²³ MG, para. 4.60; CMM, paras. 14.25-14.26.

²⁴²⁴ RG, para. 9.99.

²⁴²⁵ See CMM, paras. 13.64-13.255, and this Rejoinder, paragraphs 13.83-13.180 above.

²⁴²⁶ CMM, paras. 4.85 and 4.90.

²⁴²⁷ MG, paras. 4.68 (“A condition precedent for a breach of the obligation [to prevent] is that genocide must in fact have occurred”) and 4.70 (“The obligation to punish arises only after genocide has been committed”).

²⁴²⁸ RG, paras. 9.102-9.104.

²⁴²⁹ CMM, paras. 4.91-4.117 and 14.30-14.36.

that a State could meet its obligation under Article V by relying on the general provisions of its existing domestic criminal law”,²⁴³⁰ when some 57 Contracting Parties to the Convention have done precisely this.²⁴³¹ Apart from anything else, the fact that such a large number of Contracting Parties adopt this approach, and the absence of protests by other Contracting Parties, must be regarded as “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.²⁴³²

- 14.29 For a significant period after it became a party to the Genocide Convention, Myanmar, like these other States Parties to the Convention,²⁴³³ relied on its ordinary domestic criminal laws to give effect to its obligation under Article V, and was entitled to do so. In 2021, Myanmar then amended its Penal Code, to add new sections 311A and 311B, which contain a specific offence of genocide.²⁴³⁴ Various other States also initially relied on their ordinary domestic criminal laws to give effect to their obligation under Article V, and then ultimately enacted legislation to establish a specific crime of genocide only decades after becoming a party to the Convention.²⁴³⁵

²⁴³⁰ RG, para. 9.103.

²⁴³¹ See T. Hoffmann, “The Crime of Genocide in Its (Nearly) Infinite Domestic Variety”, in M. Odello and P. Łubiński (eds.), *The Concept of Genocide in International Criminal Law—Developments after Lemkin* (2020), pp. 67-97, at pp. 70-74, CMM, Vol. II, Annex 40, cited in CMM, footnote 601.

²⁴³² Vienna Convention on the Law of Treaties, Article 31, paragraph 3 (b), CMM, Vol. II, Annex 4. This provision was considered to be applicable on the basis that it reflects customary international law in *Kasikili/Sedudu Island (Botswana/Namibia)*, *Judgment*, *I.C.J. Reports 1999*, pp. 1059, 1075-1076, paras. 18, 47-51.

²⁴³³ CMM, para. 4.104.

²⁴³⁴ See CMM, para. 14.33; Fourth Provisional Measures Report, paras. 54-55 and Annex 3.

²⁴³⁵ See CMM, paras. 4.106-4.109. Examples include, in addition to **Canada** (see CMM, para. 4.107), the following. **Australia** ratified the Genocide Convention on 8 July 1949, but did not enact legislation creating a specific domestic criminal offence of genocide until 2002, when Division 268 was added to its Criminal Code Act 1995 by the International Criminal Court (Consequential Amendments) Act 2002. See RM, Vol. V, Annex 173. **France** ratified the Genocide Convention on 14 October 1950, but did not enact legislation creating a specific domestic criminal offence of genocide until 1 March 1994, when Article 211-1 was added to its Penal Code. See RM, Vol. V, Annex 174. The **United Kingdom** acceded to the Genocide Convention on 30 January 1970, but legislation creating a specific domestic criminal offence of genocide was not enacted until 2001 with the adoption of the International Criminal Court Act 2001 (in relation to England and Wales and Northern Ireland) and the International Criminal Court (Scotland) Act 2001 (in relation to Scotland). See RM, Vol. V, Annexes 179 and 180. For dates on which States ratified/acceded to the Genocide Convention, see United Nations Treaty Collection, Depositary, Status of Treaties, Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, status as at 2 December 2024, RM, Vol. IV, Annex 111.

- 14.30 The Gambia observes that section 311A (d) of the Penal Code of Myanmar, which implements Article II (d) of the Convention, refers to “measures, not in accordance with any existing laws, intended to prevent births within the group”. The Gambia argues that the addition of the words “not in accordance with any existing laws” gives this section of the Penal Code a narrower operation than Article II (d) of the Convention.²⁴³⁶ However, as noted in the Counter-Memorial of Myanmar, at least 19 other Contracting Parties have in their domestic legislation definitions of genocide that are more limited than the definition in the Convention.²⁴³⁷ Again, the practice of these 19 States and the absence of protests by other Contracting Parties must be regarded as “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.²⁴³⁸ Thus, even where a Contracting Party does create a specific crime of genocide in its domestic law, the Convention does not require the definition of that crime to be identical to the terms of the Convention.²⁴³⁹
- 14.31 The Gambia claims²⁴⁴⁰ that the words “not in accordance with any existing laws” are intended to permit the alleged measures referred to in paragraphs 6.36 to 6.64 of the Memorial of The Gambia, which The Gambia describes as “restrictions on procreation”.²⁴⁴¹ However, for the reasons given in the Counter-Memorial of Myanmar and this Rejoinder,²⁴⁴² such measures as have been adopted by Myanmar are not contrary to the Genocide Convention.
- 14.32 The Gambia also argues that the 2021 amendment to the Penal Code of Myanmar fails fully to implement the Genocide Convention into domestic law, since members of the Myanmar Defence Services are not subject to the Penal Code, but are instead subject

²⁴³⁶ RG, para. 9.105.

²⁴³⁷ Bolivia, Bulgaria, China (for Macau), Costa Rica, Czech Republic, Ecuador, El Salvador, Georgia, Guatemala, Guinea-Bissau, Italy, Latvia, Mexico, Mozambique, Oman, Paraguay, Peru, Poland, United States of America: see CMM, footnotes 602 and 603 and accompanying text.

²⁴³⁸ Vienna Convention on the Law of Treaties, Article 31, paragraph 3 (b), CMM, Vol. II, Annex 4. This provision was considered to be applicable on the basis that it reflects customary international law in *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, pp. 1059, 1075-1076, paras. 18, 47-51.

²⁴³⁹ See generally CMM, paras. 4.91-4.117.

²⁴⁴⁰ RG, para. 9.105.

²⁴⁴¹ MG, paras. 6.36-6.89; RG, paras. 5.34-5.52.

²⁴⁴² See also CMM, paras. 10.109-10.175; and this Rejoinder, paragraphs 10.45-10.84 above.

to the Defence Services Act 1959.²⁴⁴³ In fact, the crime of genocide in Section 311A of the Penal Code *does* apply to members of the Myanmar Defence Services, by virtue of sections 3 (e), 71, 72 and 128-129 of the Defence Services Act, 1959.²⁴⁴⁴ A person convicted by a court martial of genocide is subject to the punishments prescribed in Section 311A of the Penal Code (death (in the case of genocide under Section 311A (a)) or imprisonment for life (in the case of genocide under Section 311A (b), (c), (d) or (e)).²⁴⁴⁵

- 14.33 The Gambia furthermore argues that the 2021 amendment to the Penal Code of Myanmar fails fully to implement the Genocide Convention into domestic law, since the Commander-in-Chief of the Defence Services can issue pardons to those convicted of crimes under the new provisions dealing with genocide.²⁴⁴⁶ In this respect, Myanmar relies on what is stated in paragraphs 12.51 to 12.58 of its Counter-Memorial, with which the Reply of The Gambia does not engage. Myanmar is not the only country where the head of State or Commander in Chief has a power to issue pardons, which theoretically might enable the head of State or Commander in Chief to pardon a person who has been convicted of genocide. For instance, the constitutional power of the President of the United States of America to grant pardons²⁴⁴⁷ presumably would empower the grant of a pardon to a person convicted of genocide under the municipal law of the United States of America.²⁴⁴⁸ Similarly, the constitutional power of the President of France to grant pardons²⁴⁴⁹ presumably would empower the grant of a pardon to a person convicted of genocide under Article 211-1 of the French *Code pénal*.²⁴⁵⁰ However, as is presumably also the case in other countries, in Myanmar, the power to grant pardons is in practice exercised in accordance with established criteria.²⁴⁵¹ Generally, absolute pardons are not granted

²⁴⁴³ RG, para. 9.105.

²⁴⁴⁴ Myanmar, Defence Services Act, 1959, Sections 3 (e), 71, 72 and 128-129, RM, Vol. II, Annex 55.

²⁴⁴⁵ *Ibid.*, Sections 73 and 74.

²⁴⁴⁶ RG, para. 9.106.

²⁴⁴⁷ See CMM, para. 12.56 footnote 2193.

²⁴⁴⁸ 18 U.S. Code § 1091 (genocide), RM, Vol. V, Annex 181.

²⁴⁴⁹ See CMM, para. 12.56 footnote 2193.

²⁴⁵⁰ CMM, Vol. VII, Annex 322.

²⁴⁵¹ See Myanmar's Code of Criminal Procedure, Section 401, RM, Vol. II, Annex 54, and Defence Services Act, 1959 Section 182, RM, Vol. II, Annex 55.

for severe criminal cases such as murder, and there have been no cases of remission of sentences for major criminal cases. Furthermore, proceedings of a court-martial are conducted transparently and any punishment imposed to those convicted can be made known to the public.

- 14.34 The Gambia has therefore not established any violation by Myanmar of the duty to enact legislation in Article V of the Convention.

C. Hypothetical responsibility if genocide had been committed

- 14.35 The Gambia's arguments in relation to the international responsibility of Myanmar for breaches of the Genocide Convention fall to be rejected for the reasons given in Section B of Chapter 14 of the Counter-Memorial of Myanmar and Section B above of this Chapter. Nevertheless, for completeness, Section C of Chapter 14 of the Counter-Memorial considers what the position would have been if The Gambia had established that genocide was committed. For the reasons there given, even if The Gambia could establish, and the Court were to find, that acts of genocide have been committed for which Myanmar bears international responsibility (*quod non*), no further finding of international responsibility should be made by the Court.

- 14.36 Nothing in the Reply of The Gambia affects this conclusion.

- 14.37 The Gambia accepts that if the Court finds that a Contracting Party bears international responsibility for the commission of acts of genocide (Article III (*a*) of the Genocide Convention), the Court will make no determination of any further responsibility under Article III (*b*), (*c*), (*d*) or (*e*) of the Convention.²⁴⁵² The Gambia also does not appear to dispute that where a Contracting Party is found to be responsible for the commission of acts of genocide, it cannot additionally be found to be responsible for failing to prevent those same acts.²⁴⁵³

- 14.38 Thus, the only forms of State responsibility that could exist in addition to responsibility for the commission of genocide (Article III (*a*)) would be responsibility for breach of the duty to punish and responsibility for failure to enact legislation. In

²⁴⁵² RG, para. 9.85.

²⁴⁵³ See CMM, para. 4.41.

relation to the alleged breach of the duty to punish, Myanmar relies on Chapter 13 of its Counter-Memorial and Chapter 13 above of this Rejoinder. In relation to the alleged breach of the duty to enact legislation, Myanmar relies on paragraphs 4.91 to 4.117 and 14.33 to 14.36 of its Counter-Memorial and paragraphs 4.107 to 4.109 and 14.28 to 14.34 above of this Rejoinder.

- 14.39 The Reply of The Gambia addresses one further hypothetically possible situation, namely the situation where the Court finds that genocide has been committed, but that the acts of genocide are not attributable to Myanmar.²⁴⁵⁴
- 14.40 In such a situation, Myanmar obviously could not be responsible for the commission of genocide (Article III (a) of the Convention).
- 14.41 In the same way, if conduct falling within Article III (b), (c), (d) or (e) of the Convention has occurred but is not attributable to Myanmar, then Myanmar obviously cannot be responsible for that conduct. Nor can Myanmar be responsible for failing to prevent that conduct, since, as has been noted above, the duty to prevent genocide in Article I of the Convention does not impose a duty to prevent acts falling within Article III (b), (c), (d) or (e) of the Convention.²⁴⁵⁵ In any event, the duty to prevent genocide is a duty of conduct not a duty of result, such that the mere fact that genocide has been committed does not mean that there has been a breach of the duty to prevent genocide. The Gambia does not establish that there has been any failure by Myanmar to employ “due diligence” of the kind described by the Court in the *Bosnia Genocide* case.²⁴⁵⁶
- 14.42 Myanmar could therefore only be internationally responsible for acts under Article III (b), (c), (d) or (e) of the Convention if (1) acts of genocide have occurred but the *commission* of the acts themselves (Article III (a)) is not attributable to Myanmar, and (2) persons or entities for whose acts Myanmar is internationally responsible have engaged in conduct within the scope of Article III (b), (c), (d) or (e) in relation to those acts of genocide. This was the situation that arose in the *Bosnia Genocide* case. The Court found in that case that the Respondent State was not responsible for the

²⁴⁵⁴ RG, paras. 9.93, 9.99 and 9.100.

²⁴⁵⁵ See above, paragraph 14.20 last sentence.

²⁴⁵⁶ *Bosnia Genocide* case, p. 221, para 430.

commission of the acts of genocide at Srebrenica,²⁴⁵⁷ and therefore went on to consider whether the Respondent State was responsible for conduct within the scope of Article III (b), (c), (d) or (e) of the Convention, or for failure to prevent or punish the acts of genocide.²⁴⁵⁸ The Court ultimately found that the Respondent State was not responsible for any conduct within the scope of Article III (b), (c), (d) or (e) of the Convention, but that it was responsible for a failure to prevent the acts of genocide,²⁴⁵⁹ and for a failure to punish (by failing to transfer an indicted person to the ICTY).²⁴⁶⁰

- 14.43 In the present case, The Gambia contends that if acts of genocide have been committed but are not attributable to Myanmar, then Myanmar’s alleged “long-term discrimination against the Rohingya”, alleged “concerted hate-speech”, and the alleged “highly coordinated character of the ‘clearance operations’ by which the Tatmadaw armed civilians and encouraged them to destroy the Rohingya group”, amounted to conspiracy to commit genocide by “Myanmar’s highest State organs” (Article III (b)).²⁴⁶¹ This contention must be rejected.
- 14.44 First, The Gambia merely states this contention, without presenting any justification or explanation for it.
- 14.45 Secondly, this contention is inconsistent with the Court’s finding in the *Bosnia Genocide* case. The Court held in that case that a State cannot be responsible for conspiracy to commit genocide under Article III (b) of the Convention in respect of acts of genocide perpetrated by persons or groups who did not have the character of organs of that State, unless the perpetrators acted *on the instructions* or *under the effective control* of that State.²⁴⁶² The Gambia does not explain how the alleged “long-

²⁴⁵⁷ *Ibid.*, p. 215, para 415.

²⁴⁵⁸ *Ibid.*, pp. 215-219, paras. 416-424.

²⁴⁵⁹ *Ibid.*, pp. 220-226, paras. 428-438.

²⁴⁶⁰ *Ibid.*, pp. 226-229, paras. 439-450.

²⁴⁶¹ See RG, para. 9.93.

²⁴⁶² *Bosnia Genocide* case, p. 216, para. 417: “As regards paragraph (b) [of Article III of the Genocide Convention], what was said above regarding the attribution to the Respondent of acts of genocide, namely that the massacres were perpetrated by persons and groups of persons (the VRS in particular) who did not have the character of organs of the Respondent, and did not act on the instructions or under the effective control of the Respondent, is sufficient to exclude the latter’s responsibility in this regard.” See also Tams/Berster/Schiffbauer, *Genocide Convention* (2nd edn., 2024), Art. I, margin no. 79, RM, Vol. II, Annex 49: “[C]onduct of private persons or entities can be attributed to a state if it was in fact carried out under the instructions of that state or if the state directed or controlled it. ... If this happens, the state – by

term discrimination”, alleged “concerted hate-speech”, or alleged “highly coordinated character of the ‘clearance operations’”, amounted to the *giving of instructions* to, or to the *exercise of effective control* over, perpetrators of any acts of genocide.

- 14.46 More generally, if genocide was committed by persons whose acts are not attributable to Myanmar, there could be no conspiracy to commit genocide for which Myanmar is responsible unless persons whose conduct is attributable to Myanmar *agreed* with the perpetrators that genocide should be committed.²⁴⁶³ The Gambia does not explain how the alleged “long-term discrimination”, alleged “concerted hate-speech”, or alleged “highly coordinated character of the ‘clearance operations’”, amounted to an *agreement* between officials or organs of Myanmar with perpetrators of genocide that genocide should be committed. The Gambia also claims that Myanmar bears responsibility under Article III (b) of the Convention because it “armed civilians and encouraged them to destroy the Rohingya group”,²⁴⁶⁴ but The Gambia does not specify any facts that are said to constitute an agreement between persons whose acts are attributable to Myanmar and the perpetrators that genocide should be committed.
- 14.47 The Gambia also contends that if acts of genocide were committed that are not attributable to Myanmar, Myanmar was nonetheless complicit in those acts of genocide, within the meaning of Article III (e) of the Convention.²⁴⁶⁵ Again, this contention should be rejected. The Gambia merely states this contention, without presenting any justification or explanation for it, other than to make the bare allegation that Myanmar furnished “aid and assistance ... to individual perpetrators during the ‘clearance operations’”. The Gambia does not specify what evidence it relies on to establish complicity, and does not state specifically what aid or what assistance is said to have been provided to exactly which persons or entities who are said to have used that aid or assistance to commit genocide.²⁴⁶⁶ The Gambia also does not specify what

giving instructions or directions – will typically violate the prohibitions against incitement or conspiracy to commit genocide.”

²⁴⁶³ See Tams/Berster/Schiffbauer, *Genocide Convention* (2nd edn., 2024), Art. III, margin nos. 4-5, RM, Vol. II, Annex 49, indicating that there was “broad consensus” at the time that the Genocide Convention was drafted that “conspiracy” means an “agreement between two or more persons to commit an unlawful act”.

²⁴⁶⁴ RG, para. 9.93.

²⁴⁶⁵ RG, para. 9.99.

²⁴⁶⁶ For Myanmar to be responsible for complicity in genocide, it would be necessary for The Gambia to prove that “organs of the respondent State, or persons acting on its instructions or under its direction or effective

evidence it relies on to establish that the “organ or ... person furnishing aid or assistance to [the] perpetrator ... was aware of the specific intent (*dolus specialis*) of the principal perpetrator”.²⁴⁶⁷ In fact, if the material relied on by The Gambia is insufficient to prove that any acts of genocide are attributable to Myanmar, there is no obvious reason why it should be sufficient to prove that Myanmar was complicit in those acts. This contention should therefore be rejected.

D. Claimed breach of the Provisional Measures Order

1. General

14.48 On 23 January 2020, the Court issued the Provisional Measures Order in this case.²⁴⁶⁸ In paragraph 86 of that order, the Court indicated four provisional measures, as follows:

- (1) The Republic of the Union of Myanmar shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:
 - (a) killing members of the group;
 - (b) causing serious bodily or mental harm to the members of the group;
 - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
 - (d) imposing measures intended to prevent births within the group;
- (2) The Republic of the Union of Myanmar shall, in relation to the members of the Rohingya group in its territory, ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its

control, furnished ‘aid or assistance’ in the commission of the genocide”: *Bosnia Genocide* case, p. 217, para. 420 final sentence.

²⁴⁶⁷ *Bosnia Genocide* case, p. 218, para. 421: “the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator”.

²⁴⁶⁸ MG, paras. 13.32-13.43.

control, direction or influence, do not commit any acts described in point (1) above, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide;

- (3) The Republic of the Union of Myanmar shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide;
- (4) The Republic of the Union of Myanmar shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court.

14.49 The Gambia accepts that Myanmar has complied with the fourth provisional measure.²⁴⁶⁹ However, the Memorial of The Gambia claims that Myanmar has otherwise “failed to fully and adequately implement the Provisional Measures Order”.²⁴⁷⁰ Myanmar’s response to this claim is given in its Counter-Memorial,²⁴⁷¹ to which The Gambia replies in its Reply.²⁴⁷² Nothing in the Reply of The Gambia affects the conclusion in the Counter-Memorial that this claim of The Gambia should be rejected.

2. Temporal and territorial scope of the Order

14.50 The Provisional Measures Order was issued on 23 January 2020. Only conduct occurring after that date could be capable of constituting non-compliance with that Order.

14.51 The first and second provisional measures apply only to acts “in relation to the members of the Rohingya group in [the] territory [of Myanmar]”. These provisional measures therefore do not apply to acts affecting Bengalis from northern Rakhine State who are presently not in the territory of Myanmar (such as those in Bangladesh).

²⁴⁶⁹ RG, para. 9.108.

²⁴⁷⁰ MG, paras. 13.32-13.43 and submission 3).

²⁴⁷¹ CMM, paras. 14.44-14.57.

²⁴⁷² RG, paras. 9.107-9.115.

3. The obligations under the Order

- 14.52 The obligation of Myanmar under the **first provisional measure** is to prevent “the commission of all acts within the scope of Article II of [the Genocide] Convention”.²⁴⁷³
- 14.53 Article II of the Convention defines the acts that constitute genocide for purposes of the Convention. Acts are not within the scope of Article II unless they are committed with the *mens rea (dolus specialis)* of genocide, that is to say the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.
- 14.54 The first provisional measure thus mirrors the obligation under Article I of the Convention to prevent genocide. The obligation to prevent genocide under Article I of the Convention is limited to the prevention of the *commission* of genocide within the meaning of Article III (a). It does not extend to the prevention of conduct falling under Article III (b) to (e) of the Convention.²⁴⁷⁴
- 14.55 The difference between the first provisional measure and Article I of the Convention is that the first provisional measure requires the prevention of acts within the scope of Article II only “in relation to the members of the Rohingya group” in the territory of Myanmar.
- 14.56 The first provisional measure only requires Myanmar to prevent the commission of genocide by persons whose acts are not attributable to Myanmar. This is because the first provisional measure mirrors the obligation to prevent genocide in Article I of the Convention. Where a Contracting Party is found to be responsible for the commission of acts of genocide, it cannot additionally be found to be responsible for failing in its duty under Article I of the Convention to prevent those same acts.²⁴⁷⁵ Acts within the scope of Article II of the Convention which *are* attributable to Myanmar are dealt with by the second provisional measure, and not the first provisional measure.

²⁴⁷³ The wording of sub-paragraphs (a) to (d) of the first provisional measure obviously has exactly the same meaning as the corresponding wording in Article II of the Genocide Convention. The meaning of this wording has been dealt with in paragraphs 4.48-4.78 of the Counter-Memorial of Myanmar, and in this Rejoinder at paragraphs 4.58-4.102 above.

²⁴⁷⁴ See paragraphs 14.20 and 14.41 above.

²⁴⁷⁵ See CMM, para. 4.41, and see paragraph 14.37 above.

- 14.57 The obligation of Myanmar under the **second provisional measure** is to ensure that that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not engage, “in relation to the members of the Rohingya group” in the territory of Myanmar, in conduct falling within the scope of Article III of the Convention.
- 14.58 The obligation of Myanmar under the **third provisional measure** is to “take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention”.
- 14.59 It is unnecessary to consider the obligation of Myanmar under the **fourth provisional measure**, since The Gambia accepts that it has been complied with.

4. Details of the claimed non-compliance

- 14.60 The Memorial and the Reply of The Gambia are unclear as to the claimed facts of the alleged non-compliance with the Provisional Measures Order. The Reply states vaguely that “Myanmar has not complied faithfully with the most significant other new obligations imposed by the Order”,²⁴⁷⁶ and that “The Gambia will only recall here the most glaring failures of Myanmar”.²⁴⁷⁷ The Gambia also purports to incorporate by reference into its pleadings various paragraphs of its observations on Myanmar’s periodic provisional measures reports (The Gambia’s “**Provisional Measures Observations**”), which are said to provide factual details.²⁴⁷⁸
- 14.61 The position of Myanmar is that if a party seeks, in its formal submissions, a remedy for a claimed breach of international law by the other party, it must state *in its pleadings* the alleged material facts that are said to constitute that breach. Thus, if a party seeks in its formal submissions a remedy for claimed non-compliance with a provisional measures order, it must *in its pleadings* state the alleged material facts that are said to constitute that non-compliance. Contrary to what The Gambia contends,²⁴⁷⁹

²⁴⁷⁶ RG, para. 9.109.

²⁴⁷⁷ RG, para. 9.111.

²⁴⁷⁸ RG, para. 9.110.

²⁴⁷⁹ RG, para. 9.110.

The Gambia's Provisional Measures Observations do not form part of the pleadings in the case.

- (1) The Rules of Court provide that “The pleadings in a case ... shall consist ... of: a Memorial by the applicant; a Counter-Memorial by the respondent”,²⁴⁸⁰ and, if authorized or directed by the Court, “a Reply by the applicant and a Rejoinder by the respondent”.²⁴⁸¹ Reports by a party on the implementation of provisional measures, and observations on such reports by the other party, are therefore *not* pleadings.
- (2) The Rules of Court furthermore provide that “A Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions”,²⁴⁸² and that any Reply “shall not merely repeat the parties’ contentions, but shall be directed to bringing out the issues that still divide them”.²⁴⁸³ The material facts on which The Gambia bases its formal submissions are therefore required to be set out in its *pleadings*. Apart from anything else, Myanmar cannot be expected to collect The Gambia’s claims in respect of the material facts from multiple sources in addition to The Gambia’s pleadings, and Myanmar cannot be expected to respond to observations on Myanmar’s Provisional Measures Reports that are filed by The Gambia after the expiry of the time-limit for the filing of The Gambia’s Reply.
- (3) One of the remedies specifically sought by The Gambia in the formal submissions in its pleadings is an order of the Court that Myanmar “has failed to fully and adequately implement the Provisional Measures Order”.²⁴⁸⁴ The Rules of Court therefore require that the claimed material facts of that alleged failure to implement the Provisional Measures Order be set out in The Gambia’s *Memorial or Reply*. It does not suffice for such claims to be set out in The Gambia’s observations on Myanmar’s provisional measures reports.

²⁴⁸⁰ Rules of Court, Article 45, paragraph 1.

²⁴⁸¹ Rules of Court, Article 45, paragraph 2.

²⁴⁸² Rules of Court, Article 49, paragraph 1.

²⁴⁸³ Rules of Court, Article 49, paragraph 2.

²⁴⁸⁴ MG, Submissions, submission 3.); RG, Submissions, submission 3.).

- 14.62 It is accepted that a pleading may in general incorporate by reference material contained in other documents. Such documents (or the relevant parts of such documents) must be annexed to the pleading in accordance with Article 50 of the Rules of Court, unless the document is already before the Court. Thus, the Counter-Memorial of Myanmar in a number of instances incorporates by reference information contained in its provisional measures reports.²⁴⁸⁵ However, the material facts of a claimed breach of international law, for which a remedy is sought in the formal submissions of a party, must be expressly stated in the text of the pleading itself.
- 14.63 Therefore, the only claimed violations of the Provisional Measures Order that can be considered by the Court are those specifically set out in The Gambia's Memorial and Reply.
- 14.64 To the extent that responses are provided below to any claimed breaches of the Provisional Measures Order that are not expressly set out in The Gambia's Memorial or the Reply, these responses are without prejudice to what is stated in the previous paragraph.

5. Burden of proof and standard of proof

- 14.65 The Gambia does not appear to dispute that it bears the burden of proving its claim that Myanmar is in breach of the Provisional Measures Order, including the burden of proving the facts on which that claim is based.²⁴⁸⁶
- 14.66 The standard of proof that The Gambia must meet is the very high standard of proof that applies in cases involving alleged breaches of the Genocide Convention.²⁴⁸⁷
- 14.67 This very high standard of proof results from the general principle that "claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive".²⁴⁸⁸ A claim that a State has engaged in conduct contrary to the Genocide Convention is such a charge of exceptional gravity. A claim that a State has furthermore done so in violation of a provisional measures order issued by the Court

²⁴⁸⁵ See, for instance, CMM, footnotes 2129, 2260-2262 and accompanying text.

²⁴⁸⁶ CMM, para. 14.44, which is not addressed in the Reply of The Gambia.

²⁴⁸⁷ See CMM, paras. 5.11-5.18; and this Rejoinder, paragraphs 5.21-5.40 above.

²⁴⁸⁸ See CMM, para. 5.11, quoting *Bosnia Genocide* case, pp. 129-130, paras. 209-210.

is, if anything, a charge of even greater gravity. The very high standard of proof must therefore apply.

14.68 If the position were otherwise, the result would be anomalous. Suppose that an Applicant State claims that ongoing conduct of a Respondent State is a violation of the Genocide Convention, and in its submissions seeks a declaration of the Court to that effect. In order to succeed on the merits, the Applicant would be required to prove the facts on which that claim is based in accordance with the very high standard of proof applicable in cases under the Genocide Convention. Suppose that the Applicant State then applies for and obtains a provisional measures order requiring the Respondent State to refrain from engaging in conduct prohibited by the Genocide Convention pending the Court's judgment on the merits. At the merits hearing, the Applicant State could then claim that the ongoing conduct of the Respondent State is a violation of both the Genocide Convention and the provisional measures order. If, in relation to the claimed violation of the provisional measures order, the Applicant State was only required to prove the alleged facts in accordance with the ordinary standard of proof, the very high standard of proof that applies in cases under the Genocide Convention would be effectively circumvented. A ruling of the Court that the conduct in question is a violation of the provisional measures order would entail a prior finding that the conduct is contrary to the Genocide Convention. The Applicant State could thus obtain such a finding without having to satisfy the very high standard of proof.

14.69 At the very least, the very high standard of proof must therefore apply to the proof of facts on which the claimed non-compliance with the first and second provisional measures is based. These are the two provisional measures which mirror provisions of the Genocide Convention.

6. Relationship to the primary claim

14.70 The Gambia appears to contend that certain acts which are alleged in its primary claim to be violations of the Convention are also violations of the Provisional Measures Order. If so, in relation to such acts, Myanmar relies on its arguments above in relation to the primary claim as its response to the claim that these same acts are contrary to

the Provisional Measures Order. The paragraphs below deal only with additional matters that are not already included in The Gambia's primary claim.

- 14.71 The fact that The Gambia has not included these additional matters as part of its primary claim suggests that even The Gambia itself does not consider that these additional matters are violations of the Convention, such that they could not be violations of the first or second provisional measures (see paragraphs 14.58 and 14.62 above).

7. The first provisional measure

a. Article II (a) (killings)

- 14.72 The Memorial of The Gambia contains a bare statement that "Killing members of the Rohingya group ... in violation of paragraph 86(1) of Provisional Measures Order" has occurred.²⁴⁸⁹ The only basis cited for this claim is a quote from the UN High Commissioner for Human Rights, which makes no mention of killings.²⁴⁹⁰
- 14.73 Paragraph 9.109 of the Reply of The Gambia refers to three documents, of the UN Human Rights Council, the UN General Assembly, and the UN General Assembly Third Committee, respectively, which contain general references to "killings", without providing any facts or details, and without citing any other sources of information.²⁴⁹¹ Footnote 1211 of the Reply of the Gambia refers to paragraphs of its Provisional Measures Observations. These similarly contain general references to killings, and to documents containing general references to killings, without providing specific facts or details.²⁴⁹²

²⁴⁸⁹ See MG, para. 13.37.

²⁴⁹⁰ *Ibid.*

²⁴⁹¹ The documents contain bare references to "deliberate killing and maiming of children", "targeted killings", "reports [of] ... extrajudicial, summary or arbitrary killings".

²⁴⁹² The Gambia's First Provisional Measures Observations, para. 19; The Gambia's Fourth Provisional Measures Observations, para. 5 (referring to casualties in the armed conflict and clashes in northern Rakhine State, of which very precise details have been given in Myanmar's provisional measures reports); The Gambia's Fifth Provisional Measures Observations, para. 35; The Gambia's Sixth Provisional Measures Observations, paras. 4, 6 and 13; The Gambia's Seventh Provisional Measures Observations, para. 4; The Gambia's Eighth Provisional Measures Observations, para. 4; The Gambia's Ninth Provisional Measures Observations, paras. 28 and 35.

- 14.74 These documents would clearly be insufficient to prove that killings within the scope of Article II *(a)* of the Convention have occurred even if the ordinary standard of proof applied, let alone the very high standard of proof applicable in the present case. There is no suggestion in the sources cited that the killings referred to fall within the definition in Article II *(a)* of the Convention, and in particular, no suggestion that they were committed with genocidal intent.

b. Article II *(b)* (causing serious bodily or mental harm)

- 14.75 Paragraph 13.37 of the Memorial of The Gambia claims that there has been “serious bodily or mental harm in violation of paragraph 86(1) of Provisional Measures Order”, but no particulars are given. The Gambia merely quotes from a statement of the UN High Commissioner for Human Rights, which contains a general reference to “serious violations of human rights and international humanitarian law, including airstrikes, shelling of civilian areas, and the destruction and burning of villages in other areas”.
- 14.76 Paragraph 9.109 of the Reply of The Gambia claims that there has been “serious bodily or mental harm to the members of the group, including by engaging in arbitrary detentions and the trafficking of girls”. However, arbitrary detentions and trafficking are mentioned in only a few paragraphs of The Gambia’s Provisional Measures Observations, citing limited sources.
- 14.77 These documents are clearly insufficient to prove that acts within the scope of Article II *(b)* of the Convention have occurred. Apart from anything else, not all serious violations of human rights or international humanitarian law, and not all instances of arbitrary detentions or human trafficking, fall within the scope of Article II *(b)* of the Convention. Therefore, even if it could be proved that the claimed acts occurred (and no sufficient evidence has been presented), no justification is provided as to why the claimed acts would fall within the scope of Article II *(b)*.

c. Article II *(c)* (deliberately inflicting conditions of life)

- 14.78 It is not clear what “conditions of life” falling within Article III *(c)* of the Convention are said to have been imposed, apart from those already dealt with in Chapter 10 of the Counter-Memorial of Myanmar and Chapter 10 above of this Rejoinder (in

particular, alleged forcible confinement and alleged denial of access to sustenance²⁴⁹³). The claim concerning conditions in IDP camps²⁴⁹⁴ is said by The Gambia to be part of the primary claim.²⁴⁹⁵ The Reply of The Gambia alleges generally “unsustainable conditions of living”, and denial of humanitarian assistance and adequate healthcare, referring to various paragraphs of its Provisional Measures Observations.²⁴⁹⁶

- 14.79 The Gambia has not provided evidence capable of proving that measures falling within the scope of Article II (*c*) of the Convention have been inflicted. Apart from anything else, the mere fact that certain people live in poor conditions, or lack humanitarian assistance of healthcare, does not mean that measures falling within the scope of Article II (*c*) of the Convention have been inflicted. To fall within the scope of this provision, such measures must be *deliberately* inflicted, and must be *calculated* to bring about the *physical* destruction of the group in question. Therefore, even if The Gambia could prove its claims about “unsustainable conditions of living”, and denial of humanitarian assistance and adequate healthcare (and no sufficient evidence has been presented), no justification is provided as to why this would fall within the scope of Article II (*c*).

d. Article II (*d*) (measures ... intended to prevent births)

- 14.80 Apart from the alleged violation of Article II (*d*) in The Gambia’s primary claim, nothing in either the Memorial or the Reply of The Gambia specifically alleges that the Provisional Measures Order has been violated through the imposition of any measures intended to prevent births.

8. The second provisional measure

- 14.81 The Gambia apparently contends that Myanmar is responsible for acts falling within the scope of Article III (*a*) of the Convention, by committing the acts referred to in

²⁴⁹³ See CMM, paras. 10.176-10.245, and this Rejoinder, paragraphs 10.85-10.126 above.

²⁴⁹⁴ MG, para. 13.36.

²⁴⁹⁵ See para. 1.12 above.

²⁴⁹⁶ RG, para. 9.112 second dot point.

paragraph 14.76 to 14.84 above. The Gambia does not establish this, for the reasons given in those paragraphs above.

- 14.82 The Gambia claims that Myanmar has also breached the second provisional measure by not “duly prosecuting the perpetrators of genocide”.²⁴⁹⁷ This claim has already been dealt with in paragraph 14.51 of the Counter-Memorial of Myanmar.
- 14.83 The Gambia claims that Myanmar has engaged in direct and public incitement to commit genocide by failing to make adequate efforts to curtail pervasive anti-Rohingya hate speech.²⁴⁹⁸ In this respect, Myanmar relies on Chapter 11 of its Counter-Memorial and Chapter 11 of its Reply.

9. The third provisional measure

- 14.84 The allegations in the Memorial of The Gambia concerning destruction of evidence are already dealt with in the Counter-Memorial of Myanmar.²⁴⁹⁹
- 14.85 More generally, the Reply of The Gambia contends that Myanmar has failed to comply with the third provisional measure due to the construction of security facilities, or housing for other ethnic groups, “on lands occupied by Rohingya communities before the ‘clearance operations’ of 2016-2018”.²⁵⁰⁰ A response to this claim is given in paragraphs 2.36, 7.112, and 12.116-12.118 above.

10. The fourth provisional measure

- 14.86 The Gambia accepts that Myanmar has complied with the fourth provisional measure.

11. Conclusion

- 14.87 Myanmar has periodically reported to the Court on the measures taken to give effect to the Provisional Measures Order, as required by the fourth provisional measure. In addition to what is stated above, The Gambia has not proved that Myanmar has failed to “take all measures within its power” for purposes of the first provisional measure,

²⁴⁹⁷ MG, para. 13.40.

²⁴⁹⁸ RG, para. 9.112 third dot point.

²⁴⁹⁹ CMM, paras. 14.48-14.49.

²⁵⁰⁰ RG, para. 9.113, referring to Second Provisional Measures Observations, paras. 24-27.

or has failed to “ensure” for purposes of the second provisional measure, or has failed to “take effective measures” for purposes of the third provisional measure. The Gambia’s claim of a failure to implement the Provisional Measures Order lacks any basis in law or in fact.

CHAPTER 15

ALLEGED LEGAL CONSEQUENCES

A. Introduction

- 15.1 For the reasons given in Myanmar’s Counter-Memorial and as outlined again in the previous Chapters of this Rejoinder, The Gambia has not established that Myanmar is internationally responsible for any act of genocide within the meaning of the Genocide Convention, or that Myanmar is in breach of any of its obligations under the Genocide Convention, or that Myanmar is in breach of any of its obligations under the Provisional Measures Order.
- 15.2 Therefore, no question arises in this case as to the legal consequences that would flow from any breach of those obligations, or as to the remedies that the Court could order in respect of any such breach. The Gambia is therefore wrong to state that “Myanmar appears to accept” that the Court has jurisdiction to order the cessation of any ongoing violation of the Genocide Convention and that The Gambia has standing to request such cessation.²⁵⁰¹ Where there is no violation, there cannot be any question of cessation of a violation.
- 15.3 Nevertheless, without prejudice to this position, the Counter-Memorial of Myanmar, for the sake of completeness, responded to Chapter 13 of The Gambia’s Memorial dealing with alleged “Legal Consequences and Remedies”. Again, without prejudice to Myanmar’s position that no question of remedies falls to be considered in this case, this Chapter of this Rejoinder similarly responds for the sake of completeness to Chapter 10 of the Reply of the Gambia, dealing with alleged “Legal Consequences and Remedies”.

²⁵⁰¹ RG, para. 10.3.

B. The principle of *res judicata* is not a bar

1. General

15.4 The Gambia contends that the Judgment of the Court of 22 July 2022 on the preliminary objections raised by Myanmar²⁵⁰² has the force of *res judicata*, and that Myanmar's arguments in Chapter 15 of its Counter-Memorial are barred by that Judgment.²⁵⁰³ That is incorrect.

15.5 The Gambia, as a non-injured State, is claiming the performance of an obligation of reparation in the interest of alleged victims of genocide as well as assurances and guarantees of non-repetition of alleged violations of the Genocide Convention.

15.6 The Gambia claims that Myanmar's contentions in its Counter-Memorial on the remedies sought by The Gambia are incompatible with the operative part of the Preliminary Objections Judgment, in which the Court found that:

it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to entertain the Application filed by the Republic of The Gambia on 11 November 2019, and that the said Application is admissible.²⁵⁰⁴

15.7 The Gambia claims that that operative paragraph possesses the force of *res judicata*,²⁵⁰⁵ and that the "*res judicata* determination of jurisdiction encompasses jurisdiction over the requested remedies".²⁵⁰⁶

15.8 However, this contention of The Gambia shows a misunderstanding of both Myanmar's argument and the principle of *res judicata*.

²⁵⁰² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022*, p. 477 ("**Preliminary Objections Judgment**").

²⁵⁰³ RG, paras. 10.2 and 10.4-10.11.

²⁵⁰⁴ Preliminary Objections Judgment, p. 518, para. 115(5).

²⁵⁰⁵ RG, paras. 10.4-10.11.

²⁵⁰⁶ RG, para. 10.5.

2. The scope of *res judicata* of the Preliminary Objections Judgment

15.9 The Court has found in the operative part of the Preliminary Objections Judgment that “it has jurisdiction, on the basis of Article IX of the [Genocide] Convention” to entertain the Application filed by The Gambia. Myanmar does not question that this operative part possesses the force of *res judicata*.²⁵⁰⁷

15.10 However, as the Court noted in the *Bosnia Genocide* case:

[T]he fact that a judgment may, in addition to rejecting specific preliminary objections, contain a finding that “*the Court has jurisdiction*” in the case *does not necessarily prevent subsequent examination of any jurisdictional issues* later arising that have not been resolved, with the force of *res judicata*, by such judgment.²⁵⁰⁸

15.11 The Court also held that the force of *res judicata* attaches only to “the issues that have been determined”, expressly or by necessary implication, by a decision of the Court.²⁵⁰⁹ In order to ascertain what issues have been determined one is to examine “the reasoning set out in the judgment in question.”²⁵¹⁰ An examination of the operative paragraph of the 2022 Judgment and the underlying reasoning shows that they only address questions concerning “the existence of the Court’s jurisdiction” under Article IX of the Genocide Convention.²⁵¹¹ It thus follows that the force of *res judicata* attaching to the 2022 Judgment extends only to the existence of the Court’s jurisdiction.

15.12 The Court held in the *Bosnia Genocide* case that “jurisdictional issues” could be decided at the merits stage without contradicting the finding in an earlier judgment

²⁵⁰⁷ *Bosnia Genocide* case, p. 94, para. 123.

²⁵⁰⁸ *Ibid.*, p. 95, para. 127 (emphasis added).

²⁵⁰⁹ *Ibid.*, p. 90, para. 115. See also *ibid.*, p. 95, para. 126; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (I), p. 126, para. 60.

²⁵¹⁰ See *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Preliminary Objection, Judgment, I.C.J. Reports 2023, p. 282, para. 67; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (I), p. 126, para. 61; see also *ibid.*, p. 129, para. 75.

²⁵¹¹ See *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Preliminary Objection, Judgment, I.C.J. Reports 2023, p. 282, para. 69.

that the Court has jurisdiction, if “the issues raised related to *the extent of the jurisdiction* already established in principle with the force of *res judicata*”.²⁵¹²

- 15.13 The question of what remedies the Court may order under Article IX of the Genocide Convention concerns “the extent of the jurisdiction” of the Court.
- 15.14 The question of the jurisdiction of the Court to order particular kinds of remedies and, in particular, the question whether the Court has jurisdiction to order reparation to alleged victims of genocide under the Genocide Convention, were not addressed, let alone decided, in the Preliminary Objections Judgment, and thus have not been resolved with the force of *res judicata*. In fact, the term remedy or reparation was not used once by the Court in the reasoning of the Preliminary Objections Judgment.
- 15.15 During the oral hearing on the preliminary objections, both parties took the position that the question of whether The Gambia could claim reparation to the alleged victims was for another day. Myanmar pointed out that, if the Court accepted The Gambia’s standing, “questions concerning the entitlement of ‘non-injured’ States to claim reparation on behalf of alleged victims who are not their nationals” would arise.²⁵¹³ In response, The Gambia stated that the question of whether The Gambia could “request that Myanmar make reparation to the victims of its genocidal acts” could “only arise, if at all, when the issue of liability for a violation of the 1948 Convention comes into play. *It is not an issue that may be said to ‘possess an exclusively preliminary character’.*”²⁵¹⁴
- 15.16 As the issue of remedies was neither addressed nor determined by the Preliminary Objections Judgment, a finding at the merits stage that the Court has no jurisdiction to order reparation in the interest of the alleged victims of genocide would not reverse or contradict the operative part of that Judgment, finding that the Court has jurisdiction “to entertain the Application filed by the Republic of The Gambia”. Myanmar’s

²⁵¹² *Bosnia Genocide* case, p. 96, para. 128.

²⁵¹³ CR 2022/1, 21 February 2022, p. 38, para. 58 (Talmon), and p. 39, para. 59 (Talmon). See also Preliminary Objections Judgment, p. 513, para. 99.

²⁵¹⁴ CR 2022/4, 28 February 2022, p. 15, para. 22 (Reichler) (emphasis added).

arguments concerning the Court's jurisdiction to order the requested remedies therefore do not run counter to the principle of *res judicata*.

3. The scope and meaning of Article IX of the Genocide Convention

15.17 In the Preliminary Objections Judgment, the Court found that “it has jurisdiction, *on the basis of Article IX of the Convention*”.²⁵¹⁵ As Vice-President Yusuf pointed out:

The scope of jurisdiction of the Court in any given case is established according to the limits set forth in the instrument that founds the jurisdiction of the Court. The Court only has jurisdiction to address disputes within those limits.²⁵¹⁶

15.18 The scope of the Court's jurisdiction in the present case thus must be determined by reference to Article IX of the Genocide Convention.

15.19 Article IX of the Genocide Convention entrusts the Court with jurisdiction in respect of “[d]isputes between the Contracting Parties ... relating to the responsibility of a State for genocide.” In order to determine the scope of the Court's jurisdiction, including its jurisdiction with regard to remedies for breaches of the Convention, it is therefore imperative to interpret Article IX and, in particular, the phrase “the responsibility of a State for genocide”.

15.20 At the preliminary objections stage in the *Bosnia Genocide* case, the Court found that, “on the basis of Article IX of the Convention ..., it has jurisdiction”,²⁵¹⁷ including jurisdiction with regard to the responsibility of the Respondent State.²⁵¹⁸ At the merits stage in that case, the Court nevertheless held that the question of the scope and meaning of Article IX could be raised and decided at the merits stage, “[w]hether or

²⁵¹⁵ Preliminary Objections Judgment, p. 518, para. 115(5) (italics added).

²⁵¹⁶ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017*, p. 317, para. 8, declaration of Vice-President Yusuf.

²⁵¹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 623, para. 47(2)(a).

²⁵¹⁸ *Ibid.*, p. 616, para. 32.

not the issue now raised by the Respondent falls in that category [of *res judicata*].”²⁵¹⁹

In particular, the Court stated:

The jurisdiction of the Court in this case is based solely on Article IX of the Convention. ... It follows that the Court may rule only on the disputes between the Parties to which that provision refers. The Parties disagree on whether the Court finally decided the *scope and meaning of that provision* in its 1996 Judgment and, if it did not, on the matters over which the Court has jurisdiction under that provision. The Court rules on those two matters in following sections of this Judgment.²⁵²⁰

15.21 In that case, the Court found that it had not yet decided “the scope and meaning” of Article IX at the preliminary objections stage and, consequently, decided the question at the merits stage.²⁵²¹

15.22 As to the question of “the scope and meaning” of Article IX, the Court found that it covers not only breaches of obligations under the Genocide Convention, but also the legal consequences of such breaches. The Court held:

The jurisdiction of the Court is founded on Article IX of the Convention, ... but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, *to determine its legal consequences*, the Court will have recourse not only to the Convention itself, but also to the rules of general international law ... on responsibility of States for internationally wrongful acts.²⁵²²

15.23 The meaning of the term “the responsibility of a State for genocide” in Article IX, together with the general rules on State responsibility, thus has a direct bearing on the scope of the Court’s jurisdiction with regard to the question of remedies for breaches of the Convention.²⁵²³ At the preliminary objections stage in this case, the Court did

²⁵¹⁹ *Bosnia Genocide case*, p. 106, para. 152.

²⁵²⁰ *Ibid.*, p. 104, para. 147 (emphasis added).

²⁵²¹ See *ibid.*, pp. 107, 108-118 and p. 237, para. 152; pp., para. 471(1).

²⁵²² *Ibid.*, p. 105, para. 149 (emphasis added).

²⁵²³ See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment*, 8 November 2019, p. 617, para. 8, separate opinion of Judge Tomka.

not decide on the meaning of the term with regard to the question of remedies. Addressing that question now would not call into question the authority of *res judicata* of the Preliminary Objections Judgment.

4. The absence of any question of standing

- 15.24 The Gambia claims the performance of an obligation of reparation in the interest of alleged victims of genocide as well as assurances and guarantees of non-repetition.
- 15.25 The Gambia portrays its claims for remedies as a question of “standing” – a question that it argues has been decided by the Court in the Preliminary Objections Judgment with the force of *res judicata*.²⁵²⁴ It then asserts – wrongly – that Myanmar “argues that The Gambia lacks standing”. This assertion is reminiscent of a quixotic tilt at windmills. Myanmar did not use the term “standing” once in its objections to The Gambia’s claims for reparation in the interest of the alleged victims and assurances and guarantees of non-repetition, let alone base its objections to The Gambia’s claims on the question of standing.
- 15.26 Standing is a question of the admissibility of an application; that is to say, a question whether a State may present a certain claim before the Court.²⁵²⁵ The Gambia itself states that “the Court necessarily affirmed the standing of The Gambia to bring all the claims made in the Application.”²⁵²⁶
- 15.27 Competence to bring a claim, however, is not the same as succeeding with a claim. Otherwise, no proceedings on the merits of a claim would be necessary. Whether a claim succeeds depends, first, on whether there is a legal basis for such a claim (in this case a remedy) and, second, on whether the factual and legal requirements of that legal basis are fulfilled.
- 15.28 In its Counter-Memorial, Myanmar demonstrated that there is no “legal basis” for The Gambia’s claim for reparation in the interest of the alleged victims of genocide,²⁵²⁷ or

²⁵²⁴ RG, paras. 10.2, 10.6 and 10.27-10.37.

²⁵²⁵ Preliminary Objections Judgment, p. 511, para. 93.

²⁵²⁶ RG, para. 10.6.

²⁵²⁷ CMM, para. 15.30.

for its claim for assurances and guarantees of non-repetition.²⁵²⁸ Myanmar showed that a claim for reparation in the interest of the alleged victims could not be based either on Article 48(2)(b) ARSIWA,²⁵²⁹ or on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,²⁵³⁰ and that there was no legal basis for the claim of assurances and guarantees of non-repetition.²⁵³¹

- 15.29 The Preliminary Objections Judgment neither addresses nor decides the questions of whether there is any legal basis for the remedies claimed by The Gambia and, if so, whether the requirements of the legal basis are fulfilled. All that the Court did was to find that The Gambia could institute proceedings before the Court “with a view to determining the alleged failure to comply with its obligations *erga omnes partes* under the Convention and to bringing that failure to an end.”²⁵³² The question of the legal basis for the particular remedies claimed, and the question of whether the requirements of any such legal basis are fulfilled, are thus not subject to *res judicata*.
- 15.30 Myanmar therefore maintains that the questions of whether there is a legal basis for the remedies claimed by Gambia and, if so, whether the requirements of these remedies have been fulfilled, are still to be decided by the Court at the merits stage in the event that it were necessary to do so, taking into account the arguments put forward by Myanmar its Counter-Memorial.
- 15.31 The Memorial of The Gambia does not dispute this. The Memorial of The Gambia states that “assurances and guarantees of non-repetition” is a matter “appertaining to

²⁵²⁸ CMM, para. 15.75.

²⁵²⁹ CMM, paras. 15.30-15.61.

²⁵³⁰ CMM, paras. 15.62-15.74.

²⁵³¹ CMM, paras. 15.75-15.86.

²⁵³² Preliminary Objections Judgment, p. 517, para. 112.

the merits of the case”,²⁵³³ and that “reparation in the interest of the victims” is a matter “appertaining to the merits of the case”.²⁵³⁴

C. There is no basis for the requested remedies

15.32 The Gambia’s argument at paragraphs 10.12-10.42 of its Reply on the claimed remedies are in large part a repetition of its argument on jurisdiction and standing that has already been addressed in Part B above.

1. There is no jurisdiction for the claim in the interest of alleged victims

15.33 The Gambia asserts that the “Court has jurisdiction to entertain a reparation claim in the interest of the victims of genocide”.²⁵³⁵ However, the fact that the Court has jurisdiction “on the basis of Article IX” with regard to the “responsibility of a State for genocide” does not automatically mean that a non-injured State can claim, and that the Court can order, reparation in the interest of victims.

15.34 As shown above,²⁵³⁶ the Court’s jurisdiction depends on what is meant by the term “responsibility of a State for genocide” in Article IX of the Genocide Convention. As the Court stated in the *Bosnia Genocide* case, the Convention does not stand alone. In order to determine the “legal consequences” of a breach of the Genocide Convention, “the Court will have recourse not only to the Convention itself, but also to the rules of general international law ... on responsibility of States for internationally wrongful acts.”²⁵³⁷

15.35 Contrary to The Gambia’s repeated unsubstantiated assertion,²⁵³⁸ the rules of general or customary international law of State responsibility do not provide for reparation to the individual victims of violations of international law but for reparation to (their)

²⁵³³ MG, para. 13.11 footnote 1825.

²⁵³⁴ MG, para. 13.23 footnote 1845.

²⁵³⁵ RG, paras. 10.19-10.26.

²⁵³⁶ See above sections B.1 and B.2.

²⁵³⁷ *Bosnia Genocide* case, p. 105, para. 149.

²⁵³⁸ See RG, paras. 10.12, 10.13 and 10.29.

State.²⁵³⁹ The term “reparation” is understood as “reparation for the injury caused”.²⁵⁴⁰ Injured in terms of the law of State responsibility is, however, only the State – either itself or through its nationals.²⁵⁴¹ In its commentary on the Articles on State Responsibility, the International Law Commission (ILC) expressly excluded from the legal consequences of an internationally wrongful act and, in particular, from the secondary obligation of States in relation to reparation, “obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State.”²⁵⁴² It would thus be surprising if such obligations of reparation towards persons or entities other than a State, including victims of genocide, would exist or could be invoked under the customary international law rules on State responsibility. The position of Myanmar is that State responsibility is as much inter-State responsibility today as it was in 1948, when the term “responsibility of a State” was included in the Genocide Convention.

- 15.36 As shown in Myanmar’s Counter-Memorial, the scope of jurisdiction under Article IX of the Genocide Convention thus does not include claims by a non-injured State for reparation in the interest of alleged victims of genocide.

2. There is no legal basis for the claim in the interest of alleged victims

- 15.37 In paragraphs 10.12-10.18 of its Reply, The Gambia puts forward no new arguments to counter Myanmar’s position that The Gambia cannot claim the performance of an obligation of reparation in the interest of the alleged victims of genocide. The Gambia simply asserts that Myanmar’s position is “untenable”.²⁵⁴³
- 15.38 In particular, The Gambia does not establish any legal basis, either in treaty law or in customary international law, for its reparation claim in the interest of the alleged victims of genocide. As shown in Myanmar’s Counter-Memorial, such a claim can be

²⁵³⁹ See International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), adopted on 3 August 2001, *Yearbook of the International Law Commission 2001*, vol. II, Part Two, as corrected, Articles 33(1), 44(a), RM, Vol. IV, Annex 112bis.

²⁵⁴⁰ *Ibid.*, Articles 31(1), 34.

²⁵⁴¹ *Ibid.*, Article 42.

²⁵⁴² *Ibid.*, pp. 87-88, para. 3.

²⁵⁴³ RG, para. 10.12.

based neither on Article 48(2)(b) ARSIWA,²⁵⁴⁴ nor on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the “Basic Principles and Guidelines”).²⁵⁴⁵ All that The Gambia does is restate its unfounded assertion that the Basic Principles and Guidelines “reflect existing customary international law”.²⁵⁴⁶ The reference to the Basic Principles and Guidelines in the preambular paragraph of a recent non-binding General Assembly resolution²⁵⁴⁷ is, however, hardly sufficient evidence to establish this document as reflecting customary international law, especially if the Basic Principles and Guidelines themselves emphasise that they “do not entail new international ... legal obligations”.²⁵⁴⁸ In this context, it is also of interest to note that Judge Yusuf in his separate opinion in *Armed Activities on the Territory of the Congo* spoke with reference to the Basic Principles and Guidelines of “recent developments” and that “reparation *should* accrue to the injured individual.”²⁵⁴⁹

- 15.39 The fact that a State may have an “obligation to make reparation”, as claimed by The Gambia,²⁵⁵⁰ does not say anything about to whom that reparation is owed and even less about who may claim the performance of the obligation of reparation. As shown by Myanmar,²⁵⁵¹ The Gambia has not established that the obligation to make reparation for violations of the Genocide Convention is owed to alleged victims of

²⁵⁴⁴ CMM, paras. 15.31-15.61.

²⁵⁴⁵ CMM, paras. 15.62-15.74.

²⁵⁴⁶ RG, para. 10.15.

²⁵⁴⁷ UN, General Assembly resolution ES-11/5, Furtherance of remedy and reparation for aggression against Ukraine, adopted on 14 November 2022, UN Doc. A/RES/ES-11/ 5, 15 November 2022, last preambular paragraph, RM, Vol. IV, Annex 130. The Gambia is referring to the draft of that resolution.

²⁵⁴⁸ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, annexed to General Assembly resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147, 21 March 2006, preambular para. 7, MG, Vol. II, Annex 22.

²⁵⁴⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 9 February 2022, p. 159, para. 37, separate opinion of Judge Yusuf (emphasis added).

²⁵⁵⁰ RG, para. 10.14.

²⁵⁵¹ CMM, paras. 15.47-15.52.

genocide, nor has it established that a non-injured State may claim the performance of the obligation of reparation in the interest of the alleged victims.

- 15.40 The Gambia's reliance on the Court's 2022 Judgment in *Armed Activities on the Territory of the Congo* for the proposition that reparation is owed to the victims of a violation of international law as the ultimate beneficiaries²⁵⁵² is misplaced. The Court in that case fixed the "amounts for the compensation due from the Republic of Uganda to the Democratic Republic of the Congo for the damage caused by the violations of international obligations by the Republic of Uganda, as found by the Court in its Judgment of 19 December 2005."²⁵⁵³ In the Judgment of 19 December 2005, the Court had found that the Republic of Uganda "violated obligations owed to the Democratic Republic of the Congo under international law" and that "the Republic of Uganda is under obligation to make *reparation to the Democratic Republic of the Congo* for the injury caused".²⁵⁵⁴ It is exactly for this "State-centred approach to reparation", rather than a victim-centred approach focusing on those suffering from the wrongful conduct, that the decision was criticised, for example, by Judge Yusuf in his separate opinion.²⁵⁵⁵
- 15.41 Under the heading "The Gambia has Standing to Present a Reparation Claim", The Gambia addresses Myanmar's argument that there is "no legal basis" for such a claim by asserting that, in addition to Article 48(2)(b) ARSIWA, "no additional legal basis is needed".²⁵⁵⁶ What The Gambia does not do, is prove that Article 48(2)(b) ARSIWA is reflective of customary international law. Instead it claims that the ILC presented the Article "as a logical – if not indispensable – consequence of the standing of the non-injured States to invoke the responsibility of States for breaches of *erga omnes*

²⁵⁵² See RG, para. 10.17.

²⁵⁵³ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022*, p. 137, para. 409(1).

²⁵⁵⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, pp. 280-281, para. 345(4) and (5) (emphasis added).

²⁵⁵⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment*, 9 February 2022, p. 159, para. 37, separate opinion of Judge Yusuf.

²⁵⁵⁶ RG, para. 10.29.

(*partes*) obligations.”²⁵⁵⁷ In this context it refers to its Memorial.²⁵⁵⁸ However, the relevant paragraphs in its Memorial merely recall discussions in the ILC and a statement by the Chairman of the ILC drafting committee that Article 48(2)(b) was a “wise and useful principle worth retaining”.²⁵⁵⁹ Nothing about an indispensable consequence. On the contrary, the discussions show that the provision itself was controversial.

- 15.42 Alleged logical deductions, which are not accepted by Myanmar, do not absolve The Gambia from proving that the rule it relies on for its reparation claim is part of customary international law. The Gambia points to two recent examples where non-injured States in proceedings before the Court have claimed the performance of an obligation of reparation in the interest of victims. Claims in ongoing litigation by three States are hardly capable of establishing a rule of customary international law; especially as those claims will most likely be opposed by the respondent States in these proceedings.
- 15.43 It is also misleading if The Gambia speaks in the context of Article 48(2)(b) ARSIWA about “the endorsement” of the Articles on State Responsibility by the UN General Assembly in 2001. What the UN General Assembly did in 2001 was to “take note of the articles ... and commend them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action”.²⁵⁶⁰
- 15.44 The Gambia also addresses the question of the application of Article 48(2)(b) ARSIWA.²⁵⁶¹ In response to Myanmar’s argument, based on the text of the provision, that the non-injured State may claim reparation only “in accordance with the preceding articles”; that is, only if the beneficiary of the obligation breached can itself claim reparation, The Gambia now claims that it is “a beneficiary of the *erga omnes partes* obligations undertaken by Myanmar as a party to the Convention” and that it

²⁵⁵⁷ RG, para. 10.29.

²⁵⁵⁸ MG, paras. 13.24-13.25.

²⁵⁵⁹ MG, para. 13.25.

²⁵⁶⁰ UN General Assembly resolution 56/83 of 12 December 2001, UN Doc. A/RES/56/83, 28 January 2001.

²⁵⁶¹ RG, paras. 10.33-10.37.

may therefore claim reparation.²⁵⁶² However, The Gambia has to make up its mind whether, in terms of Article 48(2)(b) ARSIWA, it wants to be a “State other than an injured State” entitled to invoke responsibility, or whether it wants to be one of “the beneficiaries of the obligation breached.” Even if it were also to be considered a “beneficiary” of the obligations under the Genocide Convention, *quod non*, it would still have to prove that the alleged victims of genocide in whose interest it claims the performance of the obligation of reparation could claim reparation themselves. This, The Gambia, however, has not done.

- 15.45 In response to Myanmar’s argument that The Gambia has not established that it is acting in the interest of the beneficiaries of the obligations under the Genocide Convention, The Gambia simply lists the claims it has made in the present proceedings.²⁵⁶³ However, these claims neither determine the precise group of the beneficiaries, nor do they establish that the choice of the form of reparation is in fact in the interest of the beneficiaries.

3. There is no legal basis for a claim for assurances and guarantees of non-repetition

- 15.46 In paragraphs 10.38-10.42 of its Reply, which is devoted to its claim for assurances and guarantees of non-repetition, The Gambia does not address Myanmar’s argument on the lack of any legal basis for such a claim, apart from repeating that it has standing to bring such a claim and that three other States have recently done the same in ongoing cases before the Court.
- 15.47 The Gambia has neither shown that Article 48(2)(a) ARSIWA reflects customary international law nor has it established that there are “special circumstances” in the present case that would require assurances and guarantees of non-repetition. All that The Gambia does, is – in a slanderous way – to call into question Myanmar’s good faith and assert non-compliance with the obligations under the Provisional Measures Order.

²⁵⁶² RG, para. 10.33.

²⁵⁶³ RG, paras. 10.36-10.37.

15.48 The Gambia’s Reply reveals what it really wants to achieve by way of its so-called assurances and guarantees of non-repetition, namely to transform Myanmar by altering the composition of its citizenship and its governance structure.²⁵⁶⁴

D. There is no entitlement to remedies for alleged breaches of provisional measures

15.49 Myanmar has been adhering dutifully to the Court’s Provisional Measures Order and continues to do so, including by submitting reports to the Court every six months. There is therefore no reason for any remedy for alleged breaches of the Order.

15.50 The Gambia does not address Myanmar’s argument that violations of provisional measures orders cannot give rise to restitution because of the element of irreparable harm inherent in the very concept of provisional measures.²⁵⁶⁵

15.51 The Gambia also has no answer to Myanmar’s argument that remedies for violation of provisional measures orders cannot go further than the remedies available in respect of the merits, apart from calling it “misconceived” and pointing to the allegedly “distinct and autonomous character” of the obligations created by a provisional measures order.²⁵⁶⁶ The idea of an “autonomous legal regime of provisional measures of protection”, while propagated by Judge Cançado Trindade in successive dissenting and individual opinions,²⁵⁶⁷ has not been adopted by the Court. On the contrary, in the *Bosnia Genocide* case, the Court considered that:

... for the purposes of reparation, the Respondent’s non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention. The Court does not therefore find it appropriate to give effect to the Applicant’s request for an order for symbolic compensation in this respect. The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a

²⁵⁶⁴ See RG, para. 10.42.

²⁵⁶⁵ See CMM, para. 15.91.

²⁵⁶⁶ RG, para. 10.45.

²⁵⁶⁷ See e.g. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports 2015*, pp. 760-767, paras. 6-25, separate opinion of Judge Cançado Trindade.

declaration that the Respondent has failed to comply with the Court's Orders indicating provisional measures.²⁵⁶⁸

- 15.52 Rather than being distinct and autonomous, the obligations created by provisional measures orders are closely linked to the obligations and rights at issue in the main judicial proceedings. It is for that reason that, as the Court noted, “[t]he judgment on the merits is the appropriate place for the Court to assess compliance with the provisional measures.”²⁵⁶⁹
- 15.53 The Gambia itself refers to the Court's recent judgment of 31 January 2024 in the case between Ukraine and the Russian Federation, where the Court recalled that a breach of an obligation created by a provisional measures order involved “an obligation to make reparation *in an adequate form*”.²⁵⁷⁰
- 15.54 The Gambia does not explain why full reparation by restitution or compensation would be the adequate forms of satisfaction for any violation of provisional measures in the present case when The Gambia as a non-injured State is limited – as demonstrated above – to declaratory relief with regard to any violation of the underlying rights to be protected by the Provisional Measures Order.
- 15.55 As the Court held in its judgment of 31 January 2024, a declaration that the order indicating provisional measures has been breached “provides adequate satisfaction”.²⁵⁷¹ This is in line with the Court's standing jurisprudence on the matter and there is no reason to depart from it in the present case.

²⁵⁶⁸ *Bosnia Genocide case*, p. 236, para. 469 (emphasis added).

²⁵⁶⁹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports 2015*, p. 713, para. 126.

²⁵⁷⁰ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 31 January 2024, para. 401 (italics added); referring to *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21.

²⁵⁷¹ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 31 January 2024, para. 401.

PART SIX

CHAPTER 16

CONCLUSIONS

- 16.1 In accordance with Practice Direction II, the following short summary is provided of the reasoning of Myanmar. Myanmar relies on all of the evidence and arguments set out in its Counter-Memorial and in this Rejoinder.
- 16.2 Myanmar conducted counter-terrorism operations in northern Rakhine State in 2016 and 2017 in response to multiple deadly terrorist attacks on the Myanmar Defence Services, on Border Guard Police posts, and on civilians by a terrorist group, the Arakan Rohingya Salvation Army (“**ARSA**”). The Gambia does not deny that it was the attacks by ARSA that triggered the commencement of the counter-terrorism operations. However, The Gambia quite falsely seeks to portray ARSA as a “small, poorly organised militia”.²⁵⁷²
- (1) By 2016, ARSA had evolved into a professional, well-organised and trained group, made up principally of Bengali Muslim villagers throughout northern Rakhine State who operated from cells within many villages and were supported by mobilised Bengali Muslim villagers from the local communities and led by clerics. ARSA came to wield considerable control and influence across northern Rakhine State. During the period when its attacks were being planned, ARSA was responsible for killing many Muslims in the region who worked for the government or were suspected of being informants or collaborators.
- (2) ARSA executed multiple simultaneous sustained deadly attacks on three Myanmar Border Guard Police posts in October 2016. There was a further escalation in November 2016. ARSA then proceeded to consolidate its authority in the area and undertook preparations for further attacks. It set up training camps and embarked upon a recruitment campaign. A third wave of attacks commenced in the early hours of 25 August 2017. These attacks by ARSA were

²⁵⁷² See CMM, Chapter 3, and this Rejoinder, Chapter 3 above.

“qualitatively different from anything in recent decades”, and “marked a major escalation of violence in Rakhine State”.²⁵⁷³

- (3) These ARSA attacks amounted to “*offensive* military operations” directed at “Maungdaw, Buthidaung and Rathedaung Townships”, as ARSA itself described them. The core objective of these attacks was to take control of Maungdaw township and parts of Buthidaung and Rathedaung townships, giving ARSA complete control of the Bangladesh border area. During the attacks, ARSA also targeted non-Muslim communities. ARSA acted with “sheer brutality”, and its terrorists “sowed fear among Hindus and other ethnic communities with these brutal attacks”.

16.3 Almost all of the counter-terrorism operations conducted by the Myanmar security forces occurred in the three days from 10-12 October 2016, the three days from 11-13 November 2016, and the seven days from 25-31 August 2017, that is to say, in the few days immediately following each of the three main ARSA attacks. During each period there were immediate responses to wide-spread and deadly threats posed to civilian communities and state security forces by thousands of armed ARSA terrorists and their mobilised supporters. The counter-terrorism operations directly and immediately targeted the danger posed. Force was used only for as long as was necessary to neutralize the threat from ARSA, seize weapons and restore security to the area.²⁵⁷⁴

16.4 At the time of and immediately following these events, hundreds of thousands of Bengalis crossed the border from northern Rakhine State into the neighbouring Cox’s Bazar District of Bangladesh, where most continue to live today in camps located very close to the Myanmar border. The vast majority went to Bangladesh after the August 2017 ARSA attacks.²⁵⁷⁵ Myanmar acted quickly, between November 2017 and January 2018, to enter into arrangements with Bangladesh for their return from Bangladesh to Myanmar. So far, no repatriations have taken place pursuant to these

²⁵⁷³ See CMM, para. 3.6(3), 3.29, 3.40, 9.95, 12.93, 13.101, quoting International Crisis Group, *Myanmar: A New Muslim Insurgency in Rakhine State*, Asia Report No. 283, 15 December 2016, pp. 1 and 6, CMM, Vol. VII, Annex 296.

²⁵⁷⁴ See generally CMM, Chapters 3, 8, 9 and 13; and this Rejoinder, Chapters 3, 8, 9 and 13 above.

²⁵⁷⁵ See CMM, footnote 12 and accompanying text.

arrangements, but this has not been due to any lack of willingness or preparedness on the part of Myanmar to begin repatriations.²⁵⁷⁶

- 16.5 ARSA is established in the camps in Bangladesh. ARSA has intimidated and killed Muslim community leaders in the camps who disagree with the views and aims of ARSA, which seeks to maintain control and influence over the Bengali population. ARSA has targeted those who support the repatriation process.²⁵⁷⁷ There is a pervasive climate of fear of ARSA amongst inhabitants of the camps, who dare not speak out against ARSA for fear of reprisals. This has systematically impacted on claimed eyewitness accounts given by those living in the camps.²⁵⁷⁸
- 16.6 The Court only has jurisdiction in this case to interpret and apply the Genocide Convention of 1948. It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide within the meaning of the Convention. The Court therefore also has no power to rule on alleged breaches of norms of genocide under customary international law or under the Statutes of international criminal courts or tribunals which are not necessarily identical to the provisions of the Convention. Nor does the Court have jurisdiction to determine whether any acts were contrary to any other norms of international law (such as international human rights law or international humanitarian law), or of municipal law.²⁵⁷⁹
- 16.7 When applying the 1948 Genocide Convention, the Court should not depart from its settled jurisprudence in the *Bosnia Genocide* case and the *Croatia Genocide* case. The rule of law demands consistency in the application of the law, especially in relation to matters as serious as the Genocide Convention.²⁵⁸⁰

²⁵⁷⁶ See CMM, paras. 1.17-1.18, 2.85-2.88, 2.94-2.106, 16.26-16.27; and see this Rejoinder, paragraphs 2.2(8), and 2.19-2.33 above.

²⁵⁷⁷ See paragraphs 2.30 and 3.121 above.

²⁵⁷⁸ See generally CMM, paras. 3.108-3.119, 3.120-3.145, 6.63-6.67, 8.54-8.62, 9.98, and 16.16; and see this Rejoinder, paragraphs 3.106-3.122, 6.34, 7.73, 7.110, and 10.42(7) above. See also CMM, paras. 3.39, and 3.43-3.50.

²⁵⁷⁹ CMM, paras. 1.22-1.32, and 4.1-4.9; and see paragraphs 4.3-4.19 above.

²⁵⁸⁰ CMM, paras. 1.23-1.24, and 4.10-4.11; and see paragraphs 4.2, 4.3(4), and 4.19 above.

- 16.8 For acts to be genocide within the meaning of the Convention, three requirements must be met: (1) the victims must be members of a particular “national”, “ethnic”, “racial” or “religious” group within the meaning of Article II of the Convention (a “**protected group**”); (2) the actor(s) must act with “intent to destroy, in whole or in part”, the protected group as such (the *dolus specialis* of genocide); and (3) the acts must be of a kind falling within sub-paragraphs (a) to (e) of Article II of the Convention (the *actus reus* of genocide).²⁵⁸¹
- 16.9 The burden of proof is on The Gambia, as the Applicant, to prove sufficient material facts to establish each of the elements of the claimed genocide, and each of the elements of the claimed international responsibility of Myanmar. It is not for Myanmar to establish the *absence* of facts constituting genocide, nor is Myanmar required to provide explanations of the facts alleged by The Gambia.²⁵⁸² If The Gambia does not place sufficient evidence before the Court to prove its allegations to the required standard of proof, its claim will fall to be rejected as unproved. In a case such as the present involving charges of exceptional gravity, The Gambia must meet a very high standard of proof, which is in effect the same as the “beyond reasonable doubt” standard of proof applied by international criminal courts and tribunals. Proof of facts by inference is only possible if a factual proposition is the *only* reasonable conclusion that can be inferred from the evidence. The fact that it may be difficult for The Gambia to obtain evidence cannot result in a lowering of the standard of proof.²⁵⁸³
- 16.10 The Gambia has not discharged its burden of proving the *dolus specialis* of genocide.
- 16.11 The scope of the Genocide Convention is limited to the physical or biological destruction of a protected group. It is not enough to prove that members of a protected group are targeted because they belong to that group. Nor is it enough to prove that there was an intent to stop the group from “functioning as a unit”, or an intent to destroy a group’s cultural identity, or an intent to forcibly displace a group from a particular territory, or an intent to inflict damage on the group. There must be an intent to destroy physically or biologically *the protected group as such*. For an intent to

²⁵⁸¹ CMM, paras. 4.12-4.18.

²⁵⁸² CMM, paras. 5.1-5.10; and see this Rejoinder, paragraphs 5.1-5.20 above.

²⁵⁸³ CMM, paras. 4.16, 4.30-4.47, and 5.11-5.18; and see this Rejoinder, paragraphs 4.31-4.57, and 5.21-5.40 above.

destroy a group “in part”, there must be an *identifiable* part of the group that the perpetrators intend physically or biologically to destroy, as such. An intent to target even a very large number of isolated members of the group does not amount to an intent to target a “part” of a group, as such. It must be proved that the physical or biological destruction of *the identified part of the group as such* was intended.²⁵⁸⁴

- 16.12 Contrary to what The Gambia argues, the fact that the Government of Myanmar does not officially recognise the name “Rohingya”, and refers to the Bengali-speaking population in northern Rakhine State as “Bengalis”, does not mean that the Government of Myanmar is denying the rights of that population, and certainly does not mean that it has a genocidal intent towards that population.²⁵⁸⁵ The majority of the Bengali population in northern Rakhine State is the result of migrations into that region from Bengal during the British colonial period (1826-1948), and from irregular immigration into Burma/Myanmar from East Pakistan/Bangladesh since independence. The members of this population speak a Chittagonian dialect of Bengali. There is no evidence that members of this population historically considered themselves to be a single group. During the British colonial period, different parts of this population were referred to by the colonial authorities variously as “Arakan Mahomedans”, “Bengali-Mahomedans” and “Chittagonian-Mahomedans”. Use of the term “Bengali” to describe this population can be found in international publications into the 21st century, including in some United Nations documents. From the late 1940s, the name “Rohingya” began to be used by certain individuals and organisations who promoted the creation of a shared identity for Muslims in the region. The name has been described as a “political label seeking to associate a number of Muslim communities rather than an established ethnic identification”.²⁵⁸⁶ Although the use of that name has since grown, there is evidence that a majority of the Bengali-speaking population in northern Rakhine State do not self-identify by that name. Contrary to

²⁵⁸⁴ See generally CMM, paras. 4.19-4.29, and 4.47; and see this Rejoinder, paragraphs 4.20-4.30 above.

²⁵⁸⁵ CMM, Chapter 2, and see this Rejoinder, Chapter 2 and paragraphs 10.3-10.13 above.

²⁵⁸⁶ CMM, para. 2.160 (Derek Tonkin, former British diplomat). See also CMM, paras. 2.159 (Myanmar-Institute of Strategic and International Studies), 2.161 (International Crisis Group), and 13.6-13.7.

what The Gambia claims, it is not the case that there has for centuries been a people who have self-identified as “Rohingya” and a language known as “Rohingya”.²⁵⁸⁷

16.13 Rakhine State is not the only part of Myanmar that has experienced internal insurgency and communal violence. Since its independence in 1948, Myanmar has more or less continuously experienced internal insurgencies involving various ethnically based insurgent groups in different parts of the country. In various different regions of Myanmar, these conflicts have led to parts of the population moving across the border into neighbouring countries including China and Thailand, in addition to Bangladesh, and have also led to significant numbers of internally displaced persons (“IDPs”) being accommodated in IDP camps in Myanmar. In Rakhine State itself, there was an insurgency even from the time of Myanmar’s independence. Twice before, in 1978 and in 1991-1992, very large numbers of Bengalis went from northern Rakhine State to Bangladesh, and were then subsequently repatriated pursuant to agreements between Myanmar and Bangladesh. Also, in 2012, there was sectarian violence between Buddhist and Muslim communities in Rakhine State, as a result of which some 125,000 Bengalis are still living in IDP camps in Rakhine State.²⁵⁸⁸ The fact that Myanmar entered into arrangements for the repatriation of those who went to Bangladesh in 1978 and in 1991-1992, and is willing and prepared to accept repatriation of those currently in Bangladesh, is inconsistent with the alleged intention to remove this population from Myanmar. Furthermore, an intent to remove this population from Myanmar, even if it could be proved (*quod non*), would in any event not of itself be a genocidal intent.²⁵⁸⁹

16.14 As to the events of 2016-2017, although there are hundreds of Bengali villages in northern Rakhine State, the evidence relied on by The Gambia in its Memorial in fact only alleges acts of violence by the Myanmar Defence Services during the counter-terrorism operations of 2016 and 2017 in 43 locations, and most of this evidence relates to the three main locations of Min Gyi, Chut Pyin and Maung Nu. While the loss of life is alleged to be relatively large in these three main locations, in relation to

²⁵⁸⁷ See generally CMM, Chapter 2, and this Rejoinder, Chapter 2 above.

²⁵⁸⁸ See CMM, para. 10.187; Ninth Provisional Measures Report, para. 62.

²⁵⁸⁹ CMM, paras. 1.46(12), 2.6-2.8, 2.47-2.50, 2.59-2.65, 2.70-2.74, 10.56-10.73, and 16.26-16.28; and see this Rejoinder, paragraphs 2.2(7) and 10.29-10.34 above.

some of the other locations, the evidence does not even *allege* anything more than a single incident involving a single victim, or a very small number of victims, and often not involving even a single fatality. In relation to these locations, the evidence of the alleged mistreatment is so weak and lacking in evidential weight that it clearly is incapable of proving that the alleged mistreatment occurred. In relation to the remaining *hundreds* of Bengali villages across northern Rakhine State, The Gambia presents no evidence whatsoever of mistreatment by members of the Myanmar Defence Services of any member of the civilian population. The evidence therefore does not support, and indeed, positively contradicts, The Gambia's claim that during the counter-terrorism operations of 2016 and 2017, there was a "consistent pattern of conduct" involving the commission of killing, bodily harm, and sexual violence against innocent members of the civilian population on a massive scale in large numbers of locations across northern Rakhine State.²⁵⁹⁰

- 16.15 Furthermore, there is no suggestion that the approximately 117,000 Bengali Muslims living in IDP camps in Rakhine State²⁵⁹¹ came to any harm during the counter-terrorism operations in 2016 and 2017, and it has not been disputed that hundreds of thousands of Bengali Muslims continue to live in villages and towns in northern Rakhine State to this day. Hundreds of thousands of others were able to go from northern Rakhine State to Cox's Bazar District in Bangladesh, and there is evidence that they were unharmed by soldiers and police who they encountered on the way. The Gambia does not seek to quantify the number of casualties who are said to have been civilians *not* participating in ARSA's activities, and who are said to have been deliberately targeted by the Myanmar security forces, as opposed to being collateral casualties of the fighting between the Myanmar security forces and ARSA, or casualties of conduct of ARSA. Even taking the material relied upon by The Gambia at its highest, The Gambia does not establish that the total number of deaths was more than a miniscule percentage of the total Bengali Muslim population in northern Rakhine State. It is obvious that the Myanmar security forces could have inflicted far

²⁵⁹⁰ See generally CMM, Chapters 8 and 9, and this Rejoinder, Chapters 8 and 9 above.

²⁵⁹¹ This was the approximate figure in 2016 and 2017. The figure today is approximately 125,000 (see paragraph 16.13 above). The increase could be due to births in the IDP camps.

higher casualties, if their intention had been physically to destroy the Bengali Muslim population as such.²⁵⁹²

- 16.16 The Gambia has presented no direct proof of a plan or an intention physically or biologically to destroy the Bengali Muslim population of northern Rakhine State, as such. The Court has held that in the absence of direct proof, “there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership to a particular group, but also to destroy the group itself in whole or in part”.²⁵⁹³ The Gambia has not provided such evidence,²⁵⁹⁴ and has accordingly not proved the existence of a genocidal intent. The circumstances are not such as to enable an inference of genocidal intent to be drawn, much less such as to make the existence of a genocidal intent the only reasonable inference that can be drawn.
- 16.17 The counter-terrorism operations were a legitimate response to terrorist attacks by ARSA. Their objective was to respond to those terrorist attacks. The operations took place during limited times and in limited places, which correspond to times and places of the ARSA attacks and activity. Measures taken prior to the ARSA attacks (such as removal of fences, confiscation of potential weapons, imposition of curfews) were based on a legitimate security rationale, and were proportionate in nature. The Gambia fails to prove, to the requisite high standard, that a high number of civilians were harmed or that a single instance of serious sexual violence was committed. Indeed, it is clear that opportunities to destroy a substantial part of the Bengali population were systematically *not* taken. Arrests of those reasonably suspected of participation in, and/or support for, ARSA’s terrorist attacks had a legitimate purpose. The Gambia does not establish that villages suffered fire damage to the extent alleged, or that the Myanmar Defence Services were responsible for all fire damage, or that all fire damage was deliberate, or that all fire damage occurred *during* the counter-terrorism operations when villages were inhabited, or that fire damage only affected Bengalis. The Gambia does not prove that Myanmar “recruited and trained auxiliary forces”, or that Myanmar “armed and trained militias from ethnic Rakhine groups”, or that

²⁵⁹² CMM, paras. 16.24-16.25.

²⁵⁹³ *Croatia Genocide* case, pp. 64, para. 139.

²⁵⁹⁴ CMM, para. 16.32.

Myanmar denied humanitarian assistance to the Bengalis as part of a process to “render the Rohingya defenceless”.²⁵⁹⁵ It is denied that there was an attack against the Bengali population, as such.

16.18 The Gambia has also not discharged its burden of proving the *actus reus* of genocide.

16.19 Sub-paragraphs (a) to (d) of Article II of the Convention²⁵⁹⁶ each include only acts which are such as to contribute to the physical or biological destruction of *the group as such*, or are capable of bringing about its physical destruction in whole or in part. Thus, killings or inflictions of bodily harm that are not part of a campaign committed on a scale that is capable of bringing about the physical destruction of the relevant group (or part of the group) do not fall within Article II (a) or (b). Nor do legitimate killings or bodily harm caused to insurgents or terrorists in battle in an armed conflict or in a law enforcement operation, or to collateral civilian casualties caused by such operations, if they are exclusively directed at legitimate targets, and the civilian casualties are not caused deliberately. Rape and other acts of sexual violence, and forcible transfer of members of a group, are capable of falling within Article II (b) only if the resulting serious bodily and mental harm is such as to contribute to the physical or biological destruction of the protected group. Conditions of life will fall within Article II (c) only if inflicted on the *group*, and only if they are capable of bringing about its physical destruction in whole or in part, and only if they are deliberately inflicted for that purpose. To fall within Article II (d), measures to prevent births must likewise be inflicted on the *group*, and must be on such a scale as to be “capable of bringing about its physical destruction in whole or in part”. This requirement will not be satisfied if the acts or measures in question do not result in a lowering of the birth rate to such an extent that the population of the protected group will decline at a rate that threatens the very existence of the group.²⁵⁹⁷

16.20 The Gambia has not proved that during the counter-terrorism operations of 2016 and 2017, any killings, bodily harm, rape or other sexual assault, or other harm, occurred on a scale as to have amounted also to inflicting those acts *on the group*, or as to be

²⁵⁹⁵ See generally CMM, Chapters 8, 9, and Section D of Chapter 13; and this Rejoinder, Sections B and C of Chapter 3, Chapters 8, 9, and Section D of Chapter 13 above.

²⁵⁹⁶ The Gambia makes no allegation of any acts falling within Article II (e) of the Convention.

²⁵⁹⁷ See generally CMM, paras. 4.48-4.78, and this Rejoinder, paragraphs 4.58-4.102 above.

capable of bringing about its physical destruction in whole or in part. Nor does The Gambia prove that any acts during the counter-terrorism operations otherwise satisfied the definitions of Article II (a), (b), (c) or (d) of the Convention.²⁵⁹⁸

- 16.21 The Gambia has also not discharged its burden of proving that Bengalis (or Bengali Muslims) in northern Rakhine State are a protected group for purposes of the Convention.
- 16.22 The Gambia does not put its case on the basis that the “Rohingya” are a “part” of a protected group that includes others in the region, such as those in the Chittagong Division of Bangladesh. Nor does The Gambia put its case on the basis that the “Rohingya” are a number of different protected groups. Accordingly, The Gambia will fail to establish an essential element of its case unless it proves, in accordance with the applicable high standard of proof, that the set of people that it refers to as “Rohingya” is a protected group *in its own right*. The Gambia fails to do so.²⁵⁹⁹
- 16.23 In evaluating the evidence relied on by The Gambia, the Court should apply the principles established in its existing case law.²⁶⁰⁰ No evidential weight, or in some cases only very little evidential weight, can be given to any of the material relied on by The Gambia, which is of too low a quality to be capable of discharging the very high standard of proof that The Gambia is required to meet.²⁶⁰¹ There is a clear distinction between the evidence relied on by The Gambia in this case, and the findings in judgments of the ICTY that were relied on by the Court in the *Bosnia Genocide* case and the *Croatia Genocide* case. The findings of the ICTY were judicial findings by professional judges of an international tribunal established by the Security Council of the United Nations. The findings of the ICTY were based on evidence that had been subject to rigorous courtroom testing. In contrast, the evidence in the present

²⁵⁹⁸ See generally CMM, Chapters 8, 9, and Section C of Chapter 13; and this Rejoinder, Chapters 8, 9 and Section C of Chapter 13 above.

²⁵⁹⁹ See generally CMM, Sections D and F of Chapter 2, and Section B of Chapter 13; and this Rejoinder, Sections B, C and D of Chapter 2 and Section B of Chapter 13 above.

²⁶⁰⁰ These principles are set out in CMM, paras. 5.19-5.70, and this Rejoinder, paras. 5.41-5.88 above.

²⁶⁰¹ See generally CMM, Chapters 6 and 7; and this Rejoinder, Chapters 6 and 7, and paragraphs 12.52-12.62, above.

case consists solely of untested allegations, much of which are anonymous and/or hearsay allegations.

- (1) The Gambia does not deny that the evidential centre-piece of its case, on which it places overwhelming reliance, consists of the reports of the United Nations International Fact-finding Mission on Myanmar (the “FFM”), and in particular, the 2018 FFM Detailed Findings.²⁶⁰² The Gambia also relies on various reports of United Nations bodies and officials, NGOs and other bodies. No evidential weight can be given to these reports. They contain merely the opinions of their authors, based on second-hand (or possibly third- or fourth-hand) descriptions of what (almost entirely anonymous) interviewees are said to have said. The original evidence on which those reports are said to have been based is not available to the parties in these proceedings or the Court, and its quality cannot be evaluated or checked. The authors of these reports did not have personal first-hand knowledge of the events. These reports are not witness statements, and cannot be given the same evidential weight as a witness statement, but even if they were witness statements, they would be given no evidential weight, since they merely express opinions and conclusions of their authors based on what the authors were told by others who they interviewed (such that this information is hearsay or multiple hearsay), or based on what is stated in other documents that the authors considered (such that the information is merely secondary, tertiary or quaternary evidence of what is stated in the original source). Evidence indicates that NGOs and other organisations who interviewed people living in the camps in Bangladesh conducted only cursory (or even “chaotic”) interviews, and did not record information carefully. There is nothing to indicate that the FFM was any better in this respect than other organisations. The Court cannot find a fact to be established merely because the authors of a report reached that conclusion based on evidence that the Court has not seen. Reports of this kind are not designed to be used as evidence in judicial proceedings. These reports applied a much lower standard of proof than that applicable in this case, and

²⁶⁰² UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/CRP.2, 17 September 2018 (“**2018 FFM Detailed Findings**”), various extracts of which are found at MG, Vol. III, Annex 49; CMM, Vol. VI, Annex 239; RG, Vol. II, Annex 1.

they are therefore certainly not usable in proceedings where the very high standard of proof applies in the way in which The Gambia seeks to use them.²⁶⁰³

- (2) The Gambia also relies on various witness statements and written summaries of witness accounts that The Gambia has been given by Legal Action Worldwide (LAW), Fortify Rights, the Government of Bangladesh, the International State Crimes Initiative at Queen Mary University of London, and the IIMM. The Gambia appears to have little or no knowledge of this material other than what is stated in the material itself. This material is for the most part not of the quality that would be expected of witness statements for use in judicial proceedings. Furthermore, these witness statements and summaries of witness accounts are virtually entirely anonymous, and the identities of the persons giving them are unknown even to The Gambia. No evidential weight can be given to anonymous witness statements, the contents of which cannot be tested, verified or checked in any way. It is often unclear whether events recounted in such documents are first-hand observations or hearsay accounts of information obtained from others. Quite apart from anything else, no weight can be given to anonymous witness statements, and the witness statements furthermore have not been tested by cross-examination. Such evidence is diametrically different to the findings of the ICTY relied on by the Court in the *Bosnia Genocide* case and *Croatia Genocide* case: those findings of the ICTY were based on the evidence of witnesses who had been cross-examined, and the transcripts of their witness testimony under cross-examination were available alongside the findings of the professional judges based on their testimony and other evidence following lengthy and detailed trials and appellate processes.
- (3) Given the pervasive anonymity, it is impossible to know to what extent persons giving different anonymous witness statements, and anonymous persons interviewed by the organisations whose reports are relied on by The Gambia, were in fact the same persons. Given the frequent hearsay, it is impossible to know to what extent different anonymous witnesses may in fact be describing the same events. It is now known that many people were interviewed multiple times by different organisations, and some have admitted in later statements that

²⁶⁰³ CMM, paras. 16.13, and 16.18-16.20.

things they said in earlier statements were wrong, or even deliberately fabricated. Given the pervasive anonymity, it is impossible to identify and compare the different statements given by the same person.

- (4) Most of the people giving witness statements, and most of the people interviewed by the organisations whose reports are relied on by The Gambia, were living in camps in Bangladesh at the time of interview. There is clear evidence that those living in camps in Bangladesh are afraid of ARSA, and that due to their fear of or loyalty to ARSA, they cannot be relied on to give objective accounts of events that conflict with ARSA's narrative. It is an extraordinary feature of the evidence in this case that within the many hundreds of witness accounts there is systematic silence over ARSA and what really took place during the clearance operations. Such pervasive silence must have been deliberate, and whether it was out of fear of or loyalty to ARSA, it renders the accounts of such witnesses unreliable and uncreditworthy, and also prevents the court from properly assessing the facts and circumstances of the case.
- (5) The documents that have been purportedly "filed under seal" by The Gambia should be excluded from the case file and should not be considered by the Court.²⁶⁰⁴
- (6) Books, academic articles, media articles and similar material cannot be considered primary evidence.²⁶⁰⁵ Nor can resolutions of political organs of international organizations.²⁶⁰⁶
- (7) The Court does not conduct trial by media. Nor does it conduct trial by NGO reports, or trial by reports of UN bodies. The Court cannot find a fact to be established, merely because the media, or one or more NGOs, or one or more UN bodies, has expressed the opinion that the fact has been established. The Court can only consider *evidence of facts*, and the Court must then reach its own view on whether that fact has been established. Even in the generality of cases before the Court not involving the Genocide Convention, material of the kind

²⁶⁰⁴ CMM, paras. 16.14-16.16.

²⁶⁰⁵ CMM, paras. 16.17.

²⁶⁰⁶ See paragraph 7.115 above.

relied on by The Gambia would not be capable of discharging an applicant's burden of proof. Certainly, in a case involving the Genocide Convention, where a very high standard of proof applies, the burden of proof cannot be discharged by relying on published reports of UN bodies and NGOs, and books and media articles, as evidence of facts that were not within the personal knowledge of the authors of those documents.²⁶⁰⁷

- (8) In presenting its claim and its evidence, The Gambia has not exercised the due care expected of an Applicant in a case involving grave allegations against the Respondent.

16.24 The Gambia's case is not advanced by its allegations that in the decades preceding the counter-terrorism operations in 2016 and 2017, the authorities in Myanmar subjected the Bengali population in northern Rakhine State to various discriminatory laws and policies.²⁶⁰⁸ The Gambia's allegations in this respect contain factual inaccuracies. In any event, the matters referred to by The Gambia do not provide evidence of the existence of a genocidal intent (let alone proof of a genocidal intent). Furthermore, to the extent that The Gambia is permitted to so argue,²⁶⁰⁹ The Gambia does not establish that these matters are themselves acts falling within sub-paragraphs (a) to (d) of Article II of the Genocide Convention.

16.25 The Gambia's case is also not advanced by its allegations that in the decades preceding the counter-terrorism operations in 2016 and 2017, there was an officially "sponsored" or officially "supported" campaign of hate speech.²⁶¹⁰ The Gambia appears to acknowledge that it would be of no assistance to its case to prove merely that hate speech has existed within the general population in Myanmar, since Myanmar would not be internationally responsible for this, and hate speech expressed by members of the general public would say nothing about the intent of the Government or of the Myanmar Defence Services. The few specific examples given by The Gambia of alleged hate speech by members or officials of the Government and the Myanmar

²⁶⁰⁷ CMM, paras. 7.231, 16.21.

²⁶⁰⁸ CMM, Chapter 10, and this Rejoinder, Chapter 10 above.

²⁶⁰⁹ See paragraph 1.12 above.

²⁶¹⁰ CMM, Chapter 11, and this Rejoinder, Chapter 11 above.

Defence Services, upon examination, cannot even be characterised as hate speech, let alone as a co-ordinated or orchestrated *campaign* conducted by the Government or the Myanmar Defence Services. The Memorial of The Gambia claims additionally that Myanmar was responsible for hate speech by Buddhist monks, but the Reply of The Gambia now appears to accept that Myanmar is not responsible for statements by religious figures except to the extent that such statements by religious figures are disseminated by the Government or the military itself. The Memorial of The Gambia also alleges hate speech by military officers and other ranks involved in the counter-terrorism operations of 2016 and 2017, but The Gambia does not suggest that they were themselves conducting a “campaign of hate speech”, and does not show that any violence was *caused* by prior hate speech allegedly conducted by the Government and/or military prior to the operations.²⁶¹¹ The Reply of The Gambia now also relies on a report prepared by the IIMM. However, this report adopts its own definition of “hate speech” that is so broad that this would include as “hate speech” a mere denial that crimes were committed during the counter-terrorism operations, or a mere failure to refer to Bengalis in northern Rakhine State as “Rohingya”. Even applying this very broad definition, the report found that only about one percent of the items posted on the 43 Facebook pages it examined fell within the IIMM’s own exceptionally broad definition of “hate speech”. The ten examples given in the Reply of The Gambia (presumably the ten most egregious) are not comparable to the kinds of statements that the ICTR found to constitute incitement to commit genocide. The Gambia has not proved that any statements for which the Government or Myanmar Defence Services were responsible amounted to incitement to commit genocide, or are evidence of a genocidal intent.

- 16.26 The Gambia’s case is furthermore not advanced by its allegations that Myanmar has failed to investigate or prosecute persons “for crimes against the Rohingya”, has conducted “sham trials”, and has destroyed evidence.²⁶¹² These allegations are of no

²⁶¹¹ This seems to be implied by the heading above MG, para. 7.65, “Influence and Effects of Myanmar’s Official and Officially-Sponsored Hate Speech”.

²⁶¹² CMM, Chapter 12, and this Rejoinder, Chapter 12 above.

relevance to this case, unless and until The Gambia were first to prove, independently of these allegations, that genocide has in fact been committed, since:

- (1) it is accepted by both parties that there will be no breach of the duty to punish genocide unless it has first been established that genocide has in fact been committed; and
- (2) an alleged failure to investigate or prosecute “crimes against the Rohingya” generally is not evidence of a genocidal intent, since such a failure does not mean that the alleged crimes in question must have been genocide (as opposed to a crime other than genocide, or conduct that is not criminal at all), and any such failure is therefore not evidence that the perpetrators of the crime or those who failed to punish them must have had a genocidal intent.

16.27 As The Gambia has failed to discharge its burden of proving that genocide within the meaning of the Convention has been committed, its allegations concerning impunity and destruction of evidence therefore simply do not fall for consideration in these proceedings. Without prejudice to this position, The Gambia has in any event not established that Myanmar has failed to take appropriate action to investigate and prosecute crimes in accordance with the requirements of the Genocide Convention.

- (1) The Gambia bears the burden of proving any alleged breach of the duty to punish, to the same high standard of proof that applies to breaches of the Genocide Convention generally.²⁶¹³ The Gambia must prove a breach of the duty to punish *genocide within the meaning of the Genocide Convention*. There is no obligation under the Convention to punish “crimes committed against the Rohingya” more generally.²⁶¹⁴
- (2) The duty to punish under the Genocide Convention is a duty of conduct, not a duty of result. The mere fact that there have been few prosecutions does not mean that there has been a failure to punish. The question whether this obligation has been breached will depend on all of the circumstances of the particular case, including the capacity and resources of the Contracting Party in

²⁶¹³ See paragraphs 12.33-12.34 above.

²⁶¹⁴ See paragraphs 12.35-12.36 above.

question. In some cases, prosecutions may not occur because the authorities are unable to identify a suspect, or are unable to obtain sufficient evidence to meet the evidential threshold for a prosecution.²⁶¹⁵

- (3) The Court cannot be asked to find that the duty has been breached on grounds of a failure to prosecute specific named individuals, since it is not for the Court to make determinations of whether sufficient evidence exists to justify the prosecution of named individuals.²⁶¹⁶
- (4) The fact that crimes committed by members of the armed forces are dealt with by military courts and tribunals, rather than the civilian justice system, does not mean that there is a “system of impunity”.²⁶¹⁷ There is no legal obligation under the Genocide Convention to cooperate with or grant access to the Special rapporteur or the FFM, and no requirement that investigations and prosecutions be “internationally transparent”.²⁶¹⁸
- (5) The Gambia has not established that authorities in Myanmar have destroyed evidence.
- (6) In Myanmar, the authorities responsible for the investigation and prosecution of crimes are the Myanmar Police Force and the Prosecution Department of the Union Attorney General’s Office (in the case of crimes committed by civilians), and the military justice system (in the case of crimes committed by members of the Myanmar Defence Services). The fact that other bodies are set up for other purposes does not mean that they are “shams”.²⁶¹⁹

16.28 Because The Gambia has not proved that acts of genocide within the meaning of the Convention have been committed, there is no basis for any finding that Myanmar is

²⁶¹⁵ See section D of Chapter 12 above.

²⁶¹⁶ See paragraphs 12.39-12.42 above.

²⁶¹⁷ See section C of Chapter 12 above.

²⁶¹⁸ See section G of Chapter 12 above.

²⁶¹⁹ See section F of Chapter 12 above.

internationally responsible for breaches of any of its obligations under the Convention.²⁶²⁰

- (1) If no acts of genocide within the meaning of the Convention have been proved to have been committed, then Myanmar cannot be internationally responsible for the commission of any such acts (Article III (*a*) of the Convention).
- (2) If no acts of genocide within the meaning of the Convention have been proved to have been committed, then Myanmar cannot be internationally responsible for conspiracy to commit any such acts (Article III (*b*) of the Convention), or for direct and public incitement to such acts (Article III (*c*) of the Convention), or for complicity in such acts (Article III (*e*) of the Convention), because such responsibility can only arise if acts of genocide have in fact been committed. In any event, The Gambia has failed to prove any conspiracy to commit genocide, or any direct and public incitement to commit genocide, or any complicity in genocide.²⁶²¹
- (3) If no acts of genocide within the meaning of the Convention have been proved to have been committed, then no attempt to commit genocide (Article III (*d*) of the Convention) has been proved to have been committed, since acts amounting to an attempt to commit genocide must be proved to have been committed with a genocidal intent, and no genocidal intent has been proved. Furthermore, The Gambia has not proved that there was any attempt to commit any acts falling within any of the sub-paragraphs of Article II of the Convention.²⁶²²
- (4) If no acts of genocide within the meaning of the Convention have been proved to have been committed, then Myanmar cannot be internationally responsible for failing to prevent or punish such acts.²⁶²³
- (5) The Gambia has not established any breach of the obligation under Article V of the Genocide Convention to enact necessary legislation to give effect to the

²⁶²⁰ See CMM, paras. 4.79-4.117, and 14.5-14.36; and this Rejoinder, paras. 4.103-4.108, and section B of Chapter 14, above.

²⁶²¹ See section B(2), (3) and (5) of Chapter 14 above.

²⁶²² See section B(4) of Chapter 14 above.

²⁶²³ See section B(6) of Chapter 14 above.

provisions of the Convention. Article V of the Convention does not require Contracting Parties to enact into their municipal law the provisions of the Genocide Convention as such. A State can discharge its obligations under this provision of the Convention through reliance on its ordinary domestic criminal laws, such as those penalising murder, assault, and rape.

16.29 Solely for the sake of completeness, Myanmar adds the following.

- (1) Even if The Gambia could establish, and the Court were to find, that acts of genocide have been committed for which Myanmar bears international responsibility (*quod non*):
 - (a) no finding of any additional form of responsibility should be made by the Court;²⁶²⁴
 - (b) The Gambia has not established any breach of the duty to punish;²⁶²⁵
 - (c) The Gambia would not be entitled to the remedies that it claims.²⁶²⁶
- (2) If the Court were to find that genocide has been committed, but that the acts of genocide are *not* attributable to Myanmar (a hypothetical scenario raised in the Reply of The Gambia), The Gambia has not established that Myanmar bears any responsibility for such acts.²⁶²⁷

16.30 The Gambia has not established any breach of the Provisional Measures Order. The Gambia's written observations on Myanmar's Provisional Measures Reports do not form part of the pleadings in the case, and Myanmar is not called upon to respond to them in this Counter-Memorial as if they were pleadings.²⁶²⁸ In any event, The Gambia's written observations on Myanmar's Provisional Measures Reports do not establish any breach of the Provisional Measures Order.

²⁶²⁴ CMM, paras. 14.37-4.43, and this Rejoinder, paragraphs 4.35-4.38 above.

²⁶²⁵ CMM, Chapter 12, and this Rejoinder, Chapter 12 above.

²⁶²⁶ CMM, Chapter 15, and this Rejoinder, Chapter 15 above.

²⁶²⁷ See paragraphs 4.42-4.47 above.

²⁶²⁸ See paragraphs 14.64-14.68 above.

- 16.31 Because The Gambia has failed to establish any non-compliance by Myanmar with its obligations under the Genocide Convention, Myanmar requests the Court to find that the submissions of The Gambia relating to alleged violations of the Genocide Convention, and to alleged failure to implement the Provisional Measures Order, are to be rejected as lacking any basis in law or in fact. The question of remedies therefore does not arise.²⁶²⁹
- 16.32 Myanmar has not breached any obligations under the Genocide Convention or the Provisional Measures Order. Therefore, The Gambia is not entitled to the remedies that it claims.

²⁶²⁹ CMM, Section D of Chapter 14, and this Rejoinder, Section D of Chapter 14 above.

Locations mentioned in Chapters 3, 8, 9 & 13 of the Rejoinder regarding events in Buthidaung, Maungdaw and Rathedaung Townships in 2016-2017



This map is for illustrative purposes only and is not indicative of the precise locations of boundaries.

SUBMISSIONS

1. The Republic of the Union of Myanmar respectfully requests the International Court of Justice to adjudge and declare that:
 - (1) all requests in the submissions of the Republic of The Gambia relating to alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide are rejected as lacking any basis in law or in fact;
 - (2) all requests in the submissions of the Republic of The Gambia relating to an alleged failure to implement the Order indicating provisional measures issued by the Court on 23 January 2020 are rejected as lacking any basis in law or in fact; and
 - (3) all requests in the submissions of the Republic of The Gambia relating to remedies sought by the Republic of The Gambia are rejected as lacking any basis in law or in fact.
2. The Republic of the Union of Myanmar reserves the right to supplement or amend these submissions in the further proceedings.



H.E. U Ko Ko Hlaing

**Union Minister for Ministry 2 at Office of the Chairman of the
State Administration Council of the Republic of the Union of Myanmar**

Agent of Myanmar

CERTIFICATION OF ANNEXES

I hereby certify that the annexes filed with this Rejoinder are true copies of the original documents reproduced therein, and that where such a document is accompanied by a translation into English, that translation is accurate.



H.E. U Ko Ko Hlaing

**Union Minister for Ministry 2 at Office of the Chairman of the
State Administration Council of the Republic of the Union of Myanmar**

Agent of Myanmar

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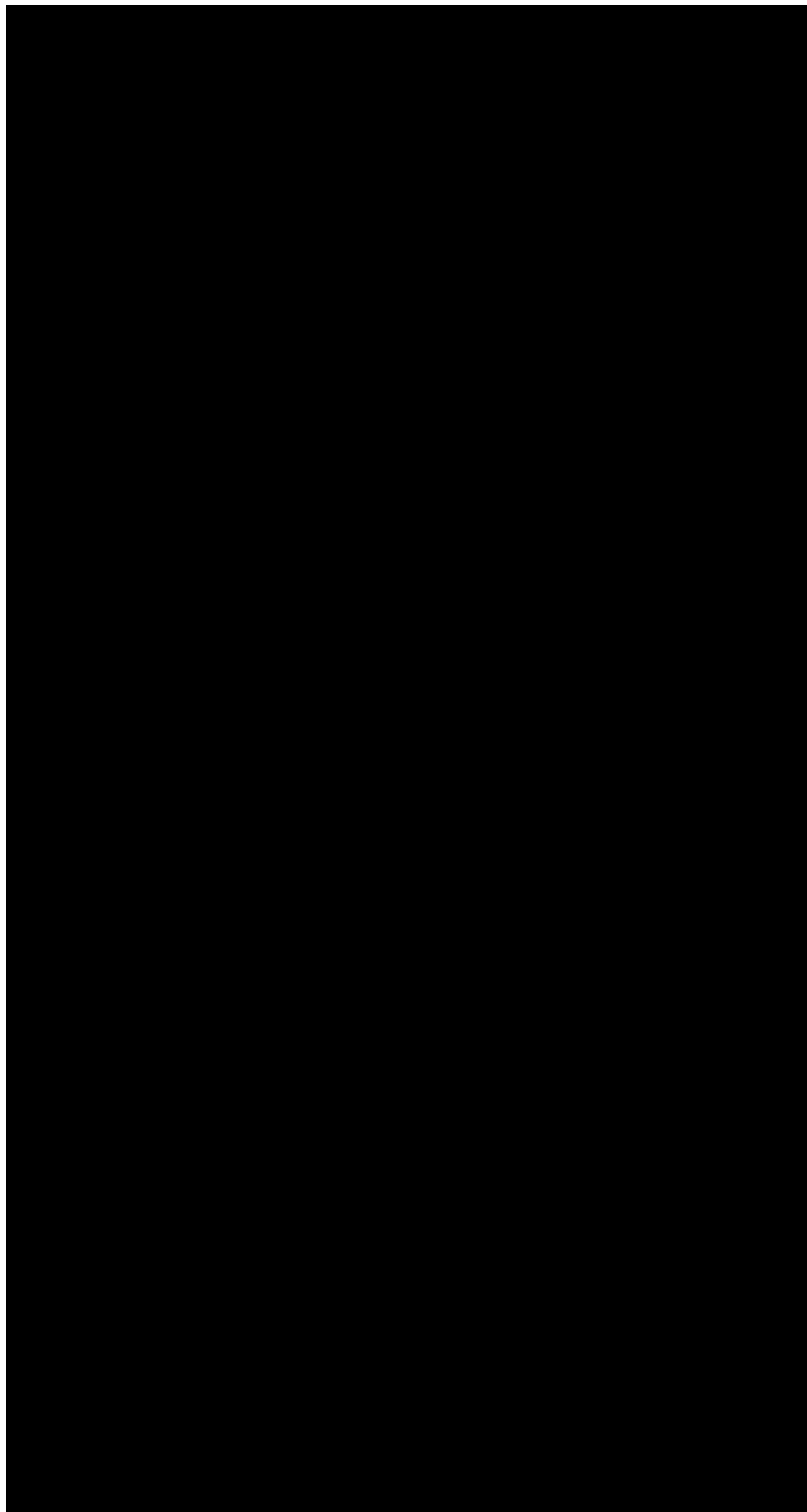
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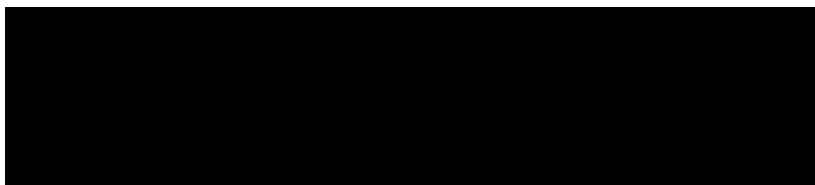
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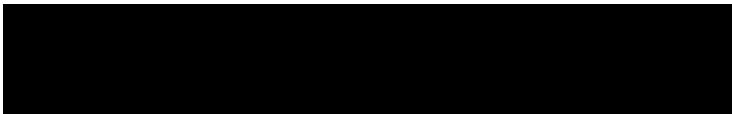
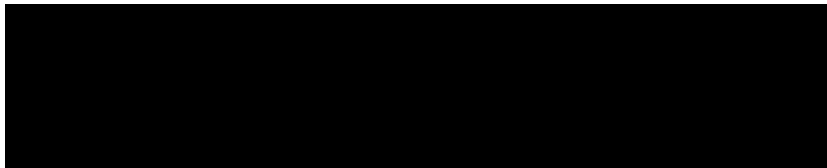
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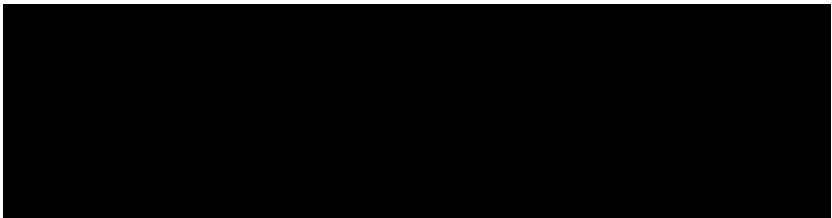
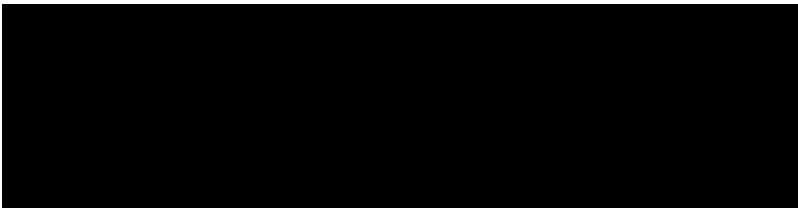
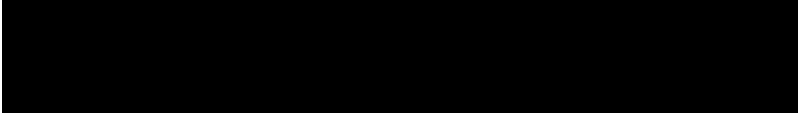
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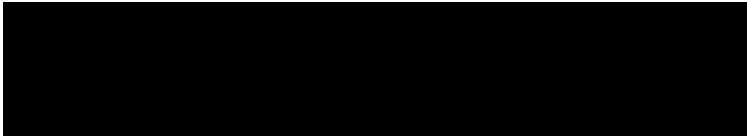
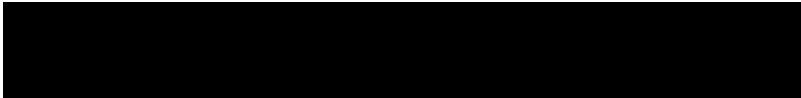
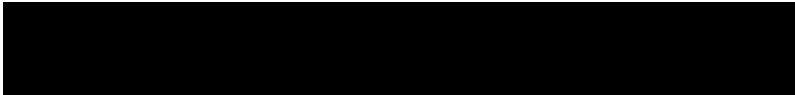
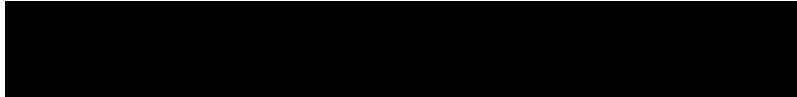
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