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International Court
of Justice

Cour internationale
de Justice

THE HAGUE

LA HAYE

YEAR 2026

Public sitting

held on Monday 12 January 2026, at 10 a.m., at the Peace Palace,

President Iwasawa presiding,

*in the case concerning Application of the Convention on the Prevention and Punishment
of the Crime of Genocide (The Gambia v. Myanmar: 11 States intervening)*

VERBATIM RECORD

ANNÉE 2026

Audience publique

tenue le lundi 12 janvier 2026, à 10 heures, au Palais de la Paix,

sous la présidence de M. Iwasawa, président,

*en l'affaire relative à l'Application de la convention pour la prévention et la répression
du crime de génocide (Gambie c. Myanmar ; 11 États intervenants)*

COMPTE RENDU

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

 Registrar Gautier

Présents : M. Iwasawa, président
M^{me} Sebutinde, vice-présidente
MM. Tomka
Abraham
Nolte
M^{me} Charlesworth
MM. Brant
Gómez Robledo
M^{me} Cleveland
MM. Aurescu
Tladi
Hmoud, juges
M^{me} Pillay
M. Kress, juges *ad hoc*

M. Gautier, greffier

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M^{me} Noor Begum,

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comme membres de la délégation.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today and will meet in the next three weeks to hear the oral arguments of the Parties on the merits in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 11 States intervening)*. I note initially that Judge Okowa has recused herself from the case under Article 17, paragraph 2, and Article 24, paragraph 1, of the Statute of the Court, and that Judge Bhandari is unable to participate in these proceedings for personal reasons. I also note that, for reasons duly made known to me, Judge Xue is unable to take her seat on the Bench today and for some time in the coming days.

Since the Court does not include upon the Bench a judge of the nationality of either of the Parties, both Parties have availed themselves of the right, under Article 31, paragraph 3, of the Statute, to choose a judge *ad hoc*. The Gambia chose Ms Navanethem Pillay, and Myanmar, Mr Claus Kress. They were duly installed as judges *ad hoc* on 10 December 2019, during the phase of the present case that was devoted to the Request for the indication of provisional measures submitted by The Gambia.

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I shall now recall the principal steps of the procedure in the present case.

On 11 November 2019, The Gambia filed in the Registry of the Court an Application instituting proceedings against Myanmar concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (to which I shall refer as the “Genocide Convention” or the “Convention”).

In its Application, The Gambia sought to base the jurisdiction of the Court on Article IX of the Genocide Convention, in conjunction with Article 36, paragraph 1, of the Statute of the Court.

The Application contained a Request for the indication of provisional measures. By an Order dated 23 January 2020, having heard the Parties, the Court indicated certain provisional measures addressed to Myanmar.

Time-limits were subsequently fixed, and then extended, for the first round of written pleadings. The Gambia filed its Memorial on 23 October 2020.

Myanmar, for its part, on 20 January 2021, raised certain preliminary objections to the jurisdiction of the Court and the admissibility of the Application. By a Judgment of 22 July 2022, the Court found that it had jurisdiction on the basis of Article IX of the Genocide Convention to entertain the Application filed by The Gambia, and that the said Application was admissible.

Myanmar filed its Counter-Memorial on 24 August 2023 within the new time-limit set for that purpose.

By an Order of 16 October 2023, the Court authorized the submission of a Reply by The Gambia and a Rejoinder by Myanmar. The Gambia filed its Reply on 23 May 2024, and Myanmar filed its Rejoinder on 30 December 2024.

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After the closure of the written proceedings, both Parties requested authorization to submit new documents pursuant to Article 56, paragraph 1, of the Rules of Court. On 8 September 2025, Myanmar sought the admission of three new documents. Taking into account the lack of objection by The Gambia, these documents were added to the case file.

For its part, The Gambia presented several requests to submit new documents. The Court authorized the production of some of these documents, which were added to the case file. Pursuant to Article 56, paragraph 3, of the Rules of Court, Myanmar commented in writing on the new documents admitted and submitted documents in support of its comments.

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I shall now say a few words about the proceedings related to the declarations of intervention in the case.

On 15 November 2023, the Maldives filed a Declaration of intervention in the case, with reference to Article 63 of the Statute of the Court. On the same date, a joint Declaration of intervention was filed, pursuant to the same provision, by Canada, the Kingdom of Denmark, the

French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland (to which I shall refer as the “Joint Declarants”).

By an Order of 3 July 2024, the Court decided that the Declarations of intervention submitted by the Maldives and the Joint Declarants were admissible in so far as they concerned the construction of provisions of the Genocide Convention.

On 28 February and 3 March 2025, the Maldives and the Joint Declarants, respectively, filed written observations on the subject-matter of their interventions pursuant to Article 86, paragraph 1, of the Rules of Court.

Declarations of intervention under Article 63 of the Statute of the Court were also filed by Slovenia on 29 November 2024, the Democratic Republic of the Congo (to which I shall refer as the “DRC”) on 10 December 2024, Belgium on 12 December 2024 and Ireland on 20 December 2024.

By an Order of 25 July 2025, the Court decided that the Declarations of intervention submitted by Slovenia, the DRC, Belgium and Ireland were admissible in so far as they concerned the construction of provisions of the Genocide Convention.

The DRC, Slovenia, Belgium and Ireland filed written observations on the subject-matter of their intervention under Article 86, paragraph 1, of the Rules of Court on 22, 23, 24 and 25 September 2025, respectively.

By letters dated 17 and 21 October 2025, the Parties and the intervening States were informed that the Court considered that it had been sufficiently informed of the positions of the intervening States on the subject-matter of their intervention by way of written observations, and that it did not deem it necessary for them to submit observations in the course of the oral proceedings, in accordance with Article 86, paragraph 2, of the Rules of Court.

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I shall now address the organization of the oral proceedings, in particular with respect to the presentation of the evidence.

By letters dated 17 July 2025, the Registrar informed the Parties of the date fixed by the Court for the opening of the hearings on the merits of the case and asked them to provide, by 8 September 2025, the names of any witnesses and experts they intended to call during the oral proceedings, as well as the other information required by Article 57 of the Rules of Court. The Parties communicated to the Registry, within the time-limit fixed, information concerning the witnesses and experts that they intended to call at the hearings. The Gambia indicated that it wished to call witnesses and an expert, whereas Myanmar stated that it intended to call only witnesses.

By letters dated 17 October 2025, the Registrar informed the Parties of decisions taken by the Court in relation to the hearing of the witnesses and the expert during the oral proceedings.

The Parties were, in particular, informed that the Court had decided that the Parties' witnesses and the expert to be called by The Gambia would be heard in the order requested by each Party. The Parties were required to submit, by 18 November 2025, a written affidavit for each of the individuals they intended to call as a witness at the hearings. The Gambia was also required to submit a written statement by the expert it intended to call to testify.

The Parties were also requested to provide, by the same deadline of 18 November 2025, unredacted copies of any previous statements or accounts given by the witnesses or expert called to testify during the oral proceedings which had been annexed to their pleadings in redacted form. The letters underscored that the unredacted versions of the affidavits, written statement of the expert and prior statements or accounts provided by each Party would be communicated to the judges and the other Party, but would be treated as confidential and would not be made available to the public.

By letters dated 13 November 2025, the Deputy-Registrar informed the Parties of further decisions taken by the Court concerning the procedure for examining the witnesses and the expert called by them.

The Parties were thus advised that, after making the solemn declaration provided for in Article 64 (a) of the Rules of Court, each witness would be asked to confirm his or her written affidavit and, if applicable, any prior written statements or accounts annexed to the written pleadings, subject to any correction the witness may wish to make. The calling Party would then proceed to its direct examination, which would take the form of replies by the relevant witness to questions put to him or her by counsel. This would be followed by cross-examination of the witness by the other

Party, which would be confined in scope to written and oral statements already made as part of the witness' evidence-in-chief. A re-examination by the calling Party would then be possible, limited to matters having arisen as part of the cross-examination.

The expert called by The Gambia would be asked, after making the appropriate declaration in accordance with Article 64 (b) of the Rules of Court, to endorse his written statement, as well as his earlier reports annexed to The Gambia's written pleadings, subject to any correction the expert may wish to make. The written statement and reports would constitute the expert's evidence-in-chief and serve in lieu of his direct examination at the hearings. This would be followed by cross-examination of the expert by Myanmar, which would be confined in scope to statements already made by him as part of his written statement or reports, and re-examination by The Gambia, which would in turn be confined to matters arising as part of the cross-examination.

Following re-examination, questions could be put to the relevant witness or expert by the President on behalf of the Court, or by individual judges. The witnesses and expert would respond orally and without delay to any question put by the Parties or by the judges, except in particular circumstances, for example when specific information was requested that needed to be verified.

In order to ensure the safety of the witnesses called by the Parties, the Court decided that they would be heard in closed sessions, with only judges, Registry staff, interpreters, technical personnel and members of the delegations on the official list provided by each Party to the Court being allowed in the courtroom during the *in camera* sessions. The Parties were also informed that the Court had agreed to the use of pseudonyms when addressing the witnesses called by the Parties or when referring to them at the hearings.

By a letter dated 18 November 2025, The Gambia provided written affidavits of its witnesses, as well as the written statement of its expert. By a letter of the same day, Myanmar informed the Court that it intended to call only one witness and reserved the right to call a different witness "if for any reason the former should be unavailable to testify". Myanmar also provided confidential written affidavits for both of these witnesses in the Myanmar language, accompanied by certified translations into English. It further indicated the pseudonyms that should be used for these two witnesses.

After ascertaining the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and documents annexed (in their redacted versions, as appropriate) would be made accessible to the public on the opening of the oral proceedings, except for certain annexes that would be kept confidential. In addition, with regard to written pleadings and documents annexed, which contain written statements and accounts given by the witnesses called by the Parties, as well as the redacted versions of the affidavits of witnesses and the verbatim records of their testimonies, it was decided that these materials would only be posted on the Court's website after the end of the oral proceedings. The Court also decided to make accessible to the public on the opening of the oral proceedings the reports submitted by Myanmar on the measures taken pursuant to subparagraph 4 of the operative clause of the Order on provisional measures of 23 January 2020 and The Gambia's comments on them. In this respect, the Court notes that the Parties were consulted on this matter and did not object to such publication. Further, after consulting the Parties and the intervening States, the Court decided to make accessible to the public on the opening of the oral proceedings the written observations of the Parties on the declarations of intervention pursuant to Article 83, paragraph 1, of the Rules of Court, the written observations of the States seeking to intervene and those of the Parties on the admissibility of the declarations of intervention in accordance with Article 84, paragraph 2, of the Rules of Court, as well as the written observations of the intervening States, referred to in Article 86, paragraph 1, of the Rules of Court, on the subject-matter of their intervention.

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I note the presence in the Court of the Agents and counsel of the two Parties. In accordance with the arrangements for the organization of the proceedings which have been decided by the Court, the hearings will comprise a first and second round of oral argument. The first round will begin today, with the oral pleadings of The Gambia, and will close on Tuesday 20 January 2026, following Myanmar's first round of pleadings. For the first round, each Party will have six sessions of three hours at its disposal. The second round of oral argument will begin on Monday 26 January and

conclude on Thursday 29 January. Each Party will have three sessions of three hours to present its reply.

In addition, the Court will hear witnesses and an expert between the two rounds of oral argument. The witnesses of The Gambia will be heard in three closed sessions on the morning and afternoon of Wednesday 21 January 2026, and on the morning of Thursday 22 January 2026. The expert called by The Gambia will be heard in open session on Thursday 22 January 2026 at 3 p.m. The witness called by Myanmar will be heard in closed session on the morning of Friday 23 January 2026.

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In this first sitting, The Gambia may, if required, avail itself of a short extension of time, in view of the time taken up by my introductory words.

I now give the floor to the Agent of The Gambia, His Excellency Mr Dawda Jallow. Sir, you have the floor.

Mr JALLOW:

I. OPENING REMARKS

1. Mr President, esteemed judges, it is an honour to address you today as the Agent of the Republic of The Gambia in our dispute with the Republic of the Union of Myanmar.

2. Six years ago, The Gambia filed its Application with this Court, seeking to hold Myanmar accountable for its violations of the Genocide Convention. In January 2020 you ordered provisional measures, and did so unanimously. We are now finally in the merits hearing, after which the Court will decide whether Myanmar is responsible for acts of genocide against the Rohingya group, as alleged by The Gambia.

3. As you will hear over the next three weeks, and in particular over the next four days, in deciding to bring this case, The Gambia acted on the basis of the most careful reflection and assessment of the facts. We did not bring this case lightly. We brought this case after reviewing credible reports of the most brutal and vicious violence imaginable inflicted upon a vulnerable group

that had been dehumanized and persecuted for many years. We received and carefully examined the meticulous reports of the United Nations Fact-Finding Mission, dispatched by the UN Human Rights Council. We also examined reports issued by reputable international human rights organizations which sounded the alarm on the genocide of the Rohingya unfolding in northern Rakhine State. Those credible reports, from diverse and independent sources, left no doubt in our minds that Myanmar had to be held accountable for its violations of the Genocide Convention.

4. And so we acted. The Genocide Convention is the first multilateral human rights treaty to have been adopted. But its words will be meaningless unless they are acted upon and enforced. It is up to the States parties to the Genocide Convention to invoke affirmatively its provisions in order to truly “liberate mankind from [the] odious scourge” that is the crime of genocide¹. That is why The Gambia invoked Article IX of the Convention and brought its dispute with Myanmar to this honourable Court.

5. The Gambia stands tall in the international community of States and takes pride in promoting and protecting human rights, including international accountability for genocide and other atrocity crimes. We do this out of a sense of responsibility, grounded in a history in which we too suffered under a military junta. Over two decades of brutal dictatorship have taught us that we must use our moral voice in condemnation of oppression, of crimes against individuals and of groups, wherever and whenever they occur. It also taught us that accountability is imperative, otherwise impunity will ensure that such crimes are repeated over and over. In present times these issues are more important than ever, and the Court’s role is more important than ever, as a bastion for the rule of law.

6. Sadly, Myanmar appears to be trapped in a cycle of atrocities and impunities. Nobody has been held responsible for the crimes against the Rohingya. Indeed, the military that perpetrated the genocide actually felt emboldened to overthrow the civilian authorities again. Myanmar’s original Agent in this case — the former State Counsellor Madam Aung San Suu Kyi — has been imprisoned by the military junta, deprived of her liberty, since she was swept from power by the same generals who continue to rule the country. And Senior General Min Aung Hlaing, who commanded the

¹ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 *UNTS* 277, preamble. Memorial of the Republic of The Gambia (23 October 2020) (hereinafter “MG”), Vol. II, Annex 1.

military during the genocide, now rules over Myanmar as the leader of the junta. Predictably, violence and atrocities have spread throughout the country, affecting Myanmar nationals of all ethnic groups.

7. Mr President, while The Gambia is the only Applicant State, we are not alone in this cause for justice and accountability. Indeed, as the General Assembly stated in 1946, genocide “shocks the conscience of mankind” and “results in great losses to humanity”², and this is because humanity — our shared humanity — is made of the various groups protected under the Convention. This is why we stand before you with the full backing and support of the 57-member Organisation of Islamic Cooperation. We also stand in solidarity with 11 intervening States, from across the world, who have urged the Court to interpret the Convention in a meaningful way, in the manner advanced by The Gambia. We stand too with the support of dozens of international human rights organizations and defenders whose investigations and reports have corroborated the findings of the UN Fact-Finding Mission and its successor, the International Investigative Mechanism for Myanmar.

8. And most importantly, we stand together, with and for the Rohingya survivors of Myanmar’s genocide. This group of Myanmar nationals has endured decades of appalling persecution, and years of dehumanizing propaganda. This culminated in the savage, genocidal “clearance operations” of 2016 and 2017, which were followed by continued genocidal policies meant to erase their existence in Myanmar. We are proud that, once again, The Gambia’s delegation includes several members of the Rohingya community, including those who have travelled from the refugee camps in Bangladesh to be with us at this hearing. I invite them to stand, so their presence may be acknowledged.

9. I turn to the case. It is not about esoteric issues of international law — it is about real people, real stories and a real group of human beings, the Rohingya of Myanmar. They have been targeted for destruction. They are farmers, labourers, teachers, mothers, fathers, sons, daughters, grandparents. They are ordinary folk. They have dreams and aspirations like all of us, and first and foremost is the most simple dream, to be able to live in peace in their homeland under conditions of

² UN General Assembly, 55th Plenary Meeting, *96 (I) The Crime of Genocide*, UN doc. A/RES/96 (I) (11 December 1946), preamble. MG, Vol. II, Annex 4.

dignity and security. Myanmar has denied them that dream. In fact, it turned their lives into a nightmare, subjecting them to the most horrific violence and destruction one could imagine.

10. Three of The Gambia's witnesses, who will testify in closed session next week, have had to endure that nightmare personally. They are first-hand eyewitnesses to the "clearance operations" that took place in three of the villages that were focused on by the UN Fact-Finding Mission, namely Min Gyi, also known as Tula Toli; Chut Pyin; and Maung Nu, also known as Monu Para. All three of them lost family members in the genocide. For their safety, we will only refer to their initials when we reference their written and oral testimony in these oral proceedings.

11. Mr President, Members of the Court, The Gambia has carefully examined this Court's jurisprudence and has fit its case within that legal framework. There were genocidal acts. And there was genocidal intent, during the "clearance operations" in 2016 and 2017, and subsequently. This is evident based on the particular circumstances in many villages, and on Myanmar's overall pattern of conduct. The Gambia believes that the evidence that has been submitted to you, and which you will hear described this week, admits of only one reasonable inference in regards to that pattern of conduct: that Myanmar acted with the intention to destroy the Rohingya as a group, in whole or in part.

12. The Gambia is proud to be represented by a diverse and talented team of international advocates who will present all aspects of The Gambia's case. Five of them — including two Gambian State Attorneys from my chambers — will be pleading before this Court for the first time.

13. After me, Professor Philippe Sands will introduce the legal context for this dispute. He will be followed by Mr Paul Reichler, who will provide an overview of The Gambia's case in the context of the Court's previous two genocide cases, that is *Bosnia v. Serbia* and *Croatia v. Serbia*. Mr Arsalan Suleman will then provide an overview of the relevant geography, demography and history of Rakhine State, and discuss why the Rohingya are a protected group under the Convention.

14. In the afternoon, Mr Reichler will return to discuss the quality and reliability of The Gambia's evidence in this case. Then, Ms Tafadzwa Pasipanodya will present the history of discriminatory laws and persecution of the Rohingya in Myanmar, which is one of the indicators of Myanmar's genocidal intent. Mr Suleman will return to discuss another of such indicators, Myanmar's years-long efforts to disseminate anti-Rohingya hate propaganda.

15. On Tuesday afternoon, Mr Andrew Loewenstein will provide an overview of Myanmar's anti-Rohingya "clearance operations" and discuss how their organized nature and execution constitute another indicator of Myanmar's genocidal intent. Our presentations will continue with four speakers who will provide detailed presentations on the clearance operations in specific locations. Ms Pasipanodya will discuss Myanmar's genocidal attacks in Min Gyi, or Tula Toli. Ms Diem Huong Ho will present on Myanmar's genocidal attacks in Chut Pyin. Ms Mariama Ngum will examine Myanmar's genocidal operations in Maung Nu, or Monu Para. And Mr Chalis Combeh Njai will describe Myanmar's genocidal attacks in other notable villages.

16. On Wednesday morning, Ms Ho will discuss how the extreme brutality of Myanmar's "clearance operations" evidences Myanmar's genocidal intent. Ms Pasipanodya will then focus on why the pervasive sexual violence during Myanmar's "clearance operations" indicates its genocidal intent. She will be followed by Mr Loewenstein, who will demonstrate that Myanmar's targeting of children is also an indicator of its genocidal intent. After that, Ms Yasmin Al Ameen will demonstrate that Myanmar's destruction of evidence is also an indicator of its genocidal intent. And Professor Pierre d'Argent will conclude the morning session with a presentation on Myanmar's pervasive impunity and how that also reveals its genocidal intent.

17. On Wednesday afternoon, Mr Suleman will show that Myanmar's argument that its "clearance operations" were ARSA counter-terrorism operations is not a defence to genocide because the evidence fully establishes that the manner in which these operations were organized and executed contradicts every tenet of counter-terrorism doctrine, including Myanmar's own. Mr Loewenstein will then demonstrate how the evidence described by the previous speakers demonstrates Myanmar's commission of the *actus reus* of genocide under Article II of the Convention. He will be followed by Professor Sands, who will highlight proof that Myanmar acted with the requisite *mens rea*, or *dolus specialis*, of genocide, and that its intent to destroy the Rohingya as a group, in whole or in part, is a manifestly reasonable inference to be drawn from that proof. Mr Reichler will conclude our presentation on Wednesday by showing that genocidal intent is the only reasonable inference that can be drawn from Myanmar's pattern of conduct across the "clearance operations" and, specifically, that the evidence demonstrates that it would be entirely unreasonable to infer that the intent of Myanmar's targeting, mass killing, maiming, raping of many thousands of unarmed and defenceless

Rohingya civilians — including pregnant women, children, the elderly and the infirm — as well as burning of their houses and razing of their villages, was to combat terrorism.

18. On Thursday, in our final session, Ms Jessica Jones will discuss other breaches of the Convention for which Myanmar is legally responsible. Mr Suleman will examine Myanmar's breaches of the Court's provisional measures Order of January 2020. Then Professor d'Argent will present the remedies requested by The Gambia. And finally, Professor Sands will conclude our opening presentations on Myanmar's commission of genocide, on the witnesses you will hear, and on the significance of this case.

19. The Gambia will present one additional witness, Professor Michael Newton, who will testify in open session next week. Professor Newton is a former military officer who specializes in the laws of war and counter-terrorism operations. His testimony will demonstrate that Myanmar's "clearance operations" cannot be reasonably explained by the intention to counter terrorism; rather, the only reasonable inference that can be drawn from its conduct is an intention to destroy the Rohingya group, as such.

20. Mr President, honourable judges, these oral hearings come at a time in which the fundamental principles of international law as enshrined in the United Nations Charter are under stress and threat, globally. Many have lost faith in the promise of international law. And many are looking at this case to see if the Genocide Convention is more than just words on paper.

21. We are confident that this Court, the principal judicial organ of the United Nations, will stand in the breach and uphold the rule of law which epitomizes our collective conscience. As the guardian of our moral and legal compass under the Genocide Convention, we come to you because this Court is the only hope for justice and accountability that the Rohingya and all people of Myanmar so greatly deserve.

22. Mr President, Members of the Court, I thank you for your courtesy, for your keen attention to this case, and for allowing me to address you. With your permission, I would ask that you call Professor Sands to the stand. Thank you.

The PRESIDENT: I thank His Excellency Mr Dawda Jallow. I now invite Professor Philippe Sands to address the Court. You have the floor, Sir.

Mr SANDS:

II. THE LEGAL FRAMEWORK OF THE GENOCIDE CONVENTION

1. Mr President, Members of the Court, it is an honour to appear before you on behalf of The Gambia, in respect of this Application under the 1948 Genocide Convention. The importance of this case, in relation to the protection of the Rohingya community in Myanmar and more broadly, and the importance of the issues before you, at a time when the international rule of law is under grave threat, are plain.

2. This morning, I am going to address the beating heart of this case, the meaning and effect of the Genocide Convention. How the Court approaches this will determine how the Gambia's Application is decided. As you well know, the Convention is of singular importance in the history of modern international law: adopted in 1948 — very largely as a result of the efforts of one man, Raphael Lemkin — it was the first modern human rights treaty we adopted after the horrors of the Second World War. It is emblematic: of who we are, of who we wish to be, of how truth and law are to address matters of raw power. If the Convention is diminished, then we are diminished, and the values that were articulated in that extraordinary postwar moment are diminished.

3. The protections provided by the 1948 Convention have been addressed by this Court on several occasions: these previous judgments inform how it is to be applied in the case of the Rohingya, and my colleagues and I will draw on these sources, guided by the rulings of this Court, as well as judgments in genocide cases before other international tribunals and, increasingly, before national courts, in respect of the points that I make in this submission.

4. Mr President, it is to be emphasized from the outset that there are many aspects of the legal framework which are not in dispute between the Parties. Myanmar and The Gambia agree on certain aspects and what the Convention says about them. But there are important areas of disagreement. In respect of these areas of disagreement, The Gambia and all 11 of the intervening States speak with one voice on how the Convention is to be understood, consistent with the history, the context, the object and purpose of the Convention, as this Court has interpreted and applied it. That united interpretation is, we say, important for it highlights that where Myanmar's interpretation diverges, as it often does, it is a solitary expression of dissent.

5. I am going to proceed this morning as follows: *first*, I am going to address the context and negotiating history of the Genocide Convention; *second*, I am going to identify key aspects of subsequent practice under the Convention, which elucidates the approach we invite the Court to take; *third*, I am going to set out the significant points of agreement between the Parties, and the interveners, on key provisions of the Convention; *fourth*, I am going to address the key components of genocide, namely, the relevant *actus reus* and *mens rea*; and *fifth* and finally, I am going to address other aspects of the legal framework to be addressed by my colleagues in due course over the next four days.

1. Context and negotiating history of the Genocide Convention

6. Let us start with the context — the negotiation of the Convention. Mr President, Raphael Lemkin invented the word “genocide”. He constructed that word, out of the Latin and Greek words *genus* and *cide*, to mean the “killing” of a “group”, or of a “people” and, here, you can see the word, in his own writing, on the screen, a document that may be found in the Rare Book and Manuscript Library at Columbia University in New York City³. He chose the word “genocide” as the title for Chapter IX of his book, *Axis Rule*, which was published in November 1944. I have taken the liberty of bringing a copy of the first edition of that book, my own copy, to Court today. As you will see, it is personally inscribed by Raphael Lemkin, in the Nuremberg Courtroom, on 4 July 1946. This room today is in direct connection with courtroom 600 and the Palace of Justice. I invite you, please, to read all of Chapter IX of that book, it is not long, it is available online⁴. As you read Lemkin’s words, I suspect, like me, you may be struck by two things: first, the convergence of Lemkin’s account of the indicators of genocide that he found in the 1930s and the 1940s with the evidence that is before you in this case; and second, that the approach taken by Raphael Lemkin is fully consistent with the approach taken by this Court in its jurisprudence. As you will know, despite the crime being argued before them, the judges at Nuremberg failed to mention the word “genocide” at all in the 1946 judgment. This is what prompted Raphael Lemkin to engage in efforts elsewhere, leading up

³ Publicly available at <https://www.vanityfair.com/culture/2016/05/phillipe-sands-east-west-street-nazi-genocide>.

⁴ “Chapter IX: ‘Genocide’” in Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (1944), available at <http://www.preventgenocide.org/lemkin/AxisRule1944-1.htm>.

to the first ever session of the United Nations General Assembly and ultimately, his efforts bore fruit in December 1948.

7. You, the judges of this Court, need no reminder of the horrors which preceded and precipitated the formulation and adoption of the Genocide Convention, and which led States parties — including so many of the countries which you are each from — to heed Lemkin’s exhortation to bring an end to the “odious scourge”⁵ of genocide. It was an imperative task in 1948, as the crime of genocide took its place alongside war crimes and crimes against humanity. And to be clear, while international law treats these crimes as distinct, it does not establish a hierarchy among them. Sadly, the task of 1948 remains as imperative today as it did then.

8. There is one aspect of the negotiating process to which I wish to draw the Court’s attention. Myanmar suggests that its crimes against the Rohingya, and they are crimes, cannot be characterized as genocide; why? — because, simply, too few Rohingya were subjected to abusive acts. The argument is fallacious, as we will show in the coming days, but, in this respect, the negotiating process of the Convention is important — as with Raphael Lemkin’s intentions — because it makes clear that the crime of genocide is not a numbers game. The negotiating process involved three drafts, and in reaching agreement on the third and final draft, there the negotiators addressed the *scale* of destruction necessary to constitute the crime of genocide. The negotiating Committee recognized that “[t]he Convention should include as instances of genocide such crimes as group massacres or *individual executions* on the grounds of race, nationality (or religion)”⁶. France’s delegate promoted this position, allowing that even a *single death* could constitute genocide: that is the approach enshrined in the Convention’s wording: that there must be an intent to destroy the group in whole *or in part*. Of course, in this case, terribly, there is not just a single death, there are thousands of deaths and tens and hundreds of thousands of other genocidal acts with upwards of a million human beings today in Cox’s Bazar. Pause for a moment and reflect on that number — over one million people.

⁵ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 *UNTS* 277, preamble (emphasis added). MG, Vol. II, Annex 1.

⁶ United Nations Economic and Social Council (ECOSOC), *Ad Hoc Committee on Genocide Basic Principles of a Convention on Genocide (Submitted by the Delegation of the Union of Soviet Socialist Republics)*, UN doc. E/AC.25/7 (7 Apr. 1948), Principle VII (emphasis added).

Let us not forget that the words “in part” were explained by Mr Rafaat, who served on Egypt’s delegation, as being intended to achieve “the aim of the French amendment”.

2. Subsequent practice under the Genocide Convention

9. I turn to subsequent practice. This Court’s first interpretation of the Genocide Convention came not long after its adoption, in the famous 1951 Advisory Opinion. There, the Court recognized and underscored the Convention’s purpose — a “purely humanitarian and civilizing purpose . . . The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions”⁷. So it is today: that purpose and those ideals inform the way in which the Court interprets and applies the provisions of the Convention in this case.

10. The Court’s jurisprudence on the Convention, in particular with the *Bosnia and Croatia* Judgments of 2007 and 2015, respectively, is the lodestar on which The Gambia’s Application has been based. Other aids to interpretation, including the jurisprudence of the international criminal tribunals and national courts — and it is worth mentioning that, in particular, it is the courts of Germany that have, in recent years, played the leading role in relation to findings, rulings, judgments of genocide perpetrated in northern Iraq and Syria, including against the Yazidi population⁸ — as well as the findings of international commissions, which provide guidance on issues arising under the Convention, as the interveners have made clear⁹. But it is the Court’s own jurisprudence — your jurisprudence — that has played a central role in guiding The Gambia’s approach, and we have fully relied on that jurisprudence in the decision of The Gambia to bring the case, and in arguing the case in our written pleadings and in the course of these oral hearings.

⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23 (emphasis added).

⁸ See e.g. Higher Regional Court of Frankfurt am Main, Case No. 5-3 StE 1/20-4-1/20, Judgment of Taha al-J (30 November 2021), available at <https://openjur.de/u/2397259.html> and United Nations Office on Drugs and Crime, *OLG Frankfurt am Main, Urteil vom 30.11.2021, 5-3 StE 1/20*, available at https://www.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/deu/2021/olg_frankfurt_am_main_urteil_vom_30.11.2021_5-3_ste_120.html; Interlinkages Database, Case No. 3 St 2/22 (Jalda A.), available at <https://interlinkagesdatabase.icct.nl/case/jalda-a-3-st-2-22>; Interlinkages Database, Case Nos. 8 St 9/18; 3 StR 246/22; 3 StR 498/23 (Jennifer W.) (2024), available at <https://interlinkagesdatabase.icct.nl/case/Jennifer8-st-918-3-str-24622-3-str-49823>; Interlinkages Database, Case No. 7 StS 3/19 (Sarah O.), available at <https://interlinkagesdatabase.icct.nl/case/sarah-o-7-sts-3-19>; Interlinkages Database, Case Nos. 2 StE 9/22; 3 StR 496/23 (Nadine K.), available at <https://interlinkagesdatabase.icct.nl/case/nadine-k-2-ste-9-22>.

⁹ Declaration of intervention of the Kingdom of Belgium under Article 63 of the Statute of the International Court of Justice (12 December 2024), para. 18; Declaration of intervention of the Democratic Republic of the Congo (10 December 2024), para. 10; Joint Declaration of intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland (15 November 2023), para. 22.

11. That approach of the Court informs the views of all the interveners and The Gambia in these proceedings. Both Parties and all the interveners agree on the basic and foundational principle, articulated with force by the Court in the *Bosnia* Judgment: that a State is prohibited from committing genocide, and a State may be held internationally responsible for the crime of genocide. We note and agree with the Democratic Republic of the Congo's very helpful summary of certain additional significant points of agreement¹⁰. The Democratic Republic of the Congo's submissions include the following:

“First, a situation of armed conflict does not preclude the crime of genocide;

Second, the Convention does not require that a genocidal intent be the sole motive pursued by the Respondent State or its agents, but permits of multiple overlapping motives;

Third, a genocidal intent does not have to be expressly stated, and may be established or inferred from ‘particular circumstances’ or a pattern of behaviour or conduct; and

Fourth, the requirement that a ‘substantial part’ of the protected group is targeted does not refer to a purely quantitative criterion, but is to be interpreted in the light of quantitative, qualitative and geographical factors.”

12. These are very important points of consensus on the basis of which we say the Court can proceed.

3. The definition of genocide

13. I turn now to the definition of genocide, the famous Article II of the 1948 Convention. This provides as follows: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

A. *Actus reus*

14. The five acts that follow in the text of Article II are:

(a) killing;

(b) causing serious bodily or mental harm;

¹⁰ Written Observations of the Democratic Republic of the Congo (22 September 2025), para. 4.

- (c) deliberately inflicting conditions of life calculated to bring about the group's physical destruction in whole or in part;
- (d) imposing measures intended to prevent births; and
- (e) forcibly transferring children to another group.

15. Any one of these acts, committed with the requisite intent, is sufficient to constitute the act and the crime of genocide. My colleagues will take you to evidence over the course of this week which will show *many* acts falling within the first four categories of Article II having been committed by Myanmar against the Rohingya group.

16. In the Counter-Memorial, Myanmar argues that the number of victims is relevant to the determination of whether the *actus reus* of genocide has been committed. This is wrong. It makes this argument specifically in relation to the *actus reus* of killing, under Article II (a). And Myanmar invites the Court to conclude that, unless killings are “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, they will be inadequate to constitute the *actus reus* of the crime of deliberate destruction of a human group”¹¹. You can read that at paragraph 4.61 of the Counter-Memorial.

17. Pure invention. There is no basis in the text of the Convention, or the jurisprudence of the Court, or as I have already explained, in the negotiating history of the Convention, to support this erroneous claim in respect of the *actus reus* under Article II (a). To the extent that numbers *may* ever be relevant, it is a factor that goes not to *actus reus* but, potentially, to the question of whether the *mens rea* of genocide has been made out; this is because it may — not necessarily — it may bear on whether there is a reasonable inference that acts were carried out with the specific intent to destroy the group. That aspect of establishing the existence of the *mens rea* of genocide is a point to which I will return on Wednesday, to be followed by Mr Reichler. But to be clear, there is no numeric or substantiality threshold inherent in the *actus reus*. As this Court has observed, and the *chapeau* of Article II makes plain, there are “two constituent elements”¹² to genocide — *mens rea* and the *actus reus*, and whilst both must co-exist for genocide to have been committed, they are “analytically

¹¹ Counter-Memorial of Myanmar (24 August 2023) (hereinafter “CMM”), para. 4.61.

¹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), p. 62, para. 130.

distinct”¹³. The issue of numbers, or the existence of “concerted plans”, plays no part in establishing *actus reus*.

18. I also wish to underscore that “killings” under Article II (*a*) are only one of five possible genocidal acts, four of which have plainly been established in the evidence that is before you. The Gambia does not contend that acts within the scope of Article II (*e*), that is to say forcibly transferring children out of the group, took place. But acts in all four other categories of Article II have been committed. And, as the six joint interveners have underscored, “[t]here is no hierarchy amongst the underlying acts of genocide and the legal relevance of all acts targeting a protected group must be emphasized”. Thus, although terrible killings undoubtedly have occurred in this appalling case, it has to be underscored that the other modalities of the *actus reus* are just as central to The Gambia’s case as acts of killing.

19. Prominent in this case are acts falling within the scope of Article II (*b*), causing serious bodily or mental harm to members of the group. The kinds of acts falling within this category are sadly diverse in this case: they include acts of sexual and gender-based violence, acts causing physical and psychological harm, and acts of forced displacement. And you are going to hear a lot more about this from the witnesses next week. I make two particular points in this regard.

20. First, Myanmar’s campaign against the Rohingya is appallingly characterized by widespread sexual and gender-based violence. As the joint interveners have submitted, and as The Gambia has also affirmed, the harm caused by such acts is, by its very nature and effect, “almost universally ‘serious’”¹⁴. This has been recognized by this Court in the *Bosnia* Judgment, which endorsed the vital findings of the Rwanda Tribunal in the *Akayesu* case. And that case made clear the effect of “rape and sexual violence [which are] one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm”¹⁵. These are genocidal acts, they fall within the scope of Article II (*b*) — all the more so where, as in the present case, children are involved, a point that is made with force by the interveners. They may also constitute *actus reus* under

¹³ *Ibid.*

¹⁴ Joint Declaration of intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland, para. 29.

¹⁵ *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. 167, para. 300, quoting ICTR, *Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), para. 731.

Article II (c) and II (d). Very frankly, the evidence you will hear about this week is dreadful, and it will be very tough to listen to some of it, but listen to it we all must, and draw the necessary conclusions from it, we say you must.

21. Second, forced displacement — the permanent expulsion of a people from their homeland — is plainly capable of causing serious mental harm to members of the group, alongside any physical harm suffered in the course of their expulsion, or which contributed to their fleeing their homes. In this case it affects not only hundreds of thousands and upwards of a million human beings, but it is recognized, expulsion is recognized by the International Criminal Tribunal for the former Yugoslavia (ICTY) as capable of being a genocidal act¹⁶. And let us be clear: expulsions do not have to result from the formal removal of people by bureaucratic State processes or the use of Auschwitz-style cattle cars. Expulsion arises, in this case, after the ransacking of villages, the burning of houses, the constant threat of violence against all who remain. It is these acts that contribute to the forced displacement that forms the *actus reus* within Article II (b). And, as the International Residual Mechanism for Criminal Tribunals (IRMCT) has made clear, forced displacements do not always require physical force. They

“can be met through the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, or taking advantage of a coercive environment. It is the absence of genuine choice that makes the displacement unlawful.”¹⁷

22. And this is exactly what has happened in the present case, as along with the use of physical force, causing grave harms to the Rohingya, within the meaning of Article II (b). Such displacements may also be genocidal *actus reus* within the terms of Article II (c), as the Court recognized in the *Bosnia* case¹⁸. This point has also been widely recognized by international criminal tribunals in genocide cases. For example, in the *Tolimir* case, the Yugoslavia Tribunal held that underlying acts of genocide may include “methods of destruction that do not immediately kill members of the group, but ultimately seek their physical destruction” by “systematically expelling members of the group from their homes”.

¹⁶ ICTY, *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-A, Appeals Chamber Judgment (8 Apr. 2015), para. 209.

¹⁷ IRMCT, *Prosecutor v. Mladić*, MICT-13-56-A, Appeal Chamber Judgment (8 June 2021), para. 356.

¹⁸ *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)*, pp. 181-182, para. 334.

B. *Mens rea*

23. I turn to the second constituent element of genocide, namely the *mens rea*. This is a subject that has received a lot of attention, and not just from lawyers: writers, journalists, psychiatrists, psychoanalysts and psychologists have all turned their mind to the key point: the question of intent.

24. I note — before turning to the *dolus specialis* of genocide — that each of the underlying *actus reus* acts has its own *mens rea* which must be present in the perpetrator when the act is done¹⁹.

As this Court explained in the *Bosnia* Judgment:

“‘Killing’ must be intentional, as must ‘causing serious bodily or mental harm’. Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words ‘deliberately’ and ‘intended’, quite apart from the implications of the words ‘inflicting’ and ‘imposing’. . . The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts”.²⁰

25. And so, for the *actus reus* to be present, the relevant acts must have been committed with the requisite volitional mindset. In most cases, it will be straightforward to establish that an act is intentional, as we say it is in this case. But alongside this aspect, and as an essential ingredient in genocide, is the existence of what has been called a *dolus specialis*: the intent must be to destroy, in whole or in part, a national, ethnical, racial or religious group, and to do so as such.

(a) *Intent to destroy . . . a group . . . as such*

26. Let us turn first to the first part of this totemic *chapeau*: the fundamental basis of genocide — the core feature of the crime, what distinguishes it from other crimes — is that it is predicated on establishing an intention to destroy. The intention, however it is expressed, must be to achieve the physical or biological destruction of the group, in whole or in part²¹, although the extent to which such destruction is *in fact* achieved, is not relevant to the establishment of the *dolus specialis*.

27. The victim of a genocide must be part of a recognizable and definable group, joined by a common nationality, or ethnicity, or race or religion. The intent must be to destroy the group “as such”. That requirement was explained by this Court in the *Bosnia* Judgment — some of you will

¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), p. 62, para. 132.

²⁰ *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. 121, para. 186.

²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), p. 63, para. 136.

know very well — as underscoring that genocide requires an intent to destroy people who share a particular group identity, because of “who those people are”²²; as the Court said, “[t]he words ‘as such’ emphasize that intent to destroy the protected group”²³. In this regard, they are targeted not because of what they have actually done or might do, but simply because of who they are. That is what counts in genocide.

28. And let us be clear: there is not a shred of doubt, none, that the Rohingya are a “group” within the meaning of the Convention, and there is not a shred of doubt that they have been — and that they continue to be to this day — targeted “as such”. My colleague Mr Suleman will address this point later today.

(b) *In whole or in part*

29. Alongside these requirements, the *chapeau* to Article II stipulates that the intent has to be to destroy the group *in whole or in part*. As the Court’s findings in respect of Srebrenica make plain, a targeted “part” of a group has to be a “substantial” part, but that does not mean that it has to be a numerically significant part in the context of the group overall, where other factors combine to make it substantial. As the Court stated at paragraph 296 of the *Bosnia* Judgment, substantiality is to be assessed by reference to “three elements”, namely: quantitative factors, relevant geographic factors and emblematic or qualitative factors. The evidence you will hear over the course of this week, and next, will leave no doubt that the targeted part of the Rohingya group was, by reference to these three elements, and it was substantial.

(c) *Establishing the presence of the dolus specialis*

30. I turn next to the need to establish the presence of the *dolus specialis*. As the Court has made clear, this can be either on the basis of direct or indirect and circumstantial evidence.

31. In the *Croatia* Judgment, ten years ago, the Court clarified its approach to identifying the existence of *dolus specialis*. It said:

“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

²² *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), pp. 124-125, para. 193.

²³ *Ibid.*, p. 121, para. 187.

inferred from the individual conduct of perpetrators of the acts contemplated in Article II In its 2007 Judgment, the Court held that

‘[t]he *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and 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’ (*I.C.J. Reports 2007 (I)*, pp. 196-197, para. 373).²⁴

Those are words, no doubt, we are going to be coming back to.

32. The Court can proceed on the basis of overt (that is to say, written) incriminating evidence of a general plan. But for understandable reasons, perpetrators have tended to avoid that approach. So the Court — very wisely, we say — has recognized, has affirmed, that it can proceed by reference to circumstantial evidence in two distinct situations: first, by reference to “particular circumstances” which are “convincingly demonstrated”, or second by reference to “a pattern of conduct” which “could only point to the existence of [the special] intent”.

33. In the context of this Application, as the evidence on the Court’s record establishes, and as will be addressed by my colleagues this week, there are “particular circumstances” which convincingly show that Myanmar and its State organs acted with genocidal intent against the Rohingya. That is especially clear in the case of at least three individual villages — Min Gyi, Chut Pyin and Maung Nu — the harrowing accounts of which will be presented to the Court tomorrow morning. Just as in Srebrenica, in the *Bosnia* case, the particular circumstances of what happened in those three villages — the concerted violence and devastation, the disproportionate and utterly inhuman treatment of the Rohingya who lived there, the widespread sexual violence and even the targeting of Rohingya children — present, we say, the inescapable conclusion that the crimes against the Rohingya who lived there were perpetrated with genocidal intent.

34. To be clear, we say that those three villages also formed part of a wider pattern of conduct, which extended to dozens of other locations in northern Rakhine State, and from which genocidal intent is “the only inference that could reasonably be drawn from the acts in question”²⁵. That does not mean, however, as I have already submitted, that in relation to a “pattern of conduct” it has to be

²⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *I.C.J. Reports 2015 (I)*, p. 66, para. 145.

²⁵ *Ibid.*, p. 67, para. 148.

the only motive. What it means is that on the basis of the evidence before you as to that special intent, it would be *unreasonable* to conclude that an intent to destroy the group in whole or in part did *not* exist. In this case, that test is plainly met. The “pattern of conduct” across the various locations identified in northern Rakhine is only explicable, we say — on a reasonable basis — by the existence of a genocidal intent acted upon by Myanmar. When the Court considers, as it must, “all of the evidence, taken together”²⁶, the only reasonable conclusion to reach is that a genocidal intent permeated and informed Myanmar’s myriad of State-led actions against the Rohingya.

35. We note that Myanmar in its Rejoinder accepts and agrees that genocidal intent can operate alongside and simultaneous with other motives²⁷. The interveners also agree with that²⁸. Indeed, the Court has itself recognized that certain acts performed *without* genocidal intent may nevertheless also assist in deducing the existence of a genocidal intent. For example, in the *Croatia* Judgment, the Court held that “acts of ‘ethnic cleansing’ may occur in parallel to acts prohibited by Article II of the Genocide Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts”²⁹. This makes it clear, in our submission, that both such intentions — ethnic cleansing and genocide (and maybe other crimes) — may coexist. In this regard, I refer you to the intervention of the Republic of Ireland, and to Judge Bhandari’s helpful separate opinion in the *Croatia* case, to explain the point. What this means is that for a pattern of conduct to *point only* to the existence of genocidal intent is not to say that it could point to such intent *only*. This is how Ireland has put it — and Ireland is, of course, a land of remarkable writers, thinking of James Joyce, Seamus Heaney, Colm Tóibín and Fintan O’Toole, writers who really know about the power of words. And their lawyers have done the same thing. This is how they put it:

“The human mind can of course accommodate and act upon more than one intention and the same conduct can be intended to achieve two or more results, however attainable each may be. It follows that it is perfectly possible that a pattern of conduct, upon examination, could point to two separate intentions, only one of which is

²⁶ *Prosecutor v Stakic*, IT-97-24-A, Appeals Judgment (22 March 2006), para. 55, cited in paragraph 54 of the joint Declaration of intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of The Netherlands, and the United Kingdom of Great Britain and Northern Ireland.

²⁷ RM, paras. 4.44-4.46.

²⁸ Written Observations of the Republic of Slovenia (23 September 2025), paras. 7-10; Written Observations submitted by the Democratic Republic of the Congo, para. 4; Written Observations of Ireland (25 September 2025), para. 30.

²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), p. 71, para. 162.

genocidal. This possibility was recognised by Judge Bhandari in his separate opinion in the *Croatia* case where, in warning against conflating *punitive motive* with *genocidal intent*, he noted that ‘genocidal intent may exist simultaneously with other, ulterior motives.’”³⁰

36. This approach, which recognizes and takes account of the realities and complexities of human behaviour — we might call it the human factor — and, in particular, its darkest acts of expression through violence and conflict, is messy and is complex. But this approach has got to be the right one in the real world, if the Convention is to have any practical utility or function. It is this precisely that informed Lemkin’s approach, as you will see when you read Chapter 9 of his book. He understood, writing in 1944, that the perpetrator’s mind is often a concoction of messy, mixed and overlapping motives. Accommodating that human reality is a way in which the particular threshold imposed by the *dolus specialis* must reflect the actuality of how human beings are and why they act, individually and collectively through the State, what makes them — what makes us — do terrible things to other people. While The Gambia recognizes that it is the attributed intention of Myanmar that matters in this case, and not that of each individual perpetrator on the ground that has to be established, it also cannot be overlooked that a State acts through people.

37. The Court, in seeking to determine whether genocidal intent is the *only* reasonable inference to be drawn from a pattern of conduct is *not*, therefore, asked to determine whether genocidal intent existed *in isolation* or *exclusively*, or only. Rather, it is required to ask itself whether the evidence before it as to the circumstances and conduct are such that, irrespective of the existence of any other motives or motives that may have been identified or stated (and which will no doubt be present in most real-world cases), a genocidal intent *also must* have been present.

38. Myanmar’s assertion that, in the conduct of the “clearance operations” targeting Rohingya villages it was merely undertaking counter-terrorism operations cannot, therefore, serve — of itself — to rebut the existence of a genocidal intent. It is perfectly possible for there to have been a counter-terror motive behind some of Myanmar’s actions, but at the same time, in the course of those operations, a genocidal intent also existed and prevailed and, in some form, propelled the actions that were taken. Indeed, as Judge Cançado Trindade recognized in the *Croatia* case, “genocide may be a

³⁰ Written Observations of Ireland (25 September 2025), para. 30.

means for achieving military objectives just as readily as military conflict may be a means for instigating a genocidal plan”³¹.

39. In establishing whether genocidal intent must have been present in the context of a pattern of conduct, the Court helpfully indicated in the *Croatia* Judgment some of the most important indicators of that intent, and I will mention four. They are:

- First, “the scale and allegedly systematic nature of the attacks”;
- Second, “the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity”;
- Third, “the specific targeting of [members of the protected group]”; and
- Fourth, “the nature, extent and degree of the injuries caused to the [protected] population”³².

40. In this case, the UN Fact-Finding Mission (hereinafter the “FFM”), an independent body, has a key role, and its findings, we say, are authoritative. It has identified seven indicators of genocidal intent, not *in abstracto*, but in the vast amount of evidence it has gathered in respect of Myanmar’s actions towards the Rohingya, and they strongly correlate with the factors the Court identified, that I have just mentioned, in the *Croatia* Judgment in relation to patterns of conduct. So, the FFM, entrusted with functions by the United Nations, concluded that genocidal intent to destroy a Rohingya people as such could be inferred in the following way:

“[F]irst, the Tatmadaw’s extreme brutality during its attacks on the Rohingya; second, the organized nature of the Tatmadaw’s destruction; third, the enormity and nature of the sexual violence perpetrated against women and girls during the ‘clearance operations’; fourth, the insulting, derogatory, racist and exclusionary utterances of Myanmar officials and others prior, during and after the ‘clearance operations’; fifth, the existence of discriminatory plans and policies . . . ; sixth, the Government’s tolerance for public rhetoric of hatred and contempt for the Rohingya; and seventh, the State’s failure to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law, both as they were occurring and after they occurred.”³³

41. In due course, my colleagues are going to take you through a close consideration of these seven indicators, which emerge from the vast amount of evidence before you. And The Gambia

³¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I)*, dissenting opinion of Judge Cançado Trindade, p. 253, para. 144.

³² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 121, para. 413.

³³ UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 September 2019), para. 224. MG, Vol. III, Annex 49.

invites this Court to reach exactly the same conclusions that the FFM did — namely, that the only reasonable conclusion is that Myanmar acted in this case with genocidal intent.

4. Other punishable acts

42. Of course, the commission of genocide is not the only internationally wrongful act prohibited by the Convention. Article I also creates an obligation to prevent and to punish genocide. And Article III prohibits a range of acts ancillary to genocide, including — but not limited to — conspiracy and direct and public incitement to commit genocide.

43. Whilst The Gambia’s primary case is that Myanmar has committed genocide in violation of Article I of the Convention, violations of Article III, and of the duties to prevent and punish genocide, also form part of our case in full. And these other punishable acts will be addressed by my colleague, Ms Jones, later in the week.

5. The evidence before the Court

44. Before I conclude, a brief word about the evidence before the Court in this case — and you are going to hear more about this — and the approach that we invite the Court to take. The Court itself has set out its task in general terms, in other cases, plainly:

“It is the duty of the Court, after having given careful consideration to all the evidence in the record, to assess its probative value, to determine which facts must be considered relevant, and to draw conclusions from them as appropriate . . . [,] the Court will make its own determination of the facts, on the basis of the totality of the evidence presented to it, and it will then apply the relevant rules of international law to those facts which it has found to be established”³⁴.

45. And so, it is for the Court to consider whether, in totality, the evidence before you in the case brought by The Gambia stands up. There is no single type of evidence or method of proof that the Court restricts parties to rely on; evidence from any source can be taken into account, and it will be for the Court to assess its credibility, reliability and probative value to the issues in question.

46. It is for the party alleging a fact to demonstrate its existence, but even this in the Court’s practice is not an absolute rule. The Court has said: “[t]he determination of the burden of proof is in reality dependent on the subject-matter and the nature of [the] dispute brought before the Court; it

³⁴ *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 (II), p. 726, para. 176.

varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case”³⁵.

47. So, the Court takes an inherently — and, we say, appropriately — flexible approach to the evidence it is prepared to receive and consider, in order to ensure that it is equipped with the materials necessary to make its own determination of the facts and to apply to those facts the relevant rules of international law.

48. Mr Reichler is going to address this in detail. The Gambia’s evidence, its reliability and its probative value will be a matter for him. Suffice it to say at this early stage, the totality — the body of evidence presented by The Gambia on this Application — fully underpinned, as it is, by the careful, thorough investigations of the FFM and the many eyewitness accounts that were collected by that body — is compelling and persuasive. To take the words of the Court, it is convincing. It provides a strong foundation for the Court to reach conclusions on the facts and to find that the Rohingya genocide is “clearly established”³⁶.

6. Conclusion

49. Mr President, Members of the Court, I have addressed the existing legal standards for proving genocide under the 1948 Convention in general terms, including proof of *dolus specialis*. These standards build directly on the approach set forth by Raphael Lemkin in his book *Axis Rule*, and so I am going to conclude by returning to where I began.

50. “New conceptions require new terms”,³⁷ Lemkin wrote in November 1944. He noted in these pages “the evolution of international law . . . has brought about a considerable interest in national groups as distinguished from states and individuals”. He invented the concept of genocide to deal with that evolution, and by genocide he wrote, “we mean the destruction of a nation or of an ethnic group”³⁸. This occurred, he continued, as “a composite of different acts of persecution or

³⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), p. 73, para. 172, citing *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010 (II), p. 660, para. 54.

³⁶ *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. 129, para. 209.

³⁷ “Chapter IX, Part I: ‘Genocide’” in Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (1944), available at <http://www.preventgenocide.org/lemkin/AxisRule1944-3.htm>, p. 79.

³⁸ *Ibid.*

destruction”³⁹, and on his interpretation there occurred, in two phases: “one, [these are his words:] destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor”⁴⁰. And — he continued — the oppressed who were subject to genocidal acts could “remain” or they could be removed⁴¹. The oppressed were always members of “certain national groups”, who lived as minorities⁴². “If these groups should not be adequately protected, such lack of protection would result in international disturbances, especially in the form of disorganized emigration of the persecuted, who would look for refuge elsewhere.”⁴³ Against this background of what he saw between 1933 and 1945, he proposed “[a]n international multilateral treaty should provide for the introduction . . . of provisions protecting minority groups from oppression because of their nationhood, religion, or race”⁴⁴.

51. The 1948 Convention is that international multilateral treaty, and Lemkin’s words, written in 1944, and Article II of the 1948 Convention, capture, regrettably but exactly, what has happened to the Rohingya. Lemkin’s assessment, back in the 1940s, was the product of a meticulous exercise of research and reflection. His book and the Convention are testament to the power of ideas, to their reduction into a written and legal form, and to their capacity to hope for the world as a better and safer place. Raphael Lemkin lived through terrible times, just as the Rohingya have, but at no point did he, or his colleague Hersch Lauterpacht, or so many others like them, choose to curl up in a corner and weep, or conclude that action or international rules were pointless. The Rohingya have adopted exactly the same approach. So has The Gambia, the Attorney General you heard from this morning. That is why The Gambia is here today. Mr President, the Genocide Convention, including its Article II, really matters, and so do its meaningful and effective interpretation and application on

³⁹ “Chapter IX, Part III: ‘Genocide’” in Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (1944), available at <http://www.preventgenocide.org/lemkin/AxisRule1944-3.htm>, p. 92.

⁴⁰ “Chapter IX, Part I: ‘Genocide’” in Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (1944), available at <http://www.preventgenocide.org/lemkin/AxisRule1944-3.htm>, p. 79.

⁴¹ “Chapter IX, Part III: ‘Genocide’” in Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (1944), available at <http://www.preventgenocide.org/lemkin/AxisRule1944-3.htm>, pp. 79, 91, 92.

⁴² *Ibid.*, p. 93.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

the facts of this case to the situation regarding the Rohingya. It is to that issue that Mr Reichler will now turn and perhaps, after a brief pause, you would call him to the bar. I thank you for your attention.

The PRESIDENT: I thank Professor Sands. Before I give the floor to the next speaker, the Court will observe a break of 15 minutes. The hearing is suspended.

The Court adjourned from 11.40 a.m. to 11.55 a.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now invite Mr Paul Reichler to address the Court. You have the floor, Sir.

Mr REICHLER:

III. OVERVIEW OF THE GAMBIA'S CASE

1. Mr President, Members of the Court, it is, as always, an honour for me to appear before you. And it is a special privilege, and a responsibility, to appear on behalf of The Gambia in this historic case. We are very much aware of its significance for the Parties, for the Rohingya people, for all parties to the 1948 Convention — including the 11 States that have intervened in these proceedings — and for the Court itself.

2. This imposes a particular obligation on counsel to be as careful as possible in dealing with the law and the facts, accurately and objectively, and to be as helpful as possible to the Court, in your effort to provide the right answers on the important issues that have been raised. These issues include, among others, the legal standards for proving genocide under the Convention, and the nature of the evidence upon which the Court may confidently rest its determination of whether those standards have been met.

3. Professor Sands has helpfully laid out our understanding of the existing legal standards for proving genocide, including proof of *dolus specialis*, as set out and applied by the Court in its 2007 Judgment in the *Bosnia* case, and the 2015 Judgment in the *Croatia* case.

4. We understand that this is a relatively high standard of proof, and we feel that this is appropriate where allegations of genocide or other grievous international crimes are concerned. This does not mean that the standard set by the Court has drawn universal praise. There has been a

considerable amount of scholarly commentary about it, some of it critical. This is not surprising. A few commentators — especially those who have seen the Peace Palace only in photographs — think they know better than you do what the law should be, and they relish telling you so.

5. But that is not what The Gambia thinks. We respect scholarship, but we are not here as commentators. We are here to present our case under the law as your jurisprudence has established it. We do not question or challenge the legal standards you have set. On the contrary, we accept them and argue our case on the basis of those standards, as defined and applied by the Court in its prior cases under the 1948 Convention.

6. We have no doubt that the evidence we have submitted fully meets those high standards, so we have no need for, nor do we seek, a change in the approach the Court has previously established, including, but not limited to, the legal standard for proving genocidal intent.

7. I will explain why this is so by comparing the evidence of genocidal intent in this case, with the evidence the Court found sufficient to establish genocidal intent in the *Bosnia* case, and then by comparing it with the evidence the Court found *insufficient* in the *Croatia* case.

8. Our central submission is that the evidence of genocide, including genocidal intent, in this case is much stronger and much more pervasive than it was in both of those cases. We say that the only reasonable inference that can be drawn from this evidence is that there was an intent by Myanmar to destroy the Rohingya Muslims as a group, in whole or in part.

9. My review of the evidence this morning will necessarily be introductory. This speech is intended as an overview of our case. This afternoon and for the three days that follow, you will hear a comprehensive presentation of it, and how it satisfies the standards set by the Court for proving both the *actus reus* and the *dolus specialis* of genocide by Myanmar. My intention now is to provide a roadmap that assists you in fully appreciating our presentation, and in understanding how each of our speeches, as it is delivered, builds to the inevitable conclusion that Myanmar is responsible for the commission of genocide against the Rohingya Muslim group.

10. With these opening remarks, I turn to the *Bosnia* and *Croatia* cases.

1. Comparison with the *Bosnia* case

11. As we all know, the *Bosnia* case is the only one in which the Court found that genocide was committed. The Court found it at one specific location, Srebrenica⁴⁵. The evidence showed that Srebrenica was predominantly inhabited by Bosnian Muslims. After it was taken over by Bosnian Serb forces, those forces separated approximately 7,000 Muslim men from the general population, removed them to a secluded area, and murdered them. As the Court explained, quoting from the ICTY's Trial Chamber in the *Krstić* case, the perpetrators "systematically targeted Bosnian Muslim men of military age, regardless of whether they were civilians or soldiers"⁴⁶. Women, children and the elderly were spared from death; they were forcibly displaced to other parts of Bosnia. Citing the Appeal Chamber in the *Krstić* case, the Court found that the killing of such a large number of men, one fifth of the overall Srebrenica community, "would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica"⁴⁷. The Court concluded on the basis of these facts that the *actus reus* of genocide under Article II (a) and (b) of the Convention had taken place.

12. The Court found further that, upon capturing Srebrenica and segregating the male population, "the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men in the enclave", and that this was sufficient to satisfy the *dolus specialis* requirement⁴⁸. The existence of this "plan" — which was not spelled out in any document — was considered proven by a number of factors identified by the Court, namely: the number and nature of the forces involved, the standardized coded language used by the units in communicating information about the killings, the scale of the executions, and the commonality of the killing methods applied⁴⁹.

13. Mr President, it is our submission that, if the Court were to apply the same legal and evidentiary standards to the present case, it would have to conclude — as others have done — that Myanmar committed acts of genocide, with genocidal intent, against the Rohingya Muslim

⁴⁵ *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), pp. 155-166, paras. 278-297.

⁴⁶ *Ibid.*, p. 163, para. 292.

⁴⁷ *Ibid.*, p. 164, para. 293.

⁴⁸ *Ibid.*, p. 163, para. 292.

⁴⁹ *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).

population during its so-called “clearance operations” in 2016 and 2017. In this case, unlike Bosnia, there were *numerous* “Srebrenicas”, that is, massacres of large numbers of Rohingya Muslims to destroy the group, based on their identity as such, carried out by Myanmar’s armed forces, in multiple locations across northern Rakhine State, where the vast majority of the Rohingya Muslims lived. In other words, what was proven to have occurred at a single site in Bosnia, is proven here to have occurred in scores of different Rohingya villages in Myanmar. Many examples are given in our written pleadings, some of which will be discussed in detail by my colleagues. For now, I wish to call your attention to three.

14. The first is Min Gyi, a village in Maungdaw Township. You can see its location on the map on your screens. Min Gyi had a population of approximately 4,300 Rohingya and 400 ethnic Rakhine⁵⁰. The UN Fact-Finding Mission found that Min Gyi was “the location of one of the largest and most egregious mass killings”⁵¹.

15. Myanmar’s armed forces, known as the “Tatmadaw”, commenced their so-called “clearance operation” in Min Gyi in the early morning on 30 August 2017. As reported by the UN Fact-Finding Mission, as soon as soldiers entered the village, they “opened fire and began burning houses”⁵². They shot directly at crowds of people fleeing to the riverbank or trying to swim across the river⁵³. Many of them were killed⁵⁴. Others, especially children and the elderly, drowned while trying to escape⁵⁵.

16. Hundreds of Rohingya who did not manage to get away were trapped and “rounded up” on the riverbank⁵⁶. The Tatmadaw then separated the men and systematically executed them with rounds of bullets, and killed those who had survived the shooting with large knives⁵⁷.

⁵⁰ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 756. MG, Vol. II, Annex 40.

⁵¹ *Ibid.*, para. 1227.

⁵² *Ibid.*, para. 761.

⁵³ *Ibid.*, paras. 761, 764.

⁵⁴ *Ibid.*, paras. 761, 765.

⁵⁵ *Ibid.*, para. 764.

⁵⁶ *Ibid.*, para. 766.

⁵⁷ *Ibid.*, paras. 766-767.

17. According to the Fact-Finding Mission, the Tatmadaw next “turned to the women and children”⁵⁸; “some of the children were shot, some thrown into the river, and others thrown onto a fire”⁵⁹. An eyewitness recalled seeing “around 27 children’s bodies floating in the water afterwards”⁶⁰.

18. Tatmadaw soldiers then took dozens of women and girls to nearby houses. The Fact-Finding Mission reported:

“Upon arrival, each group was taken to a different room. Once in the room, women and girls were stripped and beaten with sticks, punched or stabbed. They were then raped in groups of up to seven victims at a time. Many of the women and girls had infants and children with them, who were killed or severely injured, while their mothers were raped. The houses were then often locked and set on fire and most victims who were still alive were burned to death.”⁶¹

19. Mr President, this went far beyond the horrors inflicted during the Srebrenica massacre, where women, infants, children and the elderly were not attacked.

20. Satellite imagery, analysed by the United Nations Satellite Centre (UNOSAT), confirms the determination by the Fact-Finding Mission that the Rohingya houses and structures in Min Gyi were “completely burned and destroyed”⁶². By contrast, the part of Min Gyi inhabited by ethnic Rakhine, a predominantly Buddhist ethnic group favoured by Myanmar’s military régime, “remains intact”⁶³. Destruction of this Rohingya village, and many others like it, after killing, grievously wounding, raping and forcibly displacing the population, reflects even more than an intention to destroy the Rohingya as a population; it demonstrates an obsession with erasing them and their homes permanently from historical memory.

21. The second example is Chut Pyin — a village in Rathedaung Township, shown on your screen now. The “clearance operation” there took place on 27 August 2017. According to the UN Fact-Finding Mission, “hundreds of Tatmadaw soldiers” surrounded the village⁶⁴, “opened fire,

⁵⁸ *Ibid.*, para. 770.

⁵⁹ *Ibid.*

⁶⁰ Witness Statement No. 010, signed on 14 September 2020, para. 23. MG, Vol. X, Annex 347.

⁶¹ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 924. MG, Vol. II, Annex 40.

⁶² *Ibid.*, para. 773.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, para. 782.

shooting at villagers, including those who were fleeing”⁶⁵, “dragged people from houses”, shot them at “point-blank range” or slit their throats with large knives⁶⁶.

22. An elderly woman described to the Fact-Finding Mission what occurred after she and her 70-year-old brother were pulled from their house:

“Soldiers used rifle butts to beat my brother on the head and I saw his brains come out. I saw people being killed with long knives. The soldiers were also spraying bullets and many people were injured and killed. Our village was full of dead bodies. I saw dozens of people killed. First, they shot the people and then if they were still alive and the body was moving they used a machete to slaughter across the throat.”⁶⁷

23. The Fact-Finding Mission found that the Tatmadaw “set houses on fire, including those still occupied”⁶⁸. Rohingya victims were “forced inside houses” before they were “intentionally set alight”⁶⁹.

24. The Fact-Finding Mission determined that the Tatmadaw “specifically targeted” “[c]hildren, including infants and babies”⁷⁰. “[S]ome were wrenched from their mothers’ arms and thrown to the ground, others were thrown into fires and burned alive.”⁷¹ Children and babies. In the aftermath of the assault on Chut Pyin, witnesses saw “dead bodies everywhere”, including those of children “floating in the river”⁷². No less than 127 children under the age of six were slaughtered in Chut Pyin⁷³.

25. As at Min Gyi, the UN Mission found that women and girls were subjected to “rape, gang rape, sexual mutilation and sexual humiliation”⁷⁴, “including the mutilation of their breasts”⁷⁵.

⁶⁵ *Ibid.*, para. 783.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, para. 785.

⁶⁸ *Ibid.*, para. 784.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, para. 789.

⁷¹ *Ibid.*

⁷² *Ibid.*, para. 792.

⁷³ *Ibid.*, para. 796.

⁷⁴ *Ibid.*, para. 790.

⁷⁵ *Ibid.*

26. UNOSAT’s satellite imagery confirms the Fact-Finding Mission’s conclusion that “the entire Rohingya village of Chut Pyin was destroyed”⁷⁶, while in contrast, the nearby non-Rohingya village “remains intact”⁷⁷.

27. The third example is Maung Nu, a village in Buthidaung Township. It is shown on your screen now. On the same day as the massacre at Chut Pyin, villagers awoke to the sight of “several trucks full of soldiers” arriving with other troops advancing “in small groups on foot”⁷⁸. They surrounded the village and “[w]hoever ran was shot at”⁷⁹.

28. As reported by the UN Fact-Finding Mission, the soldiers approached a compound of two large and interconnected houses, where approximately 200 Rohingya had sought shelter, and “ordered” the “people to come out of the houses” or else the buildings “would be set on fire”⁸⁰. Without waiting, they broke down a door in the main house and fired their weapons into it. Then they “separated women and children from men”⁸¹ and “took the men out of the house and tied up their hands behind their back[s]”⁸². A soldier — identified by several witnesses as Sergeant Ba Kyaw of the 564th Light Infantry Battalion — after speaking on the phone — told his detachment, “We will kill them.”⁸³ The soldiers then “opened fire on the men and boys” and “slit their throats with knives”⁸⁴. Similar groups of men were taken to other places in Maung Nu, where they were shot or hacked to death⁸⁵. Again, as at Min Gyi and Chut Pyin, the Tatmadaw took special aim at women and girls. Here, too, the UN Mission found that many were “gang raped, killed and mutilated”⁸⁶.

⁷⁶ *Ibid.*, para. 788.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* para. 805; Amnesty International, “*We Will Destroy Everything*” (2018), p. 69. MG, Vol. IV, Annex 112.

⁷⁹ Witness Statement No. 005, signed on 16 July 2020, para. 13. MG, Vol. X, Annex 342.

⁸⁰ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 806. MG, Vol. II, Annex 40.

⁸¹ *Ibid.*, para. 807.

⁸² *Ibid.*, para. 808.

⁸³ Fortify Rights, *They Gave Them Long Swords* (2018), p. 64. MG, Vol. IV, Annex 114. See also Amnesty International, “*We Will Destroy Everything*” (2018), p. 70. MG, Vol. IV, Annex 112.

⁸⁴ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 808. MG, Vol. II, Annex 40.

⁸⁵ See Fortify Rights, Witness Statement of Mohammadul Hassan (23 February 2018). MG, Vol. X, Annex 337.

⁸⁶ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 810. MG, Vol. II, Annex 40.

29. Employing the same *modus operandi* as at the other two Rohingya villages just discussed, the Tatmadaw burned Maung Nu to the ground in the days following the “clearance operation”⁸⁷. UNOSAT analysis of satellite imagery confirms that around 320 structures were destroyed by fire in Maung Nu and another nearby Rohingya village⁸⁸.

30. These three villages are but a few examples. The evidence shows that Myanmar carried out “clearance operations”, employing similar tactics and methods, with the same extreme brutality and sexual violence, and devastating effects, in many other Rohingya villages in northern Rakhine State, with the gravest incidents having taken place, in addition to the three villages I have just discussed, in four other locations shown on this map. From north to south, they are: Gu Dar Pyin, Inn Din, Koe Tan Kauk and Chein Khar Li. In total, the UN Fact-Finding Mission reported that very similar mass atrocities against unarmed and defenceless Rohingya civilians were perpetrated by the Tatmadaw during these “clearance operations” in at least “54 separate locations”⁸⁹:

“‘Clearance operations’ following the same *modus operandi* took place in numerous other Rohingya villages across northern Rakhine State. The Mission verified, through multiple interviews and other information, ‘clearance operations’ similar to those detailed above in a total of 54 separate locations, and it received first-hand accounts of additional ‘clearance operations’ in a further 22 locations.”⁹⁰

31. The evidence shows that these were not random acts or the unintended consequences of undisciplined soldiers run amok. The timing and nature of the attacks make this clear. The Myanmar military units were not a group of Serb irregulars who suddenly formed an intention to destroy the Bosnian Muslims who had fallen into their hands after taking Srebrenica. Here, the evidence shows that the Tatmadaw units that deployed to scores of Rohingya villages in northern Rakhine State were following orders from a central military command, which planned and directed that the “clearance operations” be carried out in all of these locations. As at Srebrenica, the genocidal intent of that plan is clearly identifiable from the particular circumstances of its execution. Unlike Srebrenica, Myanmar’s plan was carefully and deliberately developed at the highest military level — not

⁸⁷ *Ibid.*, para. 816.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, para. 880.

⁹⁰ *Ibid.*

spontaneously by irregular forces on the scene — and it was executed across a large number of geographic locations, an even clearer reflection of Myanmar’s genocidal intent.

32. There is no doubt that Myanmar’s soldiers were acting pursuant to orders emanating from the top of its military hierarchy.

33. Myanmar does not dispute that the Tatmadaw operated under a highly centralized command structure, removed from civilian oversight⁹¹. At its apex was the Commander-in-Chief, Senior-General Min Aung Hlaing, who directly commanded the Army, Navy and Air Force⁹². His authority also extended to all of Myanmar’s security forces, including the Border Police, Border Guards and civilian militias⁹³. According to the UN Fact-Finding Mission: “The Commander-in-Chief led the Tatmadaw General Staff”, which was “responsible for formulating the objectives and limits of military operations, the role and composition of the forces involved, the rules of engagement, and the necessary logistics”⁹⁴.

34. In Myanmar’s armed forces, as in the militaries of other States, subordinate officers and units operate pursuant to direct orders from their superiors, deviation from which risks immediate sanction⁹⁵. As Senior-General Hlaing himself emphasized, “discipline and obedience” are the “backbone of the Tatmadaw” and “[e]ach and every serviceman must strictly follow rules and regulations, orders and instructions”⁹⁶.

35. Beyond the Tatmadaw’s command structure and organization, the existence of a calculated plan, conceived and developed at the highest level, to carry out the “clearance operations” against the Rohingya Muslims, is evidenced by the strikingly similar *modus operandi* with which these operations were executed all across northern Rakhine State. In dozens of locations, the UN Fact-Finding Mission observed a:

“remarkable similarity in the timing of operations, the sequence of events, the types of weapons used, the assistance received from other security forces or ethnic Rakhine, the

⁹¹ *Ibid.*, paras. 1546-1548.

⁹² Republic of the Union of Myanmar, *Constitution* (2008), Art. 20 (c). MG, Vol. VI, Annex 176.

⁹³ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018) para. 1522. MG, Vol. II, Annex 40; Amnesty International, “*We Will Destroy Everything*” (2018), para. 143. MG, Vol. IV, Annex 112.

⁹⁴ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1533. MG, Vol. II, Annex 40.

⁹⁵ *Ibid.*, para. 1527.

⁹⁶ “Highlights of Snr-Gen Min Aung Hlaing’s Armed Forces Day Speech”, *The Irrawaddy* (28 March 2018). MG, Vol. IX, Annex 282.

coordination and division of roles between perpetrators, the types of violations and the manner in which they were committed. The *modus operandi* of these attacks was recognisable and consistent throughout. *This could not have occurred in the absence of significant levels of forethought and organization.*⁹⁷

36. On the basis of this evidence, the Fact-Finding Mission found that there was a “consistent pattern of conduct” which is “only possible when all troops are acting under the effective control of a single unified command”⁹⁸ and that their operations have been “planned, ordered and supervised at the level of the Commander-in-Chief”⁹⁹.

37. This is another aspect of our case that makes it much stronger than the *Bosnia* case. In that case, the Court did not find a pattern of conduct from which an intent to commit genocide against a specific group could be inferred. The particular circumstances of the massacre at Srebrenica, which the Court did deem sufficient to constitute genocide, were *not* found to have occurred at other locations in Bosnia.

38. This gives rise to a situation here that was not present in *Bosnia*: whether, in *addition* to the particular circumstances of the massacres at numerous Rohingya villages, an intent to destroy the Rohingya as a group can also be reasonably inferred from what the Fact-Finding Mission called Myanmar’s “consistent pattern of conduct”¹⁰⁰ in at least 54 different locations.

39. In addressing this issue, as Professor Sands recalled for you, the Fact-Finding Mission identified seven factors, drawn from the Court’s jurisprudence and that of other international tribunals, which it regarded as indicators of genocidal intent, and it considered whether these factors were present in Myanmar’s “clearance operations” against the Rohingya. It then found, based on its comprehensive investigation and voluminous evidence, that every one of these seven boxes could be checked.

40. *First*, “the Tatmadaw’s *extreme brutality* during its attacks on the Rohingya”¹⁰¹. It is beyond dispute that the Tatmadaw conducted the “clearance operations” with extreme brutality. They killed, maimed and tortured members of the Rohingya group indiscriminately, in a manner that

⁹⁷ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1429 (emphasis added). MG, Vol. II, Annex 40.

⁹⁸ *Ibid.*, para. 1536.

⁹⁹ *Ibid.*, para. 1533.

¹⁰⁰ *Ibid.*, para. 1536.

¹⁰¹ UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224 (emphasis added). MG, Vol. III, Annex 49.

inflicted maximum harm. The atrocities encompassed, among others, large-scale burning of victims alive — often by confining them in homes that were then set ablaze — mutilation with knives, soaking victims in petrol and setting them on fire, and the stabbing, cutting or fatal beating of infants and young children in the presence of their parents. As regards boys and men, their Srebrenica-style separation and execution was a common feature¹⁰².

41. *Second*, “the *organized nature* of the Tatmadaw’s destruction”¹⁰³. As already noted, the evidence establishes incontrovertibly that the “clearance operations” were carried out in a highly organized manner pursuant to a co-ordinated military plan developed by the Tatmadaw’s High Command and approved by the Commander-in-Chief. The “clearance operations” were thus preceded by careful pre-planning and preparation and then executed according to plan by similar means across scores of Rohingya villages in northern Rakhine State.

42. *Third*, “the enormity and nature of the *sexual violence* perpetrated against women and girls during the ‘clearance operations’”¹⁰⁴. The UN Fact-Finding Mission identified as a “notable pattern” the perpetration of “mass gang rape, involving multiple perpetrators and multiple victims in the same incident”¹⁰⁵. Victims included children and pregnant women. And the Tatmadaw committed these atrocities with unspeakable depravity, often subjecting the victims to torture and mutilation, before killing them.

43. *Fourth*, “the insulting, derogatory, *racist and exclusionary utterances* of Myanmar officials and others, prior [to], during and after the ‘clearance operations’”¹⁰⁶. Myanmar has steadily propagated, over decades, a racist message that the Rohingya are an impure and subhuman race that originated elsewhere, came to the country illegally, and reproduced so rapidly, like animals, that they threatened to supplant the pure-blooded, “national races”¹⁰⁷ favoured by the Government. Myanmar’s dehumanizing, anti-Rohingya hate speech reached a crescendo during the “clearance

¹⁰² See e.g. UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 766, 808, 815, 1086, 1395. MG, Vol. II, Annex 40.

¹⁰³ UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224 (emphasis added). MG, Vol. III, Annex 49.

¹⁰⁴ *Ibid.*

¹⁰⁵ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 921. MG, Vol. II, Annex 40.

¹⁰⁶ UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224. MG, Vol. III, Annex 49.

¹⁰⁷ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 697-700, 1315, 1420. MG, Vol. II, Annex 40.

operations” in August and September 2017, when Senior General Hlaing, the Commander-in-Chief, spoke of the “threat” to Myanmar’s other races posed by the Rohingya’s mere existence, and gave his assurances, that the Tatmadaw would soon be “solving” the “long-standing” “Bengali problem” which was, until then, an “unfinished job”¹⁰⁸.

44. Similar derogatory and threatening racist messages about the Rohingya were disseminated on Facebook, which had widespread reach in Myanmar. The UN’s Independent International Mechanism for Myanmar (IIMM), which succeeded the Fact-Finding Mission and supplemented its work, determined that at least 43 Facebook pages were connected to the military and used by the Tatmadaw at the time of the “clearance operations” “to increase animosity towards the [Rohingya] group”¹⁰⁹. Imbued with these messages, Tatmadaw soldiers showed no restraint in their efforts to complete what their Commander-in-Chief told them was an “unfinished job”. As one Tatmadaw officer declared, “[i]f they’re Bengali, they’ll be killed”¹¹⁰. Others, also taking the cue from the Commander-in-Chief, declared that the hour had come to “kill all the [Bengalis]” and “destroy their race”¹¹¹ so that “none of them should be left alive”¹¹².

45. *Fifth*, “the existence of *discriminatory plans and policies*”¹¹³. For years prior to the “clearance operations”, Myanmar adopted and enforced racist laws and policies that specifically targeted the Rohingya, stigmatized and isolated them, characterized them as mortal enemies of the Buddhist peoples of Rakhine State, and incited violence against them. These official measures included: deprivation of nationality and citizenship, restrictions on marriage and childbirth, prohibitions on movement and employment, and confinement in internment camps and ghettos. The

¹⁰⁸ Senior General Min Aung Hlaing, “Entire government institutions and people must defend the country with strong patriotism” (2 Sept. 2017). MG, Vol. VI, Annex 150. See also UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 753. MG, Vol. II, Annex 40; Simon Lewis, Zeba Siddiqui, Clare Baldwin and Andrew R.C. Marshall, “Tip of the Spear”, *Reuters* (26 June 2018), p. 5. MG, Vol. IX, Annex 284.

¹⁰⁹ IIMM Hate Speech Report (2023), Section II.A. RG, Vol. II., Annex 5.

¹¹⁰ Simon Lewis, Zeba Siddiqui, Clare Baldwin & Andrew R.C. Marshall, “Tip of the Spear”, *Reuters* (26 June 2018), p. 7. MG, Vol. IX, Annex 284.

¹¹¹ Steve Stecklow, “Hatebook: Why Facebook is losing the war on hate speech in Myanmar”, *Reuters* (15 Aug. 2018). MG, Vol. IX, Annex 287.

¹¹² *Ibid.*

¹¹³ UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224 (emphasis added). MG, Vol. III, Annex 49.

UN Fact-Finding Mission found that these openly racist laws and policies “adversely impact[ed] every aspect of their life, including their access to food, livelihood, health and education”¹¹⁴.

46. *Sixth*, “the Government’s *tolerance for public rhetoric of hatred and contempt for the Rohingya*”¹¹⁵. Myanmar’s senior military and civilian leaders not only tolerated but actively disseminated vicious hate speech, turning the Rohingya into objects to be feared and despised by other ethnic and religious groups and inciting those groups to rise up against them. The chief actor was Senior General Hlaing himself, who incited Myanmar’s Buddhist races against the Rohingya by openly declaring that “absolutely, our country has no Rohingya race”¹¹⁶ and warning that “the Bengali population [had] exploded” to the point that it would “swallow[]” them up¹¹⁷.

47. *And seventh*, “the State’s *failure to investigate and prosecute* gross violations of international human rights law and serious violations of international humanitarian law, both as they were occurring and after they occurred”¹¹⁸. Despite the enormity of the crimes committed, Myanmar has been unwilling to properly investigate, let alone prosecute, the perpetrators. Instead, it has steadfastly refused to co-operate with impartial international agencies, including from the United Nations, and it has invested heavily in destroying evidence, including by razing the remains of the Rohingya villages where the genocide occurred. True to its nature as a *de facto* military government, Myanmar has cloaked its armed forces in an impenetrable gown of impunity¹¹⁹.

48. After reviewing the evidence of Myanmar’s conduct under these seven headings, the UN Fact-Finding Mission concluded in 2019:

“Every one of these indicators is linked to the acts or omissions of Myanmar State organs, including the military, other security forces, ministries, legislative bodies, the UEHRD and other civilian institutions. Collectively they demonstrate a pattern of

¹¹⁴ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 378, 517, 525, 534, 1403. MG, Vol. II, Annex 40.

¹¹⁵ UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224 (emphasis added). MG, Vol. III, Annex 49.

¹¹⁶ Senior General Min Aung Hlaing, “Entire government institutions and people must defend the country with strong patriotism” (2 Sept. 2017). MG, Vol. VI, Annex 150; see also UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1330. MG, Vol. II, Annex 40.

¹¹⁷ Senior General Min Aung Hlaing, “Gallant Efforts to Defend the HQ Against Terrorist Attacks and Brilliant Efforts to Restore Regional Peace, Security are Honoured” (20 Sept. 2017). MG, Vol. VI, Annex 152.

¹¹⁸ UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224 (emphasis added). MG, Vol. III, Annex 49.

¹¹⁹ See MG, Chap. 11; RG, Chap. 8.

conduct that infers genocidal intent on the part of the State to destroy the Rohingya, in whole or in part, as a group. For reasons explained in its 2018 report, *there is no reasonable conclusion to draw, other than the inference of genocidal intent, from the State's pattern of conduct.*"¹²⁰

49. In sum, the evidence of genocide, including genocidal intent, is not only much stronger and much more pervasive in Myanmar than it was in Bosnia, but it was determined by the Fact-Finding Mission to permit no reasonable conclusion other than genocide. Instead of a single Srebrenica, there were multiple villages where similar massacres of Rohingya Muslims took place. Instead of a renegade Serb militia, whose actions the Court was unable to attribute to a State, in Myanmar it was the State itself, through its armed forces, which perpetrated these atrocities. Instead of an impromptu intent formed immediately prior to the genocidal acts, in Myanmar there was a plan, prepared well in advance of the "clearance operations", at the highest level of the armed forces, and dutifully executed by subordinate officers and enlisted personnel throughout northern Rakhine State, employing the very same *modus operandi*. In Myanmar, in contrast to Bosnia, genocide, including genocidal intent, is proven not only by particular circumstances in particular locations, but also by a pattern of conduct demonstrating the existence of a plan, the intent of which, it can only reasonably be inferred, from its nature and the manner of its execution, was to destroy the Rohingya as a group.

2. Comparison with the *Croatia* case

50. Mr President, the evidence before you also distinguishes the present case from the *Croatia* case. In *Croatia*, the Court found neither particular circumstances — nothing equivalent to the massacre at Srebrenica, for example — nor a pattern of conduct from which genocidal intent was the only reasonable inference to be drawn. The case is nevertheless helpful to us here for several reasons.

51. First, the Court found that the actions of the respondent State constituted a pattern of conduct: evidenced by what it called "similarities, in terms of the *modus operandi* used, between some of the attacks confirmed to have taken place"¹²¹. These similarities included attacking and occupying Croat localities and creating what the Court called

"a climate of fear and coercion, by committing a number of acts that constitute the *actus reus* of genocide within the meaning of Article II (a) and (b) of the Convention. Finally,

¹²⁰ UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 225 (emphasis added). MG, Vol. III, Annex 49.

¹²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 122, para. 415.

the occupation would end with the forced expulsion of the Croat population from these localities.”¹²²

By the same reasoning, the evidence in our case plainly establishes a pattern of conduct by Myanmar across the expansive geographic area in which the majority of Rohingya lived in northern Rakhine State. As you have seen, this was the conclusion reached by the UN Fact-Finding Mission.

52. Second, to determine whether genocidal intent could be reasonably inferred from the respondent State’s pattern of conduct, the Court considered factors that largely overlap those employed by the UN Fact-Finding Mission in our case, and which the mission concluded were indisputably present in our case. According to the Court, the most important factors in “revealing a genocidal” intent were, as Professor Sands recalled earlier: (i) “the scale and allegedly systematic nature of the attacks” — *check*; (ii) the attacks “are said to have caused casualties and damage far in excess of what was justified by military necessity” — *check*; (iii) “the specific targeting of Croats” — in this case, the targeting of Rohingya Muslims, *check*; and (iv) “the nature, extent and degree of the injuries caused to the Croat population” — again, substitute Rohingya Muslim for “Croat”, and *check*¹²³. The Court did not find that all of these factors were present in *Croatia*; but they are all undeniably present in our case.

53. Third, and this is the feature that most distinguishes *Croatia* from our case: the Court found that Serbia’s policy was to establish “an ethnically homogeneous Serb State”, following the “forced displacement” of Croats from the parts of Croatia that Serbia hoped to annex, or at least control¹²⁴. The Court found it determinative, that this intention “namely the forced displacement of the Croats . . . did not entail their physical destruction . . . It was not a question of systematically destroying that population, but of forcing it to leave the areas controlled by these armed forces.”¹²⁵

54. In other words, for the Court, *Croatia v. Serbia* was a case of ethnic cleansing but not genocide. To be sure, the one does not necessarily exclude the other. In the *Bosnia* case, the Court explained that “acts of ‘ethnic cleansing’ may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of . . . a specific intent (*dolus specialis*) inspiring

¹²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 122, para. 415.

¹²³ *Ibid.*, p. 121, para. 413.

¹²⁴ *Ibid.*, p. 126, para. 435.

¹²⁵ *Ibid.*, p. 127, para. 435.

those acts”¹²⁶. However, in the *Croatia* case, the Court did not consider that Serbia’s ethnic cleansing of Croats was indicative of an intent to destroy them as a group. Its findings were to the contrary. It concluded that: “Croatia has not established that the only reasonable inference that can be drawn from the pattern of conduct it relied upon was the intent to destroy, in whole or in part, the Croat group.”¹²⁷

55. This further distinguishes the *Croatia* case from our case. Myanmar’s pattern of conduct, in contrast to that of Serbia, does not permit the Court to reasonably infer that its intent was to forcibly displace, or ethnically cleanse, the Rohingya Muslim group. Myanmar itself does not claim that this was its intent, or that such an intent can be reasonably inferred from its conduct. In fact, Myanmar has consistently denied this¹²⁸. To be sure, Myanmar’s “clearance operations” caused massive forced displacement, in addition to killing, maiming and raping of the Rohingyas. As the Court explained in *Croatia*, the existence of genocidal intent in such circumstances depends on whether “the forced displacement was carried out in circumstances calculated to result in the total or partial physical destruction of the group”¹²⁹. The evidence in our case shows plainly that it was, as the Fact-Finding Mission concluded.

56. As Professor Sands told you, Myanmar argues that the “clearance operations” were intended neither to forcibly displace, ethnically cleanse or destroy the Rohingyas as a group. Its only defence of this conduct is to claim that its actions were intended to combat terrorism, specifically to counter the activities of the Arakan Rohingya Salvation Army, referred to by the acronym ARSA throughout the pleadings. The “clearance operations” were exercises in counter-terrorism against ARSA, says Myanmar, not efforts to destroy the Rohingya as a group.

57. This is, frankly, a hopeless argument that is entirely unsupported by the evidence; but, in the circumstances, it appears to be the best defence that Myanmar can gin up, and we will give it due

¹²⁶ *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. 123, para. 190.

¹²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), p. 128, para. 440.

¹²⁸ See e.g. CMM, paras. 10.68, 16.27; Rejoinder of the Republic of the Union of Myanmar (30 December 2024) (hereinafter “RM”), paras. 10.33, 13.73, 16.13.

¹²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), p. 114, para. 376.

attention over the course of our presentation this week, including with a speech on Wednesday devoted entirely to this issue. For now, as a sort of preview, I will simply make three points about it.

58. First, it is fundamental — and should not be debatable — that actual counter-terrorism is based on ensuring the safety and security of the affected population, and gaining its loyalty and support. This cannot be reconciled with sending the armed forces to scores of villages, setting fire to homes with families still inside them, shooting at everyone who moves, rounding up men and boys for mass execution, hacking children and infants to death, raping, gang-raping and mutilating women and girls before killing them, forcing survivors to run for their lives, and then razing their villages to prevent them from returning. This is what the evidence shows Myanmar did. And it is a description of genocide, not counter-terrorism.

59. Second, this is not a case, as Myanmar has argued in its written pleadings, of applying Western standards to a less developed country in the global South. Yes, our expert witness, Professor Michael Newton of Vanderbilt Law School, from whom you will hear next week, is a retired United States military officer. But he has devoted both his military and academic careers to the law of war and particularly to matters of counter-terrorism, including in non-Western and developing States. His expert testimony is that the fundamental principles of counter-terrorism strategy and tactics are nearly universally accepted — including, most significantly, by Myanmar itself. This is reflected in the Tatmadaw’s own rules of engagement, which Myanmar has very helpfully attached to its pleadings. There is no problem with these rules, according to Professor Newton; the problem is — as you will be shown by my colleagues — the Tatmadaw completely ignored them in carrying out its “clearance operations” against the Rohingya. Most prominently, as the UN Fact-Finding Mission concluded:

“The killing of civilians is inherently brutal in any context. The perpetrators of the ‘clearance operations’ in Rakhine State introduced an additional dimension to this. There was not the least effort to make any distinction between ARSA fighters and civilians, or to specifically target a military objective or identify and repel an immediate threat. Everyone was a target and no one was spared: mothers, infants, pregnant women, the old and infirmed all fell victim to the ruthless campaign. The targeting of women and girls for rape, gang rape and other forms of sexual violence, as well as the targeting of and impact on children in general, has been shocking. The brutality with which the underlying acts were carried out provides further support for a conclusion that they were committed with genocidal intent.”¹³⁰

¹³⁰ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1433. MG, Vol. II, Annex 40.

60. My third point is that the “clearance operations” were, by several orders of magnitude, far out of proportion to what was needed to defend against ARSA. This is how the UN Independent Investigative Mission for Myanmar described ARSA’s capacity in August 2017 when Myanmar launched its “clearance operations”:

“Based on photographs and videos released by the Myanmar military, publicly circulated footage, witness testimonies, and official statements, the Mechanism found that by August 2017 ARSA likely possessed a modest arsenal of 40-70 firearms of mixed types and calibres . . . Most ARSA members primarily used bladed weapons, sticks and a limited number of artisanal firearms . . . While IEDs appear to have been used in the 2016 and 2017 attacks, there is no conclusive evidence that firearms were employed.”¹³¹

61. It is not surprising that Myanmar would attempt to transform ARSA, armed mainly with knives and sticks, into a major fighting force and national security threat. To be sure, we do not suggest that Myanmar should have ignored ARSA; as a sovereign State, it had the right to defend itself against such an outfit, even if it was as poorly equipped as the evidence shows. However, history teaches us that, when genocide occurs, it is almost always under cover of armed conflict. In this regard, it would be wise to recall the words of Judge Cançado Trindade in the *Croatia* case, partially quoted by Professor Sands:

“One cannot characterize a situation as one of armed conflict, so as to discard genocide. The two do not exclude each other. In this connection, it has been pertinently warned that perpetrators of genocide will almost always allege that they were in an armed conflict, and their actions were taken ‘pursuant to an ongoing military conflict’; yet, ‘genocide may be a means for achieving military objectives just as readily as military conflict may be a means for instigating a genocidal plan.’”¹³²

62. Before concluding my presentation, I would like to call attention to one more distinguishing feature from the present case and both the *Bosnia* and *Croatia* cases. In the prior cases, the Court had the benefit of findings of fact by another international judicial body, namely, the International Criminal Tribunal for the former Yugoslavia (ICTY). To be sure, the Court did not rely on those findings exclusively. In *Bosnia*, the Court found helpful a report by the Secretary-General on *The Fall of Srebrenica*, describing it as having “considerable authority” because of the care taken

¹³¹ Affidavit of Nicholas Koumjian (15 Nov. 2025), para. 62.

¹³² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), dissenting opinion of Judge Cançado Trindade, p. 253, para. 144 (citing R. Park, “Proving Genocidal Intent: International Precedent and the ECCC Case 002”, 63 *Rutgers Law Review* (2010), pp. 169-170, and cf. pp. 150-152).

in its preparation, and the independence of those responsible for it¹³³. Likewise, in *Croatia*, the Court found that it “must give evidential weight” to a report by the UN Special Rapporteur “by reason both of the independent status of its author, and of the fact that it was prepared at the request of organs of the United Nations, for purposes of the exercise of their functions”¹³⁴.

63. Here, the centrepiece of our case has been, from the very beginning, the two voluminous reports, consisting of more than 600 pages, prepared by the UN Fact-Finding Mission, appointed by the Human Rights Council, which were published in 2018 and 2019. These, too, are notable for the care taken in their preparation and the independence of those involved. The evidence contained therein has been supplemented in the course of these proceedings by numerous equally independent and authoritative reports from the IIMM, other United Nations bodies, impartial non-governmental organizations, and various States, as well as 48 sworn statements from eyewitnesses, all consistent with the conclusions of the Fact-Finding Mission, and all supportive of The Gambia’s submission that Myanmar acted with genocidal intent in carrying out its “clearance operations” against the Rohingya in 2016 and 2017.

64. Mr President, Members of the Court, I will speak again at the beginning of this afternoon session delving further into the reliability of the sources of evidence upon which The Gambia replies. In the interest of time, I will simply conclude this presentation now by thanking you for your kind courtesy and patient attention, and asking that you call my good friend and esteemed colleague, Mr Arsalan Suleman, to the podium.

The PRESIDENT: I thank Mr Reichler. I now give the floor to Mr Arsalan Suleman. You have the floor, Sir.

¹³³ *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.

¹³⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), p. 133, para. 459.

Mr SULEMAN:

IV. THE ROHINGYA ARE A PROTECTED GROUP UNDER THE CONVENTION

1. Mr President, Members of the Court, it is an honour to appear before you again and to represent The Gambia in this significant case.

2. This case is about Myanmar's acts of genocide against the Rohingya group. As I will explain, there can be no doubt that the Rohingya are a protected group within the meaning of Article II of the Genocide Convention. Myanmar's refusal to recognize them as such, or to even use the term Rohingya, is entirely without effect or relevance.

3. I begin my presentation by providing an overview of the relevant geography, demography and history of northern Rakhine State, the area where the Rohingya have mostly lived — or at least where they lived before Myanmar's genocidal "clearance operations". I will then address the evidence that establishes the Rohingya to be an ethnical, religious and/or racial group within the meaning of the Genocide Convention.

1. Overview of the relevant geography, demography and history of northern Rakhine State

4. On the screen is Figure 1.1 from The Gambia's Memorial. This is a map showing the location of Rakhine State, outlined in red. This is the westernmost state of Myanmar, with a coastline that runs along the Bay of Bengal. Zooming in, you can see more clearly that Sittwe, the capital of Rakhine State, is depicted on the map with a small circled black dot.

5. Most of the acts of genocide during the so-called "clearance operations" that we focus on in this case occurred in the three townships north-west of Sittwe. Those townships — Buthidaung, Maungdaw and Rathedaung — are depicted in Figure 1.2 from the Memorial, which you can see on your screens. Townships are an administrative unit of local governance in Myanmar. They are made up of towns and villages; the villages are grouped into village tracts¹³⁵. Numerous specific villages where "clearance operations" occurred are also depicted on this map.

6. These townships are predominantly rural, agrarian communities, with populations spread out among hundreds of villages across these lands. The houses are mostly made of bamboo, with

¹³⁵ CMM, para. 2.10.

roofs made of palm leaves. There are no major urban population centres in this part of northern Rakhine State. The manner in which the Rohingya population was situated geographically — in small villages rather than large urban centres — is a key factor for the Court’s understanding of that part of the Rohingya group targeted by Myanmar’s genocidal “clearance operations”.

7. The total population of Rakhine State, as estimated by Myanmar’s 2014 census, is 3.19 million¹³⁶. This includes people from many different ethnic groups, including Rakhine, Rohingya, Muru, Kaman, Daingnet, Chin and others. Around 1.1 million people out of that figure were “unenumerated”: this is because Myanmar reneged on its explicit commitment to allow the Rohingya to self-identify as such in that census¹³⁷. Those wishing to self-identify as Rohingya were not allowed to formally participate, but the 3.19 million figure includes that estimated “unenumerated” population¹³⁸.

8. The population of Rohingya in all of Rakhine State, including in the state capital Sittwe, was estimated to be around 1.1-1.4 million pre-“clearance operations”. The largest Rohingya population centres were in the principal towns in Maungdaw, Buthidaung and Rathedaung townships, but in many of the villages, the populations were around a few hundred people. Over 700,000 Rohingya fled the “clearance operations” in 2017 and took refuge in Bangladesh.

9. In terms of the Rohingya population specifically in each of Buthidaung, Maungdaw and Rathedaung townships, those numbers are less certain. Before the “clearance operations”, the Rohingya made up around 80-90 per cent of the population of these three townships, with Rakhine

¹³⁶ The Republic of the Union of Myanmar, Department of Population, Ministry of Immigration and Population, “The 2014 Myanmar Population and Housing Census Rakhine State” (May 2015), available at <https://myanmar.unfpa.org/sites/default/files/pub-pdf/Rakhine%20State%20Census%20Report%20-%20ENGLISH-3.pdf>, p. 1; The Republic of the Union of Myanmar, Department of Population, Ministry of Immigration and Population, “Overview of the Results of the 2014 Population and Housing Census, Myanmar” (December 2017), available at https://www.dop.gov.mm/sites/dop.gov.mm/files/publication_docs/overview_and_results_of_the_2014_census9_1_2018_0.pdf, p. 7.

¹³⁷ Timothy McLaughlin, “Myanmar Releases Census Data, but Excludes Rohingya Minority”, *Reuters* (29 May 2015), MG, Vol. IX, Annex 255; International Crisis Group, “Counting the Costs: Myanmar’s Problematic Census” (2014) Asia Group Briefing No. 144, MG, Vol. IV, Annex 92; 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), note 906. RG, Vol. II, Annex 1.

¹³⁸ The Republic of the Union of Myanmar, Department of Population, Ministry of Immigration and Population, “The 2014 Myanmar Population and Housing Census Rakhine State” (May 2015), available at <https://myanmar.unfpa.org/sites/default/files/pub-pdf/Rakhine%20State%20Census%20Report%20-%20ENGLISH-3.pdf>, p. 1; The Republic of the Union of Myanmar, Department of Population, Ministry of Immigration and Population, “Overview of the Results of the 2014 Population and Housing Census, Myanmar” (December 2017), available at https://www.dop.gov.mm/sites/dop.gov.mm/files/publication_docs/overview_and_results_of_the_2014_census9_1_2018_0.pdf, p. 7.

making up most of the rest of the population. According to data from Myanmar's 2014 census, Buthidaung township had a population of around 206,000 people; Maungdaw some 112,000 people; and Rathedaung around 140,000 people¹³⁹. It is unclear to what extent, if any at all, these figures include the "unenumerated" population.

10. Mr President, Members of the Court, for centuries, the Rohingya have called Rakhine State, or Arakan, their home¹⁴⁰. The Rohingya report authored by Francis Wade for the Independent Investigative Mechanism for Myanmar, which we also refer to as the IIMM, notes that Muslims have been present in what is now Rakhine State since at least the ninth century, when Muslim seafarers set up trading posts along the coasts¹⁴¹.

11. There is additional compelling evidence that the Rohingya have lived in present-day Rakhine State for centuries and have called themselves Rohingya. A 1799 British colonial ethnography — published by Dr Francis Buchanan — noted that "the Mohammedans, who have long settled in Arakan, and who call themselves Rooinga, or natives of Arakan", speak their own dialect¹⁴². An 1811 article in the British *Classical Journal* identified "Rooinga" as one of three languages spoken in the "Burmah Empire"¹⁴³. The collection of languages published in 1815 by German professor J.S. Vater included an entry for "Rooinga", noting the existence of the Rohingya ethnic group and its distinct language¹⁴⁴.

12. Myanmar argues that there are no other similar historical sources that refer to the Rohingya as such. This fails to refute the fact that these specific sources did exactly that. At a minimum, these sources document the fact that the Rohingya referred to themselves as such, going all the way back to the end of the eighteenth century.

¹³⁹ Myanmar Information Management Unit, "MIMU Township Profiles", available at <https://themimu.info/mimu-township-profiles-dashboard>.

¹⁴⁰ Moshe Yegar, *The Muslims of Burma: A Study of a Minority Group* (Otto Harrassowitz 1972), pp. 18-19. MG, Vol. VIII, Annex 211; Mohammed Yunus, *A History of Arakan: Past and Present* (University of Chittagong 1994), pp. 14-15. MG, Vol. VIII, Annex 212; Michael W. Charney, "Theories and Historiography of the Religious Basis of Ethnonyms in Rakhing (Arakan), Myanmar (Burma)" (2005) Workshop The Forgotten Kingdom of Arakan: A Public Seminar on the People of Present Day Arakan State of Myanmar (2005), p. 31. MG, Vol. VIII, Annex 218; Syed Zain Al-Mahmood, "Timeline: A Short History of Myanmar's Rohingya Minority", *Wall Street Journal* (23 December 2016). MG, Vol. IX, Annex 262.

¹⁴¹ Francis Wade, "IIMM Rohingya Report" (January 2022), p. 11. RG, Vol. II, Annex 4.

¹⁴² Francis Buchanan, "A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire" (2003) 1 (1) *SOAS Bulletin of Burma Research*, p. 55 (emphasis omitted). MG, Vol. VIII, Annex 214.

¹⁴³ "Numbers in 200 Tongues" (London 1811) 535 *Classical Journal*, p. 107. MG, Vol. VIII, Annex 206.

¹⁴⁴ J.S. Vater, *Linguarum Totius Orbis* (1815). MG, Vol. VIII, Annex 207.

13. Myanmar also argues that most of this population immigrated to Myanmar during the British colonial period, which began in the mid-nineteenth century. While it may be the case that some populations moved into this region over time, the historical record makes clear that the Rohingya had been present as a group in this region for three centuries.

14. The historical record also shows that after Burma's independence in 1948, its political and military leaders recognized the Rohingya as a distinct ethnic group. The first Prime Minister, U Nu, made the following statement in a 1954 radio address:

“The people living in Maungdaw and Buthidaung regions are our nationals, our brethren. They are called Rohingyas. They are one of the same par in status of nationality with Kachin, Kyah, Karen, Mon, Rakhine and Shan. They are one of the ethnic races of Burma.”¹⁴⁵

15. As noted in the IIMM Rohingya report, Prime Minister U Nu's administration had Rohingya government ministers and parliamentary secretaries; there was a Rohingya students association in the University of Rangoon; and, in 1961, there was a Rohingya language radio broadcast on the public radio station of the Burma Broadcasting Service¹⁴⁶.

16. In the early years after Burma's independence, there was an armed insurgency of Rohingya who sought to separate northern Rakhine State from Burma and join what was then called East Pakistan, or present-day Bangladesh. The Burmese Army quashed that insurrection, whose fighters were referred to as mujahideen. In July 1961, during the so-called mujahid insurgent surrender ceremony, Burma's Vice Chief of Staff of the Armed Forces, Brigadier-General Aung Gyi, delivered a speech identifying the Rohingya as an ethnic group in Burma.

17. His speech is at Annex 143 of the Memorial. In relevant part General Aung Gyi said the following:

“In central Burma, there are people who hold the view that (Rohingya) people in this region are not Tai-yin-tha or ethnic group native to the Union of Burma . . . These are false views . . . I want to openly and publicly tell you this: we consider (the Rohingya people) of Mayu District an ethnic minority integral to the Union of Burma. Let me be very precise about this. Those of you here . . . ought to view yourselves as an ethnic minority of Burma. Only then will peace prevail in this region and in this country of ours.”¹⁴⁷

¹⁴⁵ Francis Wade, “IIMM Rohingya Report” (January 2022), p. 5. RG, Vol. II, Annex 4.

¹⁴⁶ *Ibid.*

¹⁴⁷ General Aung Gyi, “Address Delivered in Mujahid Insurgents' Surrender Ceremony” (Maungdaw Township, 4 July 1961), p. 3. MG, Vol. VI, Annex 143.

18. He went on to recognize the legitimate grievances of the Rohingya that had led to the insurgent movement in the first place, and declared that the persecution of the past was ending:

“They said the Mujahideen rebellion broke out because of religious persecution. They said there was economic persecution. They said there was racial persecution. Yes, they are correct as these rationales and explanations were true to a certain degree, before . . . But that was the past . . . There is no more racial persecution. For we have emphatically and categorically recognized Rohingyas as an ethnic minority . . ., making efforts for the progress and development of the Rohingya ethnic minority.”¹⁴⁸

19. Myanmar quotes from his speech in its Rejoinder — using its own translation — to argue that General Aung Gyi referred to the Rohingya as the same ethnic group as existed across the border in present-day Bangladesh, and not as a distinct ethnic group in Myanmar¹⁴⁹. I will address the argument about the distinctiveness of the group shortly, but what is important is that Myanmar concedes that General Aung Gyi used the term Rohingya to refer to the Muslim-majority population of present-day northern Rakhine State.

20. Unfortunately, the commitment to recognition and inclusion and an end to persecution referred to in these speeches — the very same demands that the Rohingya have to this very day — did not hold true. Those who sought to exclude the Rohingya from the country soon regained power. In 1962, a military coup ousted the civilian government, and there began a long process of systematic persecution and discrimination against, and exclusion of, the Rohingya, extending and enlarging over the next several decades. This eventually culminated in the genocidal “clearance operations” of 2016-2018. Ms Pasipanodya will go into further detail on this history of discrimination as one of the indicators of Myanmar’s genocidal intent.

2. The Rohingya are a protected group under the Convention

21. I will now address why the Rohingya are plainly a protected group within the meaning of Article II of the Genocide Convention.

22. Article II defines genocide as any of the acts listed therein that are “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

¹⁴⁸ General Aung Gyi, “Address Delivered in Mujahid Insurgents’ Surrender Ceremony” (Maungdaw Township, 4 July 1961), p. 5 (emphasis omitted). MG, Vol. VI, Annex 143.

¹⁴⁹ RM, para. 13.46.

23. As articulated in *Bosnia v. Serbia*, the Court has defined a group for purposes of the Genocide Convention as “a collection of people who have a particular group identity” that is defined by “positive characteristics — national, ethnical, racial or religious”, which can be identified through a “combined subjective-objective approach”¹⁵⁰.

24. The key objective factors include distinguishing, well-established or immutable characteristics, such as language, religion, citizenship or hereditary physical characteristics. The key subjective factors include self-identification, perceived characteristics and socio-historic context.

25. Myanmar argues that these ethnical, racial or religious characteristics must be such that the group is “distinct from the rest of the world’s population”¹⁵¹. There is no basis in the Court’s jurisprudence for this extreme position, which seems more motivated by Myanmar’s desire to deny the existence of the Rohingya group than an effort to reasonably address the Court’s standard for defining the group under the Convention. There is also no basis in the Court’s jurisprudence to apply — as Myanmar seeks to do — a high standard of proof applicable to findings of genocide to the identification of the group at issue.

26. As the Court made clear in *Bosnia*, all that is necessary is that the positive and objective characteristics of the group are such that it would enable the Court “to have in mind the identity of the group against which genocide may be considered to have been committed”¹⁵².

27. The identity of the Rohingya group is clear.

A. The Rohingya are an ethnical group

28. First, the Rohingya are rightly considered as an ethnical group given their language, culture, self-identification and their identification as such by Myanmar and the United Nations.

29. Clear evidence indicates that the Rohingya group speaks a common language, namely the Rohingya language. As noted, British and German ethnographic documentation from 1799, 1811 and 1815 refer to the Rohingya language as being spoken by Rohingya in Burma.

¹⁵⁰ *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), pp. 124-125, paras. 191, 193.

¹⁵¹ RM, para. 13.20.

¹⁵² *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. 124, para. 191.

30. Furthermore, a 2018 report from the NGO Translators Without Borders found that, among Rohingya refugees surveyed, all “said that they speak Rohingya, with 99 per cent of them saying it is their primary language at home”, that it is the “only spoken language that all [Rohingya] refugees understand and prefer”¹⁵³. Myanmar has not challenged this evidence.

31. Rather, Myanmar argues that The Gambia has not established that the Rohingya speak a language not shared by others in the Chittagong Division in Bangladesh. That is not something that The Gambia is required to prove. The fact that the Rohingya share this specific language is a positive characteristic that helps to establish their identity as an ethnical group. As The Gambia noted in the Memorial, the Rohingya language is related to the Chittagonian dialect of Bangla and considered by anthropologist Dr Prasse-Freeman to be a different dialect, one that the Rohingya view as central to their ethnic identity¹⁵⁴. Even Myanmar has noted the Rohingya’s shared language in defining the group for purposes of its first report on implementation of the Court’s Order on provisional measures. In that document, Myanmar noted that members of the group “speak an Indo-European tongue which is a variant of, or is closely related to, the Chittagonian dialect”¹⁵⁵.

32. The Rohingya also share a common culture. As discussed in the Memorial, the Rohingya’s shared culture includes communal organization around a mosque (or group of mosques), an emphasis on family and community, and their own music, art, poetry and foods. Myanmar again argues that these cultural characteristics may also be common to communities in Bangladesh, but that does not rebut the fact that these shared cultural characteristics allow for the identification of the Rohingya as an ethnical group in Myanmar.

33. The subjective factor of self-identification is also highly relevant to characterization of the Rohingya as an ethnical group. As noted, ethnographical reports from the eighteenth and nineteenth centuries document their historic self-identification as Rohingya. The UN High Commissioner for

¹⁵³ Translators Without Borders, *The Language Lesson: What We’ve Learned About Communicating With Rohingya Refugees* (November 2018), available at https://translatorswithoutborders.org/wpcontent/uploads/2018/12/TWB_Bangladesh_Comprehension_Study_Nov2018.pdf, p. 10.

¹⁵⁴ UN High Commissioner for Refugees, Culture, *Context and Mental Health of Rohingya Refugees: A review for staff in mental health and psychosocial support programmes for Rohingya refugees* (2018), p. 20. MG, Vol. II, Annex 31; Elliott Prasse-Freeman & Kirt Mausert, “Two Sides of the Same Arakanese Coin: ‘Rakhine’, ‘Rohingya’, and Ethnogenesis as Schismogenesis” in Prasse-Freeman, Chachavalpongpun & Strefford (eds), *Unraveling Myanmar: Critical Hurdles to Myanmar’s Opening Up Process* (Kyoto University Press 2020), p. 12. MG, Vol. VIII, Annex 236.

¹⁵⁵ Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86 (4) of the Order of 23 January 2020 (22 May 2020), para. 35.

Human Rights has reported that “Rohingya Muslims ‘self-identify as a distinct ethnic group with their own language and culture, and claim a long-standing connection to Rakhine State’”¹⁵⁶. Other authoritative UN reports, like the reports of the UN Fact-Finding Mission on Myanmar, have found that the Rohingya self-identify as such. As noted in the Memorial, 85 per cent of the Rohingya self-identified as such during Myanmar’s 2013 Inquiry Commission on Sectarian Violence. And as noted earlier in my presentation, an estimated 1.1 million people were recorded as “unenumerated” in Myanmar’s 2014 census because Myanmar did not allow them to self-identify as Rohingya in that census.

34. Furthermore, Myanmar itself clearly recognized the Rohingya as an ethnic group in its early years after independence. The speeches of Prime Minister U Nu in 1954 and General Aung Gyi in 1961 clearly acknowledged and accepted the Rohingya identity as such. Moreover, Myanmar’s long-standing discriminatory treatment of the Rohingya — which will be discussed in further detail by Ms Pasipanodya — also confirms their distinct existence as a particular group in Myanmar.

35. Finally, the international identification of the Rohingya as a distinct ethnic group by the United Nations and other States is a relevant subjective factor. In addition to the reporting by the UN entities noted above, the UN High Commissioner for Refugees has identified the Rohingya as a group since 1978. UN bodies like the UN General Assembly and the UN Human Rights Council have consistently referred to the Rohingya group by that name in dozens of UN resolutions specifically addressing concerns over the treatment of the Rohingya, as have the UN Special Rapporteurs on the situation of human rights in Myanmar. And as noted in The Gambia’s Reply, the courts of several States, including Japan, France and Australia, have all found persecution against the Rohingya based on their identity as such.

36. All of these objective and subjective factors indicate that the Rohingya are widely recognized as an ethnical group within the meaning of Article II of the Genocide Convention.

B. The Rohingya are a religious group

37. Second, the Rohingya are also a distinct group of Muslims for purposes of the Genocide Convention. It is not disputed that the Rohingya are predominantly Muslim. In fact, Myanmar

¹⁵⁶ UN OHCHR, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar, Report of the UN High Commissioner for Human Rights*, UN doc. A/HCR/32/18 (29 June 2016), para. 3. MG, Vol. II, Annex 28.

consistently refers to the Rohingya by their religious identity as Muslims as a means of identifying them as a group.

38. For example, as the Court may recall, Myanmar's first Agent in this case, the former State Counsellor Aung San Suu Kyi, referred to the Rohingya as "Muslims" living in Rakhine State during the oral proceedings on provisional measures¹⁵⁷. And in the first report on implementation of the Court's Order on provisional measures, Myanmar referred to the group as one of two "sizeable Muslim communities" in Rakhine State, the other being Muslims of the Kaman ethnicity¹⁵⁸.

39. The historical record also confirms the close association of the Rohingya with Islam. Myanmar notes in its Rejoinder that the British colonial census data refers to Arakan-Mohammedans. That is, Muslims of Arakan, the territory that is now Rakhine State, which is one way in which the term Rohingya itself could be defined.

40. The Muslim faith identity of the Rohingya group is central to their otherization and dehumanization in Myanmar, key parts of the genocidal process to which they have been and are being subjected. Several discriminatory laws, like restrictions on marriage and on the number of children couples could have, were explicitly targeted against Muslims — as you will hear in the presentation later today by Ms Pasipanodya. And the pervasive hate speech that targeted the Rohingya often focused on the threat that they, as Muslims, allegedly pose to Myanmar's Buddhist-majority population. You will also hear more on that later today.

41. Myanmar argues that if there are non-Muslim Rohingya, then it cannot be considered as a religious group under the Convention. But religion is not an immutable characteristic, so individuals who identify ethnically as Rohingya could be non-Muslim. They can convert to another religion or no longer believe in any religion. Many consider the small Hindu population in northern Rakhine State to be part of the Rohingya ethnic group. Indeed, in its Counter-Memorial, Myanmar states: "Not all Bengalis in northern Rakhine State are Muslim; a small minority are Hindu or Christian."¹⁵⁹ Nonetheless, when The Gambia is referring to the Rohingya group, it is referring to that group based in part on its primary identity as a group of Muslims.

¹⁵⁷ CR 2019/19, p. 18, para. 27 (Aung San Suu Kyi).

¹⁵⁸ Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86 (4) of the Order of 23 January 2020 (22 May 2020), para. 35.

¹⁵⁹ CMM, para. 2.24.

42. Myanmar further argues that the Rohingya cannot be a separate religious group because they are not distinct religiously from the many Muslims in neighbouring Bangladesh. But the existence of Muslims in Bangladesh is not relevant to defining a group in Myanmar for purposes of the Convention. As we know from the Court's decision in *Bosnia*, a geographical limitation combined with a religious identity can be used to define a group for purposes of the Convention¹⁶⁰.

43. For all these reasons, the Rohingya are a religious group within the meaning of Article II of the Convention.

C. The Rohingya are a racial group

44. Finally, the Rohingya are also a racial group under the Convention. A racial group can be defined by objective characteristics like physical traits, as well as subjective factors like their socio-historic context and their perception by Myanmar authorities.

45. Myanmar is a deeply race-based country. Citizenship is defined by belonging to eight so-called "national races". Myanmar's 135 officially recognized ethnic groups all fall within one of these eight races. Despite the early recognition of the Rohingya as an ethnic group by Burma's political and military leaders, the Rohingya have since been excluded from these national races. Thus, Myanmar considers them to be a different race from these national races, which is effectively an admission that they are a distinct racial group¹⁶¹.

46. In describing the Rohingya, Myanmar officials have been documented as referring to their darker skin colour and their being of "Bengali stock"¹⁶². Myanmar's treatment of the Rohingya — which includes severe restrictions on movement and lack of access to healthcare, education and livelihoods — is implemented by recognition of members of the group based on their physical appearance.

¹⁶⁰ *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), pp. 125-127, paras. 196, 199.

¹⁶¹ CMM, para. 2.2.

¹⁶² UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 460 and note 1066. MG, Vol. II, Annex 40; 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), p. 76, para. 46. MG, Vol. II, Annex 6.

47. The reality of this race-based treatment of the Rohingya, combined with their long history of persecution, constitutes a subjective factor allowing for their treatment as a racial group in Myanmar for purposes of the Convention.

48. Myanmar once again argues that these factors do not establish the Rohingya as a race separate from people of Bengali origin, but that is not what matters. So long as the objective and subjective characteristics allow the Court to identify the group at issue *in Myanmar*, the Rohingya can be considered as a racial group for purposes of the Convention.

49. In conclusion, Mr President, the relevant objective and subjective factors establish without the shadow of a doubt that the Rohingya of Myanmar are an ethnical, religious and/or racial group for purposes of Article II of the Genocide Convention.

50. Thank you, Mr President, Members of the Court, for your kind attention. Mr Reichler will give The Gambia's next presentation, but this concludes The Gambia's presentations for the morning session. Thank you.

The PRESIDENT: I thank Mr Suleman. This concludes this morning's sitting. The oral proceedings will resume this afternoon, at 3 p.m.

The sitting is closed.

The Court rose at 1.25 p.m.
