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**International Court
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**Cour internationale
de Justice**

THE HAGUE

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YEAR 2026

Public sitting

held on Wednesday 14 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 mercredi 14 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*

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

The Court meets this morning to resume hearing the first round of oral argument of The Gambia.

I now give the floor to Ms Diem Huong Ho. You have the floor, Madam.

Ms HO:

**I. THE EXTREME BRUTALITY OF MYANMAR’S “CLEARANCE OPERATIONS”
REVEALS ITS GENOCIDAL INTENT**

1. Thank you. Mr President, distinguished Members of the Court, from the presentations you heard yesterday, there can be no doubt that the Tatmadaw’s “clearance operations” — in Min Gyi, Chut Pyin, Maung Nu and the four other villages that Mr Njai discussed — were carried out with extreme brutality. The UN Fact-Finding Mission reported that a strikingly similar *modus operandi* was employed in at least 54 other Rohingya villages. And it concluded that the extreme brutality with which these operations were carried out across northern Rakhine State was a compelling indicator of Myanmar’s genocidal intent. In its words, genocidal intent was evident in “the Tatmadaw’s extreme brutality during its attacks on the Rohingya”¹.

2. The Court is now well aware of the underlying facts. So let us turn to the jurisprudence. It is beyond dispute that the brutality of an attack on a protected group constitutes evidence of genocidal intent. The Court itself recognized, in *Croatia v. Serbia*, that genocidal intent can be inferred from “the scale and allegedly systematic nature of the attacks, the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity, the specific targeting of [members of the protected group] and the nature, extent and degree of the injuries caused to the [protected] population”². The ICTY and the ICTR have also found genocidal intent based on

¹ UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 224. MG, Vol. III, Annex 49.

² *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.

the brutality of an attack — not only through the attack’s scale and those targeted by it, but also because of the extent and the degree of injury which the attack caused to its victims³.

3. Each of these hallmarks of brutality evidencing genocidal intent is present in this case. Myanmar’s “clearance operations” were large scale and systematic; they caused civilian casualties and destruction far beyond any military necessity; they targeted the most vulnerable members of the Rohingya group; and they were deliberate and extreme in their cruelty.

1. Scale and systematic nature of the “clearance operations”

4. I begin with the scale and systematic nature of the crimes against the Rohingya. The ICTR Trial Chamber in the *Ndindabahizi* case explained that an attack on several thousand members of an ethnic group “is itself indicative of the requisite intent to destroy [that group], in whole or in part”⁴. Similarly, the Trial Chamber found, in the *Akayesu* case, that an attack “on a *massive* scale” indicated that “the massacres were aimed at exterminating the group”⁵.

5. Our case fits the description here. As Mr Loewenstein explained yesterday, in two waves of the “clearance operations”, Myanmar mounted a systematic and large-scale attack against the Rohingya. The UN Fact-Finding Mission concluded that, while the “exact number of casualties may never be known”, “the ‘clearance operations’ that started on 25 August 2017 alone have directly resulted in more than 10,000 deaths” — an estimate it considered to be “conservative”⁶.

6. The United States Department of State’s report found that the attacks were “extreme, large-scale, [and] widespread”⁷. One in five witnesses interviewed had seen a “mass-casualty event of killings or injuries . . . with *more than 100* victims”⁸.

³ See *Prosecutor v. Muhimana*, ICTR-95-1B-T, Trial Judgment (28 Apr. 2005), para. 496; *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999), para. 93; *Prosecutor v. Alfred Musema*, ICTR-96-13-A, Trial Judgment and Sentence (27 Jan. 2000), para. 166; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 Sept. 1998), paras. 118, 523; *Prosecutor v. Goran Jelišić*, IT-95-10-A, Appeals Chamber Judgment (5 July 2001), para. 47.

⁴ *Prosecutor v. Ndindabahizi*, ICTR-2001-71-T, Trial Judgment (15 July 2004), para. 461.

⁵ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 Sept. 1998), paras. 118, 163.

⁶ 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 Sept. 2018), paras. 1008, 1395. MG, Vol. II, Annex 40.

⁷ US Department of State, *Documentation of Atrocities in Northern Rakhine* (Aug. 2018), p. 2. MG, Vol. VII, Annex 194.

⁸ *Ibid.*, p. 1 (emphasis added).

7. The Holocaust Memorial Museum also found that “[the] Myanmar Army’s attacks against the Rohingya population . . . were both widespread and systematic”⁹.

**2. The casualties and destruction of the “clearance operations”
went far beyond any military necessity**

8. I now turn to the *second* aspect of Myanmar’s brutality which evidences genocidal intent: casualties and destruction far beyond any military necessity. In *Bosnia v. Serbia*, the Court recalled the ICTY’s findings that the executions in Srebrenica “systematically targeted Bosnian Muslim men of military age, *regardless* of whether they were civilians or soldiers”, with no effort to distinguish between them¹⁰. The ICTY treated this pattern of indiscriminate targeting as probative of the intent to destroy the Bosnian Muslims in Srebrenica in whole or in part¹¹. This Court accepted the same factor as an indicator that genocidal intent was present in the particular circumstances of Srebrenica.

9. The Tatmadaw, too, systematically targeted civilians, with no effort to distinguish between civilians and ARSA fighters. You will recall this excerpt from the UN Fact-Finding Mission’s 2018 report: “There was not the least effort on [the Tatmadaw’s] part 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.”¹² Later today, Mr Suleman will explain why Myanmar’s “clearance operations” were not counter-terrorism operations.

10. Myanmar consistently employed at least four methods of violence that reveal an intent to kill as many Rohingya civilians as possible. You already heard yesterday evidence of three of them:

⁹ US Holocaust Memorial Museum, “*They tried to kill us all*”: *Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar* (Nov. 2017), available at <https://reliefweb.int/report/myanmar/they-tried-kill-us-all-atrocity-crimes-against-rohingya-muslims-rakhine-state-myanmar>.

¹⁰ *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. 163, para. 292 (emphasis added).

¹¹ *Ibid.*

¹² 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 Sept. 2018), para. 1433. MG, Vol. II, Annex 40.

indiscriminate shootings¹³, burning to death¹⁴ and targeted executions¹⁵. There is ample evidence that these methods were repeated in multiple Rohingya villages, which will be included in the footnotes of the compte rendu.

11. Mr President, attacks on escape corridors is the fourth *modus operandi* consistently employed by the Tatmadaw. Even after forcing the Rohingya to the Bangladesh border, the Tatmadaw were not satisfied — they wanted the Rohingya dead. As the UN Fact-Finding Mission determined:

“Tatmadaw soldiers shot at groups of Rohingya who were *en route*. At times, these attacks occurred in villages that were already burned, where fleeing Rohingya were seeking refuge on their journey. At other times, attacks took place in forested areas or when Rohingya were forced into the open, for example when crossing rivers.”¹⁶

12. The Tatmadaw turned border crossing points with Bangladesh into killing fields, opening fire on enormous crowds of desperate Rohingya¹⁷. On one occasion, the Myanmar Navy sank “four

¹³ 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 Sept. 2018), paras. 884, 1084 (emphasis added). MG, Vol. II, Annex 40; US Department of State, *Documentation of Atrocities in Northern Rakhine State* (Aug. 2018), p. 2. MG, Vol. VII, Annex 194; UN OHCHR, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT* (3 Feb. 2017), pp. 14, 15. MG, Vol. II, Annex 30; Legal Action Worldwide, Collated Information from Victims/Witnesses, Statement CK0352. MG, Vol. X, Annex 336; Amnesty International, “We Are At Breaking Point”: Rohingya: Persecuted in Myanmar, Neglected in Bangladesh (19 Dec. 2016), p. 20. MG, Vol. IV, Annex 97; The Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya* (Dec. 2018), p. 41. MG, Vol. IV, Annex 121; Witness Statement No. 016, signed on 28 Sept. 2020, para. 22. MG, Vol. XI, Annex 353; Amnesty International, “We Will Destroy Everything”: Military Responsibility for Crimes Against Humanity in Rakhine State, Myanmar (June 2018), p. 86. MG, Vol. IV, Annex 112; Interview of Myo Win Tun (15 Aug. 2020), p. 5. MG, Vol. V, Annex 142; Interview of Zaw Naing Tun (15 Aug. 2020). MG, Vol. V, Annex 141.

¹⁴ 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 Sept. 2018), paras. 905, 907, 908, 910, 949. MG, Vol. II, Annex 40; UN OHCHR, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT* (3 Feb. 2017), p. 17. MG, Vol. II, Annex 30; Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar* (July 2018), p. 146. MG, Vol. IV, Annex 114.

¹⁵ 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 Sept. 2018), para. 892. MG, Vol. II, Annex 40; The Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya* (Dec. 2018), pp. 41-42. MG, Vol. IV, Annex 121; Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar* (July 2018), p. 61. MG, Vol. IV, Annex 114; Legal Action Worldwide, Collated Information from Victims/Witnesses, Statement TS0804, p. PDF 51. MG, Vol. X, Annex 336; International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar’s Annihilation of the Rohingya* (2018), p. 51. MG, Vol. IV, Annex 109.

¹⁶ 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 Sept. 2018), para. 985, available at <https://digitallibrary.un.org/record/1643079?ln=en&v=pdf>.

¹⁷ The Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya* (Dec. 2018), pp. 47, 73. MG, Vol. IV, Annex 121.

boats full of refugees”¹⁸. A survivor recalled: “[T]here were so many bodies and so much blood in the river, it looks like the river was bleeding.”¹⁹

13. Where the Tatmadaw did not shoot fleeing civilians, it starved them. Along the Naf riverbank, on the Myanmar side, soldiers cordoned off the Rohingya waiting to cross, denying them food and medical care and leaving them to die slowly from hunger and disease. Journalists Alex Crawford and Neville Lazarus of Sky News, who reached Dang Khali Saur in Maungdaw Township, described in their witness statement hundreds of desperate Rohingya trapped on the beach — some stranded for weeks, others for months — begging for help, holding out their children, the elderly, the wounded. They learned that thousands more were pinned along that strip of sand²⁰.

14. These methods of extreme brutality — which were repeatedly and consistently deployed by Myanmar — produced casualties far beyond any conceivable notion of military “necessity”. Taken together, they reveal a deliberate design to destroy the Rohingya as a group.

3. The deliberate targeting of the most vulnerable members of the Rohingya group during the “clearance operations”

15. Mr President, I turn to the *third marker* of extreme brutality, indicative of genocidal intent: the deliberate targeting of the most vulnerable members of a protected group. I am speaking here of the wholesale slaughter of children, pregnant women, as well as the elderly — people who posed no conceivable threat. This abhorrent conduct served no military purpose — or indeed any non-genocidal purpose.

16. The ICTR Trial Chamber in *Akayesu* underscored that the targeting of newborn babies and pregnant women on grounds that “the fetuses in their wombs were fathered by Tutsi men” showed an intention to “wipe out the Tutsi group in its entirety”²¹. Likewise, the ICTY found in *Popović* that the killings of “some children, elderly and infirm”, alongside the systematic execution of men and boys, suggested an intent to destroy the group as a whole²².

¹⁸ *Ibid.*, p. 73.

¹⁹ *Ibid.*

²⁰ Witness Statement of Alex Crawford and Neville Lazarus (12 Oct. 2020), paras. 24-30. MG, Vol. XI, Annex 374.

²¹ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 Sept. 1998), para. 121.

²² See *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgment (10 June 2010), paras. 860-861.

17. The UN Fact-Finding Mission observed that the Tatmadaw “targeted the most vulnerable, including children, women and the elderly”²³. The US Department of State similarly reported that: the military “specifically targeted” those “who were not able to dodge the attacks — often women, children and the elderly”. As you heard yesterday, there is extensive evidence of targeting of the elderly²⁴ and pregnant women²⁵. You can find additional evidence cited in the footnotes in the transcripts.

18. Mr Loewenstein will present later this morning the legal conclusions to be drawn especially from the Tatmadaw’s systematic, widespread, and deliberate targeting of Rohingya children and infants.

4. The deliberate and extreme cruelty with which the “clearance operations” were conducted

19. The *fourth and final* hallmark of genocidal brutality, Mr President, is the extreme cruelty with which an attack is conducted. Cruelty betrays the perpetrators’ animus towards the targeted group, and a calculated intent to maximize suffering as a means to bring about the group’s destruction. It also evidences the consequences of long-standing efforts to dehumanize the target group. As the ICTR Chamber held in *Kayishema*: “[T]he cruelty with which the attackers killed, wounded and disfigured their victims indicates that the [anti-Tutsi hate propaganda] unleashed on Rwanda had the desired effect, namely the destruction of the Tutsi population.”²⁶

²³ 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 Sept. 2018), para. 904. MG, Vol. II, Annex 40.

²⁴ *Ibid.*, para. 896; UN OHCHR, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT* (3 Feb. 2017), pp. 17-18. MG, Vol. II, Annex 30; Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingyas Muslims in Rakhine State, Myanmar* (July 2018), p. 145. MG, Vol. IV, Annex 114; Legal Action Worldwide, Collated Information from Victims/Witnesses, Statement CK0352, P. PDF 77. MG, Vol. X, Annex 336; The Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingyas* (Dec. 2018), p. 43. MG, Vol. IV, Annex 121; US Department of State, *Documentation of Atrocities in Northern Rakhine State* (Aug. 2018), p. 13. MG, Vol. VII, Annex 194.

²⁵ US Department of State, *Documentation of Atrocities in Northern Rakhine State* (Aug. 2018), p. 13. MG, Vol. VII, Annex 194; Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingyas Muslims in Rakhine State, Myanmar* (July 2018), p. 61. MG, Vol. IV, Annex 114; UN OHCHR, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT* (3 Feb. 2017), p. 18. MG, Vol. II, Annex 30; 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 Sept. 2018), para. 895. MG, Vol. II, Annex 40; The Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingyas* (Dec. 2018), p. 39. MG, Vol. IV, Annex 121; Legal Action Worldwide, Collated Information from Victims/Witnesses, Statement CK0243, p. PDF 28. MG, Vol. X, Annex 336.

²⁶ *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999), para. 290. See also Court of Bosnia and Herzegovina, *Prosecutor v. Stupar et al.*, No. X-KR-05/24, First Instance Verdict (29 July 2008), p. 120. MG, Vol. X, Annex 327.

20. The evidence we have reviewed shows that the Tatmadaw set out to brutalize the Rohingya with maximum cruelty—violence designed not just to kill, but to terrorize and dehumanize. As the UN Fact-Finding Mission and others have laid bare, the atrocities were systematic and immense: people burned alive, often locked inside their homes before the houses were torched; bodies slashed and mutilated with knives; victims doused with petrol and set on fire; and young children and babies stabbed, beaten and cut to death in front of their parents.

21. These already brutal killings were often accompanied by mutilation and dismemberment. In Kyet Yoe Pyin, a witness recounted at least 20 bodies in a field, their flesh “cut into pieces”²⁷. A witness from La Ba Daung, Buthidaung Township, described how the military “cut the little children’s bodies into pieces”²⁸. Yet, another survivor from Khun Thi Pyin, Maungdaw Township, watched soldiers seize a young man, “cut his ears and nose” and “sliced his body with knives”²⁹. Still in Kwan Dine village, Buthidaung Township, girls were abducted, their breasts and genitals cut, and they were beheaded³⁰.

22. Witnesses described intestines pulled out and displayed; limbs, hands and feet severed; eyes gouged out — even from children; men castrated; tongues and testes cut off³¹. Survivors described “hundreds of body parts hanging from trees”³² and “heads floating in the river like footballs”³³.

23. A witness from Maungdaw Township described the scene:

²⁷ Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar* (July 2018), p. 60. MG, Vol. IV, Annex 114.

²⁸ Médecins Sans Frontières, *“No one was left”: Death and Violence Against the Rohingya in Rakhine State, Myanmar* (2018), p. 10. MG, Vol. IV, Annex 110.

²⁹ Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar* (July 2018), p. 60. MG, Vol. IV, Annex 114.

³⁰ Legal Action Worldwide, Collated Information from Victims/Witnesses, Statement CK0147, PDF p. 21. MG, Vol. X, Annex 336.

³¹ The Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya* (Dec. 2018), p. 49. MG, Vol. IV, Annex 121; US Department of State, *Documentation of Atrocities in Northern Rakhine* (Aug. 2018), p. 11. MG, Vol. VII, Annex 194.

³² *Ibid.*

³³ US Department of State, *Documentation of Atrocities in Northern Rakhine State* (Aug. 2018), p. 12. MG, Vol. VII, Annex 194.

“I saw people without hands, with intestines pulled out spread across the village. They shoot people, if they don’t die, the military uses cobra knives to cut them. If the intestines don’t come out, they pull them out.”³⁴

24. Mr President, Members of the Court, extreme brutality of this scale and of this nature is not incidental to counter-terrorism. It *is* the point. It tells you what the perpetrators intend to do — to destroy the Rohingya group as such.

25. I thank you for your kind attention. May I request, Mr President, that you call to the podium Ms Pasipanodya.

The PRESIDENT: I thank Ms Diem Huong Ho for her statement. I now invite Ms Pasipanodya to address the Court. You have the floor, Madam.

Ms PASIPANODYA:

II. SEXUAL AND GENDER-BASED VIOLENCE EVIDENCING GENOCIDAL INTENT

1. Introduction

1. Good morning Mr President, Members of the Court. This case presents a stark and well-corroborated record of the sexual violence perpetrated by Myanmar’s security forces against the Rohingya. What I propose to do today is to focus on *how* this sexual violence evidences genocidal intent. In the first part, I will focus on the legal principles that link genocidal intent with sexual violence. In the second, I highlight the features that are particularly probative that are present in this case. The Court is already familiar with the atrocious acts of sexual violence perpetrated by Myanmar’s security forces. I therefore address the facts in a relatively limited manner just to make clear that the five features that are probative are present in this case.

2. The legal significance of sexual violence to genocidal intent

2. I begin with the legal principles. International law recognizes that rape and other forms of sexual violence can reveal a perpetrator’s intent to destroy a protected group. This traces back to the first conviction of genocide in an international tribunal: the case *Jean-Paul Akayesu*. There the International Criminal Tribunal for Rwanda elaborated the contours of genocidal intent and

³⁴ The Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya* (Dec. 2018), p. 49. MG, Vol. IV, Annex 121.

established — for the first time and authoritatively — that acts of sexual violence can constitute acts of genocide and reveal and evidence the specific intent to destroy a protected group. The ICTR found that “the rape of Tutsi women was systematic” and perpetrated “solely against them”, and, in a formulation that has since become a touchstone, it held that “[s]exual violence was a step in the process of destruction of the Tutsi group — destruction of the spirit, of the will to live, and of life itself”. These determinations underscore two propositions central to the present case: first, that patterns of sexual violence are probative of genocidal intent when situated in a broader context of attacks upon a protected group; and second, that sexual violence may itself, by the means by which perpetrators carry out the destruction, constitute genocide.

3. Three provisions of the Convention are particularly important here: Article II (*b*), encompassing the infliction of serious bodily and mental harm; Article II (*c*), addressing conditions of life calculated to bring about physical destruction; and Article II (*d*), concerning measures intended to prevent births within the group. International courts have recognized that sexual violence can satisfy each provision, and that the manner and circumstances of its commission can reveal destructive purpose. The *Akayesu* Trial Chamber explained that sexual violence “formed an integral part of the process of destruction” because of the physical and psychological harms to victims and the far-reaching effects on families and communities³⁵. In the ICTY, the *Tolimir* Appeals Chamber emphasized that the manner and circumstances of the violence are relevant for proving specific intent³⁶. This Court, in *Croatia v. Serbia*, recognized that both physical and mental measures can constitute measures intended to prevent births, and that conditions of life calculated to bring about destruction may be shown by patterns that degrade bodily integrity, reproductive capacity, and social cohesion³⁷.

4. *Akayesu* and its progeny help us identify five patterns of sexual violence that are particularly probative of genocidal intent. The first is the raping of women while killing their children. Such acts extinguish a group’s present and future in the same moment and have been treated as emblematic of

³⁵ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 Sept. 1998), paras. 731-733, 507-508.

³⁶ *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-A, Appeals Judgment (8 Apr. 2015), para. 253.

³⁷ *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. 72, para. 166.

its destructive purpose³⁸. The second is rape accompanied by threats to kill, or by killing, revealing an intent to destroy rather than merely to terrorize³⁹. The third is public and humiliating violence — mass gang rapes staged before family and neighbours, in schools, mosques or open areas — designed to degrade the group as a whole⁴⁰. The fourth is the deliberate targeting of women and girls of reproductive age, including pregnant women, with assaults aimed at reproductive organs and the abdomen, causing miscarriage, sterility and trauma that deters marriage and procreation⁴¹. The fifth is scarring, such as distinctive bite marks, that “brand” survivors, fracture social bonds and cause enduring mental harm⁴².

3. The sexual violence perpetrated against the Rohingya reveals its genocidal intent

5. The evidentiary record supports a finding that all of these five patterns of sexual violence probative of genocidal intent are observable in the present case.

6. *First*, Myanmar’s security forces routinely coupled the rape of women with the killing of their children. The UN Fact-Finding Mission found that mothers were often gang raped while their babies and young children were beaten, stabbed, cut, shot or killed in front of them⁴³. Many women described the loss of children or unborn children as the most “unbearable” aspect of the suffering resulting from those assaults⁴⁴. My colleagues and I addressed numerous examples of rape fused with killing of children in our presentations on seven main villages yesterday. This pattern recurs across several other locations. For example, in Nga Yant Chaung⁴⁵, in Yae Khat Chaung Gwa Son⁴⁶ and in Kyet Yoe Pyin⁴⁷. The US Department of State’s randomized survey of 1,000 Rohingya refugees in

³⁸ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 Sept. 1998), paras. 733, 121.

³⁹ *Ibid.*, para. 733.

⁴⁰ *Ibid.*, paras. 731-733.

⁴¹ *Ibid.*, paras. 507-508, 121.

⁴² *Ibid.*, paras. 507-508.

⁴³ 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 Sept. 2018), para. 928. MG, Vol. II, Annex 40.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ UN OHCHR, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT* (3 Feb. 2017), p. 18. MG, Vol. II, Annex 30.

⁴⁷ *Ibid.*

Bangladesh likewise recorded multiple accounts of children beheaded or otherwise killed while their mothers were raped⁴⁸. These methods are incompatible with any benign explanation. They reveal a deliberate strike at both the group's physical existence and its biological continuity, squarely engaging Article II (b), II (c) and II (d).

7. *Second*, the Tatmadaw often explicitly declared an intent to kill their victims while raping them. On Monday, Mr Suleman provided several examples. Consistent with this hallmark, many victims were in fact killed after being subjected to sexual violence⁴⁹. Examples were shared yesterday. This pattern repeats itself in Yae Khat Chaung Gwa Son⁵⁰, Hpar Wut Chaung and many other villages⁵¹.

8. Moreover, Tatmadaw soldiers testified that commanders ordered rapes that were accompanied by killing. One describing the “clearance operations” carried out by his unit in Maungdaw and Buthidaung explained that “[w]hen we clear house by house, there were rapes when they clear”⁵², and admitted that some of the women were “killed after rape”⁵³. Another soldier testified about sexual violence he witnessed in Taung Bazaar, confirming that troops were “ordered” to rape women⁵⁴, and describing how soldiers “put the gun at [the victims’] forehead and killed right away” after raping them⁵⁵. Rapes followed by killing reveal an obvious intent to destroy.

9. *Third*, Myanmar's security forces conducted sexual violence in public, and in particularly humiliating and brutal ways. The Mission identified mass gang rape as a “notable pattern”, with incidents in which “up to 40 women and girls were raped or gang raped together”⁵⁶. Assaults were

⁴⁸ US Department of State, *Documentation of Atrocities in Northern Rakhine State* (Aug. 2018), pp. 16-17. MG, Vol. VII, Annex 194.

⁴⁹ UN Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, UN doc. A/HRC/42/CRP.4 (22 Aug. 2019), para. 75. MG, Vol. III, Annex 48.

⁵⁰ Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar* (July 2018) p. 151. MG, Vol. IV, Annex 114.

⁵¹ See e.g. UN Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, UN doc. A/HRC/42/CRP.4 (22 Aug. 2019), para. 75. MG, Vol. III, Annex 48; Human Rights Watch, *Massacre by the River: Burmese Army Crime Against Humanity in Tula Toli* (19 Dec. 2017), p. 24. MG, Vol. IV, Annex 107.

⁵² Interview of Zaw Naing Tun (15 Aug. 2020), p. 9. MG, Vol. V, Annex 141.

⁵³ *Ibid.*, p. 10.

⁵⁴ Interview of Myo Win Tun (15 Aug. 2020), pp. 6-7. MG, Vol. V, Annex 142.

⁵⁵ *Ibid.*, p. 7.

⁵⁶ 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 Sept. 2018), para. 921. MG, Vol. II, Annex 40.

in open areas, in large houses, in schools and mosques, in forests, and in military and police compounds⁵⁷. Frequently, rapes occurred in front of family members, including husbands, parents and young children⁵⁸. The Mission reports that a

“total of 80 per cent of incidents of rape corroborated by the Mission were of gang rape, and 82 per cent of these gang rapes were perpetrated by the Tatmadaw. Incidents of rape and sexual violence were also carried out by members of the BGP, the Myanmar Police Force and ethnic Rakhine, although considerably less so.”⁵⁹

Beyond the seven villages addressed yesterday, public and humiliating gang rapes were perpetrated throughout northern Rakhine, including in Kyet Yoe Pyin⁶⁰, in Pwint Hpyu Chaung⁶¹ and in Maung Gyn Hanut⁶², as well as in Nga Yant Chaung⁶³.

10. *Fourth*, military forces regularly targeted women and girls of reproductive age — including pregnant women — inflicting reproductive injury. We addressed numerous examples yesterday. Others are recorded in Kyein Chaung⁶⁴, in Ngar Sar Kyu⁶⁵, in U Shey Kya⁶⁶ and in Kha Maung Seik⁶⁷. The UN Fact-Finding Mission and medical organizations recorded mutilations and other injuries to reproductive organs, miscarriages, prolonged genital bleeding and permanent damage requiring surgery; survivors reported an inability to resume sexual relations or bear children, and widespread fear of marital rejection and social stigma⁶⁸. These are precisely the physical and

⁵⁷ *Ibid.*, paras. 920-923.

⁵⁸ *Ibid.*, para. 928. See also Médecins Sans Frontières, “*No one was left*”: *Death and Violence Against the Rohingya in Rakhine State, Myanmar* (2018), p. 19. MG, Vol. IV, Annex 110.

⁵⁹ 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 Sept. 2018), para. 932. MG, Vol. II, Annex 40.

⁶⁰ *Ibid.*, para. 923.

⁶¹ Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar* (July 2018), p. 150. MG, Vol. IV, Annex 114.

⁶² 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 Sept. 2018), para. 923. MG, Vol. II, Annex 40.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, para. 921. See also *ibid.*, para. 1091.

⁶⁵ UN OHCHR, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT* (3 Feb. 2017), p. 18. MG, Vol. II, Annex 30.

⁶⁶ *Ibid.*, p. 26.

⁶⁷ Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar* (July 2018), p. 61. MG, Vol. IV, Annex 114.

⁶⁸ 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 Sept. 2018), paras. 926, 934. MG, Vol. II, Annex 40.

mental measures the jurisprudence recognizes as “measures intended to prevent births” under Article II (d)⁶⁹.

11. *Fifth*, the Tatmadaw routinely sought to visibly scar and brand rape victims. The UN Fact-Finding Mission and medical professionals recorded distinctive bite marks on the cheeks, breasts and thighs, and mutilations leaving permanent scars⁷⁰. Forensic analysis confirmed violent bite marks on the face of a 15-year-old survivor and found that a “substantial portion” of women and girls had been bitten, indicating an intentional practice akin to branding⁷¹. These findings are probative of serious bodily and mental harm and of the purposeful creation of social stigma that deters marriage and childbearing, falling within the “mental” measures embraced by Article II (d)⁷².

12. Across these indicative features, multiple, methodologically distinct sources converge with the UN Fact-Finding Mission. The UN Office of the High Commissioner for Human Rights reported that more than half of women fleeing the 2016 and 2017 operations that it independently interviewed were victims of sexual violence and documented genital stabbing and other mutilations consistent with being “raped to death”⁷³.

13. The US Department of State likewise confirmed, based on its randomized survey, that Rohingya women and girls were subject to “widespread sexual assault and rape” during both waves of the “clearance operations”⁷⁴. Respondents similarly reported “exceptionally violent attacks”

⁶⁹ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 Sept. 1998), paras. 507-508.

⁷⁰ 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 Sept. 2018), paras. 926, 1397-1399. MG, Vol. II, Annex 40. See also, UN Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, UN doc. A/HRC/42/CRP.4 (22 Aug. 2019), para. 75. MG, Vol. III, Annex 48.

⁷¹ 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 Sept. 2018), para. 926. MG, Vol. II, Annex 40.

⁷² *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 Sept. 1998), paras. 507-508.

⁷³ UN OHCHR, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT* (3 Feb. 2017), pp. 20, 21-23. MG, Vol. II, Annex 30; UN Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, UN doc. A/HRC/42/CRP.4 (22 Aug. 2019), para. 75. MG, Vol. III, Annex 48. See also, Steve Sandford, “UN Gathers Horror Stories from Rohingya Women Fleeing Myanmar”, *Voice of America* (28 Dec. 2017). MG, Vol. IX, Annex 273; UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *Press Release: One year into the Rohingya crisis, Special Representative Patten calls for accountability for sexual violence crimes* (24 Aug. 2018). MG, Vol. II, Annex 38. See also MG, paras. 9.2-9.4.

⁷⁴ US Department of State, *Documentation of Atrocities in Northern Rakhine State* (Aug. 2018), p. 14. MG, Vol. VII, Annex 194.

during the rapes, and several individuals from different villages witnessed soldiers “cut[ting] off the breasts of women they raped” and “mutilat[ing] genitals or other parts of bodies”⁷⁵.

14. Mr President, Myanmar’s security forces’ crimes of sexual violence against Rohingya women and girls achieved their intentions: the destruction of group life. The Fact-Finding Mission concluded that survivors of sexual violence are less likely to procreate, less likely to marry due to stigma and ostracism, and, in some cases, rejected by spouses; it described the broader social damage to the Rohingya community — their capacity to live, to heal and to reproduce⁷⁶.

15. A multidisciplinary study published by Legal Action Worldwide in 2023 documented permanent genital damage affecting fertility and severe psychological injuries that have left survivors in extreme distress nearly six years after the “clearance operations”⁷⁷. That research found that the systematic nature of the sexual violence damaged the Rohingya social fabric in three mutually reinforcing ways: the ostracism of female survivors undermined cultural identity; the powerlessness of men to protect them eroded their social role; and the forced reorganization of family units and lineage weakened future social alliances, including marriage within the community⁷⁸. In short, the architecture of Rohingya social life was intentionally weakened, with consequences that endure and compound⁷⁹. These are physical and mental consequences contemplated by Article II (b), II (c) and II (d).

16. Taken together, these facts form the kind of pattern from which courts infer genocidal intent, as *Akayesu* and subsequent jurisprudence confirm.

17. Before concluding, I address briefly Myanmar’s contention that accounts of sexual violence should be discounted because they do not account for ARSA attacks. Even if, contrary to the evidence, Myanmar were to substantiate its claims concerning the ARSA threat in every village

⁷⁵ US Department of State, *Documentation of Atrocities in Northern Rakhine State* (Aug. 2018), p. 17. MG, Vol. VII, Annex 194. See also Physicians for Human Rights, *Sexual Violence, Trauma, and Neglect: Observations of Healthcare Providers Treating Rohingya Survivors in Refugee Camps in Bangladesh* (Oct. 2020), p. 2. MG, Vol. V, Annex 133; Médecins Sans Frontières, “*No one was left*”: *Death and Violence Against the Rohingya in Rakhine State, Myanmar* (2018), p. 18. MG, Vol. IV, Annex 110.

⁷⁶ 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 Sept. 2018), para. 1410. MG, Vol. II, Annex 40.

⁷⁷ Legal Action Worldwide, “*Every Day, I Remember They Destroyed My Life*”: *Long-Term Physical and Psychosocial Consequences of Genocidal Sexual and Gender-Based Violence the Myanmar Military Committed against the Rohingya in its 2017 “Clearance Operations”* (Nov. 2023), p. 30. RG, Vol. II, Annex 16.

⁷⁸ *Ibid.*, p. 8 (emphases omitted).

⁷⁹ *Ibid.*

that suffered “clearance operations” and sexual violence, counter-terrorism operations do not justify rape, gang rape, genital mutilation or the killing of children during sexual assaults. As Germany, France, Canada, Denmark, the Netherlands and the United Kingdom observe in their joint Declaration of intervention, “sexual and gender-based violence is not capable of advancing any military objective”; when it is pervasive, methodical, and directed at a protected group, it “*can provide compelling evidence of specific intent to destroy a protected group*”⁸⁰.

18. Members of the Court, the sexual violence inflicted on Rohingya women and girls was purposefully destructive of the Rohingya’s physical integrity, reproductive capacity and social cohesion. Its methods are hallmarks of a campaign to destroy a group in part. They satisfy Article II (b), II (c) and II (d), and reveal the specific intent that the Convention requires. Sexual violence of this scale, character, and method serves no military end. It is an instrument of destruction.

19. I thank you for your attention and respectfully request that Mr Loewenstein be called to the podium to continue The Gambia’s submissions.

The PRESIDENT: I thank Ms Pasipanodya for her statement. I now call Mr Andrew Loewenstein to the podium. You have the floor, Sir.

Mr LOEWENSTEIN:

III. MYANMAR’S TARGETING OF ROHINGYA CHILDREN

1. Mr President, Members of the Court, good morning. I will address children. The Gambia has chosen to make children the focus of this presentation because children are central to the crime of genocide. The 1948 Convention is, fundamentally, about the protection of human groups, and if a group is to continue, if it is to survive, it will be through its children. Raphael Lemkin understood this. That is why he addressed children and matters of birth in Chapter IX of *Axis Rule*.

2. The drafters of the 1948 Convention understood the centrality of children to genocide as well. That is why two of the *actus reus* of genocide set out in Article II are specific to children: imposing measures intended to prevent births within the group and forcibly transferring children of

⁸⁰ 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, paras. 54-56, 64 (emphasis added).

the group to another group, under paragraphs (d) and (e). And, of course, children can be, and are, victims of the acts of genocide described in paragraphs (a), (b) and (c).

3. The Gambia agrees with the interveners who have rightly placed significant emphasis on children. It agrees entirely with the submission of Ireland, which stated as follows:

“Where there is evidence that children of the protected group have been particularly targeted, or that the conduct targeting the group made no distinction between child and adult members of it, certain conclusions can be drawn. As children are essential to the continued existence of any human group, acts constituting the material elements of genocide directed at, or without making distinction for, child members of the group will have an obviously significantly greater impact on the resilience and ultimate survival of the group than the same acts directed at a similar or larger number of adult members. It therefore follows that certain reasonable inferences can be drawn from acts directed against, or failing to distinguish, child members of the group.”⁸¹

4. Mr President, Myanmar killed the children of the Rohingya group, often in unimaginably cruel ways. The evidence is overwhelming. The horrors go on, and on, and on. Yesterday, during The Gambia’s presentations on just seven of the hundreds of Rohingya villages that had been the subject of these proceedings, you heard a fraction of it. You heard accounts like those which caused the OHCHR to report that victims who ranged in ages “from newborns to teenagers” included children who were “killed by live ammunition or stabbed while at home; while fleeing to safety; or while in farms or fields”⁸². You heard testimonies matching those which caused the UN Special Rapporteur to report “young children being thrown into fires”⁸³. And you heard a great many examples of the targeted killings and other abuses of Rohingya children like those underpinning the UN Fact-Finding Mission’s conclusion that “[c]hildren were subjected to . . . serious human rights violations, including killing, maiming and sexual violence”⁸⁴.

5. We will not belabour the point. Suffice to say, we could review with you even more evidence that is equally credible, and terrible, both in relation to the villages discussed yesterday and many, many more. But we feel the point has been adequately made. It is, we say, incontestable that

⁸¹ Written observations of Ireland (25 Sept. 2025), para. 39 (e) (ii).

⁸² UN OHCHR, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT* (3 Feb. 2017), p. 18. MG, Vol. II, Annex 30.

⁸³ UN OHCHR, *Statement by Ms Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council* (12 Mar. 2018), PDF p. 2. MG, Vol. II, Annex 32.

⁸⁴ UN Human Rights Council, *Report of the independent international fact-finding Mission on Myanmar*, UN doc. A/HRC/39/64 (12 Sept. 2018), para. 39. MG, Vol. II, Annex 39.

Myanmar did, in fact, systematically murder the children of the Rohingya group. It did so intentionally. It did so knowingly. It did so deliberately. And it did so on a scale that is — or ought to be — unimaginable.

6. Therefore, unlike the presentations yesterday, the focus of my presentation is not evidential. Instead, I will address the legal significance of the evidence before you, particularly as it relates to the killings and other grave abuses to which Myanmar subjected Rohingya children. Where appropriate, I will refer to the evidence in order to discuss how it bears upon the legal determinations that you are called upon to make. However, the evidence per se will not be my focus.

7. I begin with the *actus reus* of genocide and, in particular, “[k]illing members of the group” under Article II, paragraph (a). Myanmar argues that Article II (a)

“does not apply to the legitimate killing of insurgents or terrorists in battle in an armed conflict or in a law enforcement operation, and does not extend to civilian deaths caused by such operations, if they are exclusively directed at legitimate targets, and the civilian casualties are not caused deliberately”⁸⁵.

8. Myanmar’s intentional killing of Rohingya children in the circumstances, and in the manner we heard yesterday, bears directly on this defence. Its targeted killings of the youngest of the Rohingya group, including those not yet born, lacked any conceivable legitimate objective, military or otherwise. They were not carried out in the context of military or law-enforcement operations; they were not directed at combatants. Instead, they were directed at the Rohingya’s most helpless. Put simply, they foreclose Myanmar from being able to argue with any credibility whatsoever that Rohingya deaths were — in the words Myanmar used in the 7th paragraph of its Rejoinder — that they were just “collateral casualties” of “fighting between the Myanmar security forces and ARSA”⁸⁶. That is false. Manifestly so. And the same is true with respect to any similar argument in regard to the causing of serious bodily or mental harm within the meaning of Article II (b) of the Convention.

9. Mr President, the targeting of Rohingya children has particular relevance for the Court’s consideration of Article II (b). As it held in *Croatia v. Serbia*, for harm to be “serious” for purposes of that paragraph, it “must be such as to contribute to the physical or biological destruction of the

⁸⁵ RM, para. 4.64.

⁸⁶ RM, para. 1.7.

group, in whole or in part”⁸⁷. The Court’s consideration of whether an act contributes to the physical or biological destruction of a group requires taking into account not just the nature of the relevant act itself, but also the specific circumstances of the victims. This applies with special force in relation to crimes committed against children, as happened here, in view of their heightened vulnerability.

10. And the same is the case with respect to the deliberate infliction of conditions of life calculated to bring about its physical destruction in whole or in part, under Article II (c). The acts that will qualify as the *actus reus* of genocide under this paragraph must necessarily take account of the particular characteristics of the members of the group that are impacted by the relevant conditions. Here, Rohingya children of all ages, including infants and newborns, were subjected not only to Myanmar’s efforts to deprive the Rohingya of food and healthcare prior to the “clearance operations”, but also to the atrocious attacks on their villages and during their forced displacement, where they lacked food and shelter. I need not dwell upon the fact that children are especially vulnerable to such privations.

11. Mr President, this brings me to the issue of genocidal intent. Here, we respectfully submit, the targeting of Rohingya children is of singular importance. The acts described yesterday qualify as acts of extreme brutality, one of the indicators of genocidal intent, as has been clearly shown by my colleague Ms Ho. So, too, the fact that they were frequently committed in conjunction with acts of sexual violence, another indicator of genocidal intent, as explained by Ms Pasipanodya.

12. But that is not their only relevance to genocidal intent. Myanmar’s targeting of Rohingya children demonstrates that the members of the group were targeted *because* of their membership in the group. There is no other conceivable explanation. And the evidence that they were targeted on a significant scale, as is unquestionably the case, precludes any basis for concluding they were targeted for any other reason.

13. Further, what qualifies as a substantial part of the group depends on the relevant circumstances, including whether a specific part of the group is emblematic of the overall group or

⁸⁷ *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. 69, para. 157.

is essential to its survival, as the ICTY Appeals Chamber held in *Krstić*⁸⁸. In that connection, Rohingya children form a substantial part of the Rohingya group and thus their targeting is compelling evidence of Myanmar's intention to destroy the group as such, at least in part. That is undoubtedly so, as the physical destruction of the Rohingya as a group would be assured if the next generation were destroyed, as Myanmar sought to do when it systematically shot, stabbed, burned and drowned Rohingya children of all ages.

14. The targeting of Rohingya children is also highly probative of planning and organization — another indicator of genocidal intent. Mr President, as you heard, Myanmar's targeting of Rohingya children was not confined to isolated incidents. They were a ubiquitous occurrence during the "clearance operations". Médecins Sans Frontières estimates that between 734 and 2,109 children died during the "clearance operations" or were killed during flight to Bangladesh⁸⁹. And those are just the children under the age of five⁹⁰.

15. The Tatmadaw deliberately killed children in each of the villages that was addressed yesterday. And it did so in a great many more. These atrocities were committed in different geographical areas and by different military units, all subject to a common command structure. It is fair to say that the killing of Rohingya children is one of the "clearance operations" hallmarks. In these circumstances, it is impossible to avoid the conclusion that this was planned and directed from above.

16. Mr President, this brings me to three more indicators of genocidal intent and the relation to the Rohingya children — the vicious, race-based discrimination to which the Rohingya are subject, and Myanmar's propagation of extreme anti-Rohingya hate speech and its toleration for such public expressions by others.

17. Ms Pasipanodya and Mr Suleman reviewed the relevant evidence yesterday. What they described shines a revealing light on the question of how such widespread depravity could be perpetrated. It is not a coincidence that the same Tatmadaw soldiers who committed such heinous

⁸⁸ *Prosecutor v. Radislav Krstić*, IT-98-33-A, Appeals Chamber Judgment (19 Apr. 2004), para. 12. See also Written Observations 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 (3 Mar. 2025), para. 60.

⁸⁹ Médecins Sans Frontières, *"No one was left": Death and Violence Against the Rohingya in Rakhine State, Myanmar* (2018), p. 5, fn. 6. MG, Vol. IV, Annex 110.

⁹⁰ *Ibid.*

crimes against the youngest of the Rohingya — even Rohingya who had yet to be born — in Min Gyi, in Chut Pyin, in Maung Nu and in many other Rohingya villages across northern Rakhine State, and who wrenched infants from their mothers’ arms and flung them into flames, had long been subjected to the calumny that those Rohingya children’s mere *birth* was a threat of the highest order. That message had been communicated by the Tatmadaw’s leadership and its allies through their incessant propaganda about the exploding birth rates and about Bengalis spreading “like weeds”. The message was received; the message was understood; and when the Tatmadaw arrived at Min Gyi, at Chut Pyin, at Maung Nu, and at a host of other Rohingya villages, it was tragically, obscenely, implemented.

18. Mr President, the bottom line is that the intentional, deliberate killing of Rohingya children on a scale as massive as happened here is irrefutable proof of Myanmar’s specific intent to destroy the Rohingya as a group as such⁹¹. It can only be understood as reflecting that intention; it is, put simply, an indicator of genocidal intent *par excellence*.

19. As the ICTR found in *Akayesu*, evidence that “even newborn babies were not spared” reflected an “intention to wipe out the Tutsi group in its entirety”⁹². That is true for the Rohingya as well. The killing of Rohingya children shows that members of the Rohingya group were targeted *because* they were Rohingya. In the words of *Akayesu*, Myanmar did this to wipe out the Rohingya as a group.

20. Mr President, thank you for your kind attention. I ask that you invite Ms Al Ameen to the podium.

⁹¹ See also 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 under Article 63 of the Statute of the International Court of Justice (15 Nov. 2023), paras. 67-71; Written Observations 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 (3 Mar. 2025), paras. 58-62; Declaration of intervention of the Democratic Republic of the Congo under Article 63 of the Statute of the International Court of Justice (10 Dec. 2024), paras. 53, 90; Declaration of intervention of Ireland under Article 63 of the Statute of the International Court of Justice (20 Dec. 2024), para. 41, pp. 19-20; Written Observations of Ireland (25 Sept. 2025), para. 39 (e) (ii).

⁹² *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), Trial Chamber (2 Sept. 1998), para. 121. See also *Prosecutor v. Kayishema and Ruzindana*, (Case No. ICTR-95-1), Trial Chamber I (21 May 1999), paras. 532-533; 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 under Article 63 of the Statute of the International Court of Justice (15 Nov. 2023), para. 70.

The PRESIDENT: I thank Mr Loewenstein for his statement. J'invite maintenant M^{me} Yasmin Al Ameen à s'adresser à la Cour. Vous avez la parole, Madame.

M^{me} AL AMEEN :

**IV. LA DESTRUCTION ET LA DISSIMULATION DES PREUVES DES CRIMES COMMIS
CONTRE LES ROHINGYA PROUVENT ÉGALEMENT L'INTENTION GÉNOCIDAIRE
DU MYANMAR**

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un honneur de prendre pour la première fois la parole devant la Cour et surtout de le faire au soutien de la Gambie et du peuple rohingya.

2. Il me revient d'aborder la question de la destruction et de la dissimulation des preuves des crimes perpétrés par le Myanmar contre les Rohingya, révélant également l'intention génocidaire de l'État.

3. Mesdames et Messieurs les juges, cette destruction et cette dissimulation ne furent ni fortuites ni marginales, mais procédèrent d'une politique coordonnée dont l'effet — et l'objectif apparent — était d'effacer le crime en effaçant ses traces. La destruction et la dissimulation des preuves trahissent ainsi l'intention génocidaire du Myanmar ; cette destruction prolonge et consolide le génocide. Les rapports onusiens, analyses géospatiales et multiples témoignages établissent que les villages rohingya ont été méthodiquement rasés, que les sites religieux et funéraires ont été nivelés et qu'ensuite des bases et infrastructures sécuritaires ont été érigées sur ces lieux. Le Myanmar a donc entendu dissimuler ses actes de génocide, et empêcher ainsi toute enquête *in situ*. Par la même occasion, le Myanmar a consolidé les fruits de son génocide en effaçant les traces de la présence des Rohingya dans les villages martyrs.

4. Dans cette perspective, j'avancerai quatre propositions cardinales. Premièrement, il est factuellement établi que le Myanmar a systématiquement détruit, altéré et dissimulé des éléments de preuve du génocide commis contre les Rohingya, durant les « opérations de nettoyage » de 2016 à 2018. Deuxièmement, il a poursuivi ces actes après les « opérations de nettoyage » pour parfaire son crime. Troisièmement, le Myanmar a systématiquement bloqué les enquêtes indépendantes et l'accès à son territoire. Et, quatrièmement, les dénégations par le Myanmar de sa destruction des preuves sont dénuées de fondement.

1. Le Myanmar a détruit des éléments de preuve du génocide durant les « opérations de nettoyage » de 2016–2018

5. Je commence par les actes commis lors des opérations de nettoyage. Comme vous l'avez entendu de mes collègues, entre 2016 et 2018, les « opérations de nettoyage » dans les cantons de Maungdaw, Buthidaung et Rathedaung furent marquées par une politique délibérée de destruction du peuple rohingya. En même temps qu'il abattait une violence brutale inouïe sur les membres du groupe des Rohingya, le Myanmar a méticuleusement cherché à effacer toute trace de ses crimes et toute trace de la présence même des Rohingya assassinés⁹³.

A. Charniers et enlèvement des corps

6. L'un des principaux moyens utilisés était de se débarrasser des cadavres dans des fosses communes ou en les incinérant dans des charniers.

7. À Gu Dar Pyin (dans le canton de Buthidaung) par exemple, la mission a indiqué que « [e]fforts were made by the Tatmadaw, police and the ethnic Rakhine men to *dispose* of bodies. A series of pits were dug in different locations and the bodies put in them. »⁹⁴ Quelques jours après les « opérations de nettoyage », les villageois retournant ont signalé des cadavres calcinés dans des tombes peu profondes et non couvertes, et la vidéo examinée par la mission montre des têtes humaines en état de décomposition⁹⁵. Le même schéma s'est répété dans d'autres villages⁹⁶.

8. Ces constatations sont également corroborées par la déclaration du témoin MS, que vous écouterez la semaine prochaine, lequel a témoigné qu'à Min Gyi (ou Tula Toli en rohingya) :

« Later, after people had been killed, the military and Rakhine collected all the dead bodies, like timber, and put them all together in 4 big holes which some of them had dug. Some people were still alive at that point, but they were very severely injured and the military and Rakhine dragged their bodies and put them in the fire. ... Then they brought some dry grass from the village and put it on the dead bodies. Then they put

⁹³ Voir mémoire de la Gambie (23 octobre 2020) (ci-après, « MG »), par. 11.45 ; 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 septembre 2018), par. 818-879, 1000-1003, 1242-1244. MG, vol. II, annexe 40. 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 septembre 2018), p. 232. RG, vol. II, annexe 1 (additional excerpts to MG, Vol. II, Annex 40) ; Amnesty International, *“My World Is Finished” : Rohingya Targeted in Crimes Against Humanity in Myanmar* (octobre 2017), p. 35. MG, vol. IV, annexe 99.

⁹⁴ United Nations 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 septembre 2018), par. 830 (emphasis added). MG, vol. II, annexe 40.

⁹⁵ *Ibid.*

⁹⁶ Voir, par exemple, *ibid.*, par. 768, 814, 794, 795.

petrol or kerosene on. I don't know which it was, I saw them pour something from the bottle and set light to these holes full of bodies.

.....

Some of the small children died from the initial shooting or being attacked by knives but most were later thrown on the fire in the graves that were dug. »⁹⁷

9. Vous avez déjà entendu des atrocités de même ordre — et même pire — au fil des discours de mes collègues.

10. Il n'est donc pas surprenant que la mission d'établissement des faits ait conclu que

« [t]he information points to a concerted effort by the Tatmadaw to dispose of Rohingya corpses following the “clearance operations” in villages. The manner in which the bodies were disposed of, including through the preparation of large pits, both to burn bodies and to bury them ... suggests both a level of pre-planning and an intention to destroy criminal evidence... It is likely that hundreds, and possibly thousands, of bodies have been burned, buried or subsequently destroyed. »⁹⁸

B. Usage d'acide et mutilations pour empêcher l'identification

11. La mission d'établissement des faits et d'autres sources indépendantes ont également constaté la mutilation et la dissimulation des corps, empêchant leur identification et la collecte de preuves médico-légales⁹⁹. Un reportage d'*Associated Press* a documenté, à travers des vidéos de téléphones portables horodatées, des images satellitaires et des interviews, au moins cinq fosses communes de civils rohingya à Gu Dar Pyin et a montré que les corps avaient été brûlés à l'acide dans une tentative manifeste de détruire les preuves¹⁰⁰. Des soldats ont amené de grands bidons d'acide, qu'ils ont utilisé pour brûler visages et mains ; des vidéos rapportées publiquement montrent des flaques d'acide autour de corps corrodés¹⁰¹, comme vous pouvez le lire dans le rapport public, à l'onglet n° 6 de votre dossier d'audience. Selon la mission onusienne, ces macabres pratiques,

⁹⁷ Witness Statement No. 013, signed 23 Sept. 2020, par. 28, 30. MG, vol. X, annexe 350.

⁹⁸ 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 septembre 2018), par. 1002. MG, vol. II, annexe 40. Voir aussi *ibid.*, par. 1000-1003.

⁹⁹ *Ibid.*, par. 1000-1005, 1405 ; *ibid.*, par. 1216-1244 et 1548.

¹⁰⁰ Foster Klug, « AP finds evidence for graves, Rohingya massacre in Myanmar », *AP News* (1^{er} février 2018). MG, vol. IX, annexe 276 ; « Myanmar government denies AP report of Rohingya mass grave », *AP* (3 février 2018). MG, vol. IX, annexe 277.

¹⁰¹ Foster Klug, « AP finds evidence for graves, Rohingya massacre in Myanmar », *AP News* (1^{er} février 2018). MG, vol. IX, annexe 276 ; Legal Action Worldwide, Witness Statement No. 040 (21 avril 2024), par. 51. RG, vol. IV, annexe 64.

méthodiquement planifiées et mises en œuvre, étaient destinées à détruire toute preuve des crimes commis contre ces victimes¹⁰².

C. Aveux confirmatoires des exécutants

12. Monsieur le président, Mesdames et Messieurs les juges, ces faits accablants n'ont rien de fortuit mais supposent une organisation et une logistique spécifique dont disposent les forces armées. Ils ont en outre été confirmés par des aveux de membres de la Tatmadaw qui font état d'ordres explicites de brûler des villages rohingya et de supprimer les preuves incriminantes.

13. Moe Yan Naing, un capitaine de police déserteur, a déclaré à *Reuters* que, bien que l'ARSA n'ait mené aucune attaque après le 25 août 2017, ses supérieurs lui ont donné pour instruction, ainsi qu'à d'autres officiers, d'incendier les villages où de nombreux cadavres couvraient le sol à la suite des « opérations de nettoyage »¹⁰³. De même, selon le capitaine Nay Myo Thet, un autre soldat déserteur, le plus haut magistrat de l'armée, Aung Lin Dwe, s'est rendu dans le nord de l'État de Rakhine en 2017 pour aider à dissimuler les preuves d'atrocités contre les Rohingya. Selon le soldat, « The Judge Advocate General came to the No. 4 Border Guard Force office in Mawrawaddy, fabricated incidents as the military wanted ... and got rid of the evidence of the acts of terrorism the military committed. »¹⁰⁴

14. Un des propres témoins du Myanmar confirme cette pratique. Le capitaine Hein, dans sa déclaration à l'annexe 157 du contre-mémoire, déclare que des crémations de corps ont été menées près du village de Bet Daga, où les corps ont été « brûlés et enterrés »¹⁰⁵. Cette pratique n'apparaît

¹⁰² 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 septembre 2018), par. 1002. MG, vol. II, annexe 40.

¹⁰³ Voir Reuters Investigates, « Planned Purge : New evidence shows how Myanmar's military planned its brutal purge of the Rohingya » (4 août 2022), accessible à l'adresse suivante : <https://www.reuters.com/investigates/special-report/myanmar-rohingya-warcrimes-investigation/>. Voir aussi Interview of Myo Win Tun (15 août 2020), p. 5. MG, vol. V, annexe 142.

¹⁰⁴ « How Myanmar's military covers up past crimes against the Rohingya, and erases them from the country's future », *Myanmar Now* (15 février 2023), accessible à l'adresse suivante : <https://myanmar-now.org/en/news/how-myanmars-military-covers-up-past-crimes-against-the-rohingya-and-erases-them-from-the-countrys-future/> (ellipse dans l'original).

¹⁰⁵ Witness Statement of Captain Hein XXX, company commander, Frontline Light Infantry Regiment (4 septembre 2017), p. 38. Contre-mémoire du Myanmar (24 août 2023) (ci-après, « CMM »), vol. V, annexe 157.

pourtant dans aucune règle d'engagement du Myanmar, n'est pas conforme aux pratiques funéraires des musulmans et, surtout, enfreint la norme établie dans les conventions de Genève¹⁰⁶.

15. D'autres témoignages de soldats affirment pareillement des consignes de suppression d'images sur téléphones et de mises en scène pour effacer les preuves. Selon le capitaine Nay Myo Thet également, « [w]e were told to check our mobile phone every few days and delete whatever photos or videos we had there », ayant lui-même transmis cet ordre à ses propres subordonnés¹⁰⁷.

16. Mais le Myanmar ne s'arrête pas là. En plus de détruire des preuves, à la même occasion, le Myanmar a constitué de fausses preuves. Ainsi, le capitaine Nay Myo Thet et l'ancien capitaine de police Moe Yan Naing ont déclaré que le personnel de sécurité a monté des scènes en plaçant des machettes à côté des corps des Rohingya décédés et en les photographiant pour donner l'impression qu'ils étaient des insurgés de l'ARSA¹⁰⁸. Selon le témoin P5513 du Mécanisme d'enquête indépendant pour le Myanmar — dont la déclaration est à l'onglet n° 8 de vos dossiers —, un des corps qu'il avait d'abord photographié face contre terre a été déplacé par les soldats et, 25 minutes plus tard, sur instruction du commandant adjoint, photographié à nouveau, mais cette fois-ci avec un engin explosif improvisé posé à côté, indiquant donc une mise en scène¹⁰⁹.

17. En outre, ce même témoin confirme que « the soldiers had tacit approval by their commanders, because when they reported the burning down of villages, commanders did not ask why or question their actions »¹¹⁰. Il mentionne également que les rapports qui indiquent que l'ARSA a incendié le village de Sin Oe Pyin (dans le canton de Buthidaung) n'étaient « pas factuels ni corrects » et que c'est le bataillon d'infanterie légère 562 qui aurait incendié le village¹¹¹.

¹⁰⁶ Voir Customary International Law, Rule 115. Disposal of the Dead, accessible à l'adresse suivante : <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule115#title-0>. Voir aussi première convention de Genève, art. 17 ; troisième convention de Genève, art. 120 ; quatrième convention de Genève, art. 130.

¹⁰⁷ « How Myanmar's military covers up past crimes against the Rohingya, and erases them from the country's future », *Myanmar Now* (15 février 2023), accessible à l'adresse suivante : <https://myanmar-now.org/en/news/how-myanmars-military-covers-up-past-crimes-against-the-rohingya-and-erases-them-from-the-countrys-future/>.

¹⁰⁸ Voir Reuters Investigates, « Planned Purge : New evidence shows how Myanmar's military planned its brutal purge of the Rohingya » (4 août 2022), accessible à l'adresse suivante : <https://www.reuters.com/investigates/special-report/myanmar-rohingya-warcrimes-investigation/> ; « How Myanmar's military covers up past crimes against the Rohingya, and erases them from the country's future », *Myanmar Now* (15 février 2023), accessible à l'adresse suivante : <https://myanmar-now.org/en/news/how-myanmars-military-covers-up-past-crimes-against-the-rohingya-and-erases-them-from-the-countrys-future/>.

¹⁰⁹ United Nations Independent Investigative Mechanism for Myanmar, *Screening of Mechanism Person Code No. P5513* (septembre 2025), par. 28.

¹¹⁰ *Ibid.*, par. 29, 36.

¹¹¹ *Ibid.*, par. 31.

D. Corroboration géospatiale

18. Enfin, ces témoignages sont aussi corroborés par des images satellitaires. Selon la mission d'établissement des faits, des centaines de villages ont été détruits et rasés, comme démontré par l'imagerie satellitaire d'août 2017 à mars 2018¹¹². Le Mécanisme, pour sa part, a en outre constaté que « [l']analyse géospatiale menée par UNOSAT documente la destruction massive et soutenue de villages rohingya dans le nord de l'État de Rakhine pendant et après les opérations de nettoyage de 2017 »¹¹³. J'y reviendrai sous peu.

2. Il existe des preuves convaincantes que le Myanmar a détruit des éléments de preuve du génocide après les « opérations de nettoyage »

19. Monsieur le président, Mesdames et Messieurs les juges : ce n'est pas seulement durant les « opérations de nettoyage » elles-mêmes que le Myanmar s'est employé à effacer les traces de ses crimes, mais également après celles-ci, visant ainsi à parfaire sur le terrain l'éradication de la présence des Rohingya. Ce sera mon deuxième point.

A. Un programme d'évacuation et de réaménagement orchestré par l'État

20. Comme l'a relevé la mission onusienne, les autorités civiles ont supervisé, après les violences génocidaires, le rasage au bulldozer de villages rohingya incendiés, remplacés par la construction d'installations de la police des frontières et d'autres infrastructures de sécurité¹¹⁴. M^e Loewenstein l'a noté dans son discours hier.

21. Ceci fut le cas, par exemple, dans le canton de Maungdaw, à Maung Nu, Kan Kya et Inn Din et, dans le canton de Buthidaung, à Hpaung Taw Pyin¹¹⁵. De plus, les terres cultivées par les Rohingya massacrés ou ayant fui ont été réaffectées à des non-Rohingya au bénéfice desquels des

¹¹² United Nations Human Rights Council, *Detailed Findings Report of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 septembre 2018), par. 959.

¹¹³ United Nations Independent Investigative Mechanism for Myanmar, *The Destruction and Dispossession of Rohingya Land and Property During the 2017 Clearance Operations - Public Summary* (29 septembre 2025), accessible à l'adresse suivante : <https://iimm.un.org/sites/default/files/2025/09/Land%20Report%20Public%20Summary%20EN.pdf>, par. 43.

¹¹⁴ 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 septembre 2018), par. 1233-1241. MG, vol. II, annexe 40.

¹¹⁵ *Ibid.*, par. 1234-1235.

logements ont été construits, de même que des routes et des installations militaires¹¹⁶. La mission onusienne a souligné, au-delà de leur caractère clairement discriminatoire, que ces mesures constituaient « une tentative délibérée d’entraver la justice »¹¹⁷, violant l’obligation de mener des investigations promptes, indépendantes et impartiales, et qu’elles contribuaient à rendre « méconnaissable » le paysage des crimes¹¹⁸.

22. Ces constats sont corroborés par des témoignages directs du journaliste de la *BBC* Jonathan Head et des témoignages récoltés par la mission onusienne, documentant la construction, sur les ruines de hameaux rohingya, de casernes de police et d’enclos sécurisés¹¹⁹, y compris dans le canton de Maungdaw à Myo Thu Kyi et à Inn Din, ainsi que l’édification de centres d’accueil clôturés à Myar Zin dans le même Maungdaw¹²⁰. Amnesty International a également fait état dès novembre 2017 d’un vaste chantier de déblaiement, puis de nouvelles constructions étatiques, sur les terres rohingya, dont les « villages modèles » (*Na Ta La village*) et des postes de sécurité, après la démolition de structures intactes et l’arrachage de la végétation¹²¹.

23. La mission onusienne a, en outre, documenté la confiscation de dizaines de milliers d’hectares de terres rohingya *via* des programmes étatiques (à savoir, l’Entreprise de l’Union pour l’assistance humanitaire, la réinstallation et le développement dans l’État rakhine (UEHRD)) et des amendements à la loi sur les terres « vacantes, en jachère, ou vierges », facilitant l’attribution de terres rohingya à d’autres groupes ou leur réaffectation à des fins militaires¹²².

¹¹⁶ UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 septembre 2019), par. 126-140. MG, vol. III, annexe 49. Voir aussi 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 septembre 2018), accessible à l’adresse suivante : <https://digitallibrary.un.org/record/1643079?ln=en&v=pdf>, par. 1216-1217 ; *ibid.* , par. 1218-1232, 1242-1244. MG, vol. II, annexe 40.

¹¹⁷ *Ibid.*, par. 1244.

¹¹⁸ Amnesty International, *Myanmar: Remaking Rakhine* (2017), p. 4. MG, vol. IV, annexe 98.

¹¹⁹ Voir UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 septembre 2019), par. 126.

¹²⁰ Witness Statement of Jonathan Head (14 octobre 2020), par. 38-44. MG, vol. XI, annexe 375 ; MG, chap. 10, par. 10.69–10.78.

¹²¹ Amnesty International, *Myanmar: Remaking Rakhine* (2017), p. 3-7. MG, vol. IV, annexe 98.

¹²² UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 septembre 2019), par. 123-126, 139-140. MG, vol. III, annexe 49 ; United Nations Independent Investigative Mechanism for Myanmar, *The Destruction and Dispossession of Rohingya Land and Property During the 2017 Clearance Operations - Public Summary* (29 septembre 2025), accessible à l’adresse suivante : <https://iimm.un.org/sites/default/files/2025/09/Land%20Report%20Public%20Summary%20EN.pdf>, par. 48.

B. Poursuite des destructions de preuves malgré l'ordonnance de mesures provisoires de la Cour

24. Ces faits ont, pour partie, été portés à la connaissance de la Cour lors de l'audience sur les mesures conservatoires de décembre 2019 et conduit la Cour à ordonner au Myanmar de

« prendre des mesures effectives pour prévenir la destruction et assurer la conservation des éléments de preuve relatifs aux allégations d'actes entrant dans le champ d'application de l'article II de la convention pour la prévention et la répression du crime de génocide »¹²³.

Il est évident que l'ordonnance de la Cour ne peut effacer des destructions antérieures au 23 janvier 2020. Mais malgré l'ordonnance de la Cour, les incendies de villages rohingya en vue d'effacer les preuves n'ont pas cessé.

25. La haute-commissaire aux droits de l'homme a rapporté, le 30 juin 2020, des incendies de grande ampleur en mai 2020 dans le canton de Buthidaung, attestés par des témoins oculaires et confirmés par des images satellitaires, démontrant que « des zones où se dressaient autrefois jusqu'à une douzaine de villages Rohingya, gisaient en cendres »¹²⁴. La haute-commissaire a souligné que ces sites « n'étaient pas seulement des habitations ... mais aussi des preuves » des événements de 2017, appelant à des mesures de préservation immédiates¹²⁵.

26. Mesdames et Messieurs les juges, dans sa duplique le Myanmar prétend que sa propre enquête « n'a révélé aucun signe visible que des villages auraient été incendiés dans ledit canton pendant cette période »¹²⁶. Mais les affirmations du Myanmar sont intéressées, non vérifiées par une source indépendante et, je vous le rappelle, le Myanmar a refusé l'accès à son territoire à toute enquête indépendante.

27. Le rapporteur spécial des Nations Unies sur la situation des droits de l'homme au Myanmar a en outre relevé en septembre 2020 que de nouvelles installations militaires avaient été construites sur les terres des villages rohingya détruits¹²⁷. En septembre 2025, le Mécanisme d'enquête

¹²³ *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar), mesures conservatoires, ordonnance du 23 janvier 2020, C.I.J. Recueil 2020*, p. 30, par. 86 3).

¹²⁴ UN Human Rights Council, *Oral update on the human rights situation of Rohingya people (S-27/1), Statement by Michelle Bachelet, High Commissioner for Human Rights* (30 juin 2020). MG, vol. III, annexe 81. Voir aussi UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN doc. A/HRC/45/5 (3 septembre 2020), par. 29. MG, vol. III, annexe 56.

¹²⁵ UN Human Rights Council, *Oral update on the human rights situation of Rohingya people (S-27/1), Statement by Michelle Bachelet, High Commissioner for Human Rights* (30 juin 2020). MG, vol. III, annexe 81 ; MG, chap. 13, par. 13.37–13.39.

¹²⁶ Duplique du Myanmar (30 décembre 2024) (ci-après, « DM »), par. 12.117.

¹²⁷ UN OHCHR, *UN human rights expert calls for immediate end to military assaults on Rakhine villages, decries mounting death toll of children* (22 septembre 2020). MG, vol. III, annexe 83 ; MG, chap. 13, par. 13.38.

indépendant pour le Myanmar, pour sa part, a publié un rapport — à l'onglet n° 7 de votre dossier — établissant que, malgré l'ordonnance de la Cour, le Myanmar a poursuivi une politique de démolition systématique et d'altération des sites concernés¹²⁸. Selon l'enquête du Mécanisme, la conversion de villages rohingya — s'étendant d'Ah Lel Than Kyaw au sud à Taung Pyo Let Wea au nord de Maungdaw — en bases pour la police des frontières, combinée à des opérations coordonnées de bulldozer et de nivellement du terrain à grande échelle, a transformé des scènes de crime en terrains stériles, effaçant les marqueurs matériels essentiels à toute enquête forensique et à la restitution, et rendant la collecte de preuves sur site impraticable¹²⁹. Pour reprendre les mots du Mécanisme,

« Myanmar's systematic demolition and razing of Rohingya villages and construction of BGP Battalion bases on these sites has destroyed or permanently concealed much evidence of what occurred during the 2017 clearance operations. »¹³⁰

28. Le Mécanisme a conclu que cette stratégie a eu pour effet de soustraire ou de détruire des catégories cruciales de preuves : fosses communes et restes humains ; structures incendiées ; effets personnels permettant l'identification des victimes et la reconstitution des modes opératoires ; indices balistiques ; traces d'explosifs et armes ; documents de propriété et de ciblage des victimes ; ainsi que les liens entre la direction militaire et les opérations sur le terrain¹³¹.

29. En altérant fondamentalement les lieux de ses crimes et en recouvrant mosquées, cimetières, madrasas — qui sont des écoles religieuses — et habitations par des infrastructures sécuritaires, le Myanmar n'a ménagé aucun effort pour cacher la vérité.

C. Preuves géospatiales démontrant un schéma d'« effacement et construction »

30. À cet égard, des images satellitaires successives des mêmes endroits, prises à des moments différents, offrent des preuves irréfutables de cet effort de dissimulation. L'analyse de l'UNOSAT (qui est le centre satellitaire des Nations Unies) a identifié, dans de nombreux sites partiellement ou

¹²⁸ United Nations Independent Investigative Mechanism for Myanmar, *The Destruction and Dispossession of Rohingya Land and Property During the 2017 Clearance Operations - Public Summary* (29 septembre 2025), accessible à l'adresse suivante : <https://iimm.un.org/sites/default/files/2025/09/Land%20Report%20Public%20Summary%20EN.pdf>, par. 58-59.

¹²⁹ *Ibid.*, par. 43-47, 59.

¹³⁰ *Ibid.*, par. 59.

¹³¹ *Ibid.*

totalelement détruits par les incendies déclenchés par la Tatmadaw, des opérations de nivellement et de défrichement puis de nouvelles constructions étatiques¹³².

31. Pour prendre un exemple, l'image satellitaire affichée à l'écran révèle, dans plusieurs villages rohingya du canton de Maungdaw, des destructions étendues : celles intervenues jusqu'en novembre 2018 apparaissent en jaune, tandis que celles survenues entre novembre 2018 et avril 2019 — et donc postérieurement aux « opérations de nettoyage » — sont signalées en rouge¹³³.

32. Le projet Ocelli — un ensemble de données géospatiales interactives compilant des preuves open-source, développé en partenariat avec le Center for Advanced Defense Studies — a, de son côté, recensé au moins 44 sites où de nouvelles constructions ont eu lieu en 2018 sur l'emplacement d'anciens villages rohingya incendiés, schéma que l'ONG a synthétisé en ces termes qui résumant très bien l'intention du Myanmar : « Burn, Destroy, Erase »¹³⁴, corroborant un effort pour « rendre le paysage méconnaissable »¹³⁵. Ces données confirment que la disparition des structures et de la végétation, suivie par la construction d'implantations policières et militaires et de « villages modèles »¹³⁶, relève d'un effort systématique visant à refaçonner le territoire où vivaient les Rohingya afin d'effacer la preuve des massacres et d'empêcher le retour des survivants¹³⁷.

33. Ceci est visible dans les images satellitaires qui apparaissent sur vos écrans ; elles montrent d'abord des villages incendiés et ensuite de nouvelles constructions.

¹³² United Nations Institute for Training and Research, *Affected settlements in Buthidaung, Maungdaw and Rathedaung Townships of Rakhine State in Myanmar* (18 octobre 2018). MG, vol. III, annexe 70; 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 septembre 2018), accessible à l'adresse suivante : <https://digitallibrary.un.org/record/1643079?ln=en&v=pdf>, par. 1216-1217 ; 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 septembre 2018), par. 1218-1244. MG, vol. II, annexe 40 ; UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 septembre 2019), accessible à l'adresse suivante : https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf, par. 126-140.

¹³³ UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 septembre 2019), p. 41. MG, vol. III, annexe 49.

¹³⁴ Ocelli Project, *Burn, Destroy, Erase*, accessible à l'adresse suivante : <https://ocelli.c4ads.org/investigations>; MG, chap. 11, par. 11.48 et note 1008.

¹³⁵ Amnesty International, *Myanmar: Remaking Rakhine* (2017), p. 4. MG, vol. IV, annexe 98; UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 septembre 2019), par. 139-140. MG, vol. III, annexe 49.

¹³⁶ UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 septembre 2019), par. 119.

¹³⁷ *Ibid.*, par. 139-140. MG, vol. III, annexe 49 ; Amnesty International, *Myanmar: Remaking Rakhine* (2017), p. 3-7. MG, vol. IV, annexe 98.

34. Le premier exemple concerne le village de Inn Din, dans le canton de Maungdaw. Entre janvier et février 2018, comme l'illustrent les images, des villages ont été incendiés tandis que de nouvelles constructions étaient simultanément implantées¹³⁸. Le deuxième exemple porte sur les villages de Chein Khar Li et Koe Tan Kauk dans le canton de Rathedaung en mars 2019 et révèle un schéma d'action similaire¹³⁹. Le troisième exemple montre le village de Gu Dar Pyin, situé dans le canton de Buthidaung, en 2020, et qui a connu lui aussi le même sort¹⁴⁰. Enfin, l'exemple de Kan Kya, dans le canton de Maungdaw, met en évidence la même séquence d'actes : destructions par incendies suivies de nouvelles constructions¹⁴¹. Et ce ne sont là que quelques cas parmi ceux documentés par la mission onusienne.

3. À tout moment, le Myanmar a bloqué les enquêtes indépendantes et l'accès

35. Mon troisième point, Monsieur le président, est que, en refusant tout accès à son territoire aux mécanismes internationaux, le Myanmar a facilité la destruction et l'effacement des preuves, en dépit des appels répétés des organes des Nations Unies et des obligations de préservation de preuves spécifiquement ordonnées par la Cour¹⁴². M^e Reichler l'a souligné lundi et ce fait est indéniable. Le Myanmar se drape derrière sa souveraineté et l'absence d'obligation juridique de coopérer avec les

¹³⁸ Amnesty International, *Myanmar: Remaking Rakhine* (2017), p. 11-12. MG, vol. IV, annexe 98.

¹³⁹ UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 septembre 2019), accessible à l'adresse suivante : https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFMMMyanmar/20190916/A_HRC_42_CRP.5.pdf, p. 44. Vol. III, annexe 49.

¹⁴⁰ *Ibid.*, p. 43.

¹⁴¹ MG, figure 13.1, citant UN Special Rapporteur on the situation of human rights in Myanmar, *Oral Update to UN Human Rights Council* (22 septembre 2020).

¹⁴² 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 septembre 2018), par. 1242-1244. MG, vol. II, annexe 40 ; UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 septembre 2019), par. 126-140. MG, vol. III, annexe 49 ; *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar), mesures conservatoires, ordonnance du 23 janvier 2020, C.I.J. Recueil 2020*, par. 86 3).

instances onusiennes¹⁴³. Ce comportement obstructionniste montre toutefois clairement qu'il a quelque chose à cacher.

36. En dépit de l'ordonnance de la Cour qui, comme je l'ai rappelé, enjoignait au Myanmar de prendre des mesures efficaces pour prévenir la destruction et assurer la préservation des preuves¹⁴⁴, le défendeur a persisté dans son refus d'accorder l'accès à l'ONU ou autres mécanismes indépendants, soutenant que la convention sur le génocide ne lui imposait aucune obligation de coopération¹⁴⁵. Or, entraver les enquêtes tout en procédant au rasage de villages et à la construction sur les scènes de ses crimes de bâtiments militaires et policiers est foncièrement incompatible avec l'exécution de bonne foi de l'ordonnance imposant la conservation des éléments de preuve¹⁴⁶.

4. Les dénégations par le Myanmar de sa destruction de preuves sont dénuées de fondement

37. Mesdames et Messieurs les juges, j'en viens à mon quatrième point. Malgré l'accumulation des éléments de preuve dont je viens de vous faire état, le Myanmar nie sa propre pratique de destruction des preuves.

38. Il soutient que la Gambie ne présente aucune preuve quant aux circonstances particulières des incendies, ajoutant que leur attribution à ses forces armées ne serait pas établie¹⁴⁷. Mais l'explication alternative du Myanmar — selon laquelle les Rohingya auraient eux-mêmes incendié leurs propres villages — est d'autant plus indigne qu'il est établi qu'elle est fautive. En effet, les

¹⁴³ Voir UN OHCHR, *Myanmar refuses access to UN Special Rapporteur* (20 décembre 2017). MG, vol. III, annexe 67 ; UN General Assembly, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN doc. A/74/342 (30 août 2019), par. 2. MG, vol. III, annexe 77 ; 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 septembre 2018), par. 1618. MG, vol. III, annexe 40 ; UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, UN doc. A/HRC/42/50 (8 août 2019), par. 4. MG, vol. III, annexe 47 ; UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 septembre 2019), accessible à l'adresse suivante : https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFMMyanmar/20190916/A_HRC_42_CRP.5.pdf, par. 29. Voir aussi CMM, par. 12.84 ; DM, par. 6.6 ; UN General Assembly, *Decision adopted by the Human Rights Council on 29 September 2017*, UN doc. A/HRC/DEC/36/115 (5 octobre 2017), accessible à l'adresse suivante : <https://docs.un.org/en/A/HRC/DEC/36/115>, Preamble ; UN General Assembly, *Resolution adopted on 27 December 2019 on Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN doc. A/RES/74/246 (15 janvier 2020), par. 4. MG, vol. III, annexe 79 ; UN General Assembly, *Resolution adopted by the Human Rights Council on 26 September 2019*, UN doc. A/HRC/RES/42/3 (3 octobre 2019), par. 11.

¹⁴⁴ *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar), mesures conservatoires, ordonnance du 23 janvier 2020, C.I.J. Recueil 2020*, p. 30, par. 86 3).

¹⁴⁵ CMM, par. 12.84 ; duplique du Myanmar (30 décembre 2024) (ci-après, « DM »), par. 12.42-12.46.

¹⁴⁶ *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar), mesures conservatoires, ordonnance du 23 janvier 2020, C.I.J. Recueil 2020*, p. 30, par. 86 3).

¹⁴⁷ DM, par. 12.111, 12.112.

reportages publics et le témoignage du journaliste de la *BBC* Jonathan Head établissent clairement que les photos montrant prétendument des Rohingya en train d'incendier leurs maisons ont été délibérément mises en scène par la Tatmadaw¹⁴⁸, comme l'a relevé M. Suleman lundi. Par ailleurs, le Myanmar ne fournit aucune preuve crédible à l'appui de cet étonnant argument. Le Myanmar s'appuie également sur des déclarations intéressées de prisonniers de l'ARSA confinés à la notoire prison de Buthidaung, et qui ont de bonnes raisons de signer tout ce que leurs geôliers mettent devant eux, comme M. Ho l'a expliqué hier.

39. Pris la main dans le sac par des images satellitaires, le Myanmar n'a pas nié avoir utilisé des bulldozers pour nettoyer les villages rohingya incendiés mais, très cyniquement, il soutient qu'il s'agissait de « prépar[atifs] ... de rapatriement »¹⁴⁹. Mais de quel rapatriement est-il question ? Un rapatriement vers des installations militaires et de police, construites au-dessus de leurs anciens villages ? Les actions du Myanmar, documentées par les organismes des Nations Unies, contredisent complètement ses dires. La conclusion de la mission d'établissement des faits et du Mécanisme d'enquête de l'ONU, basée sur leur enquête approfondie, est, comme je l'ai rappelé, que le Myanmar s'engageait dans « une tentative délibérée d'entraver la justice »¹⁵⁰.

5. Conclusion : la responsabilité exige la vérité, et la vérité exige la préservation

40. Mesdames et Messieurs les juges, il ne sied ni de mêler le faux à la vérité, ni de la dissimuler sciemment. La destruction des preuves n'est pas un dommage collatéral des « opérations de nettoyage », mais une pratique délibérée visant à entraver la justice et à effacer la réalité historique¹⁵¹. Cette destruction, organisée, cruelle, méticuleuse et systématique ne peut se comprendre que comme reflétant un indice de culpabilité. En matière de génocide, cette constatation

¹⁴⁸ Voir Witness Statement of Jonathan Head (14 octobre 2020), par. 15-19. MG, vol. XI, annexe 375. *Reuters Investigates*, « Planned Purge: New evidence shows how Myanmar's military planned its brutal purge of the Rohingya » (4 août 2022), accessible à l'adresse suivante : <https://www.reuters.com/investigates/special-report/myanmar-rohingya-warcrimes-investigation/>. Voir aussi United Nations Independent Investigative Mechanism for Myanmar, *Screening of Mechanism Person Code No. P5513* (septembre 2025), par. 28.

¹⁴⁹ Republic of the Union of Myanmar, President Office, *Rebuttal Statement at the Interactive Dialogue on the Situation of Human Rights in Myanmar during 37th Session of Human Rights Council* (13 mars 2018). MG, vol. VI, annexe 157.

¹⁵⁰ 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 septembre 2018), par. 1244. MG, vol. II, annexe 40.

¹⁵¹ United Nations Independent Investigative Mechanism for Myanmar, *The Destruction and Dispossession of Rohingya Land and Property During the 2017 Clearance Operations — Public Summary* (29 Sept. 2025), accessible à l'adresse suivante : <https://iimm.un.org/sites/default/files/2025/09/Land%20Report%20Public%20Summary%20EN.pdf>, par. 43, 57, 61.

de bon sens est confortée par la jurisprudence du Tribunal pénal international pour l'ex-Yougoslavie selon lequel la destruction et la « dissimul[ation] » de corps sont un « fait révélateur » de l'intention de détruire le groupe¹⁵². La convergence des faits dûment établis dans cette affaire ne laisse place à aucune autre conclusion raisonnable.

41. Je vous remercie, Mesdames et Messieurs les juges, pour votre aimable attention. Puis-je vous prier, Monsieur le président, de bien vouloir appeler M. d'Argent à la barre ? Mais peut-être après la pause, si vous jugez cela opportun. Merci.

Le PRÉSIDENT : Je remercie M^{me} Al Ameen. Before I give the floor to the next speaker, the Court will observe a coffee break of 15 minutes. The sitting is suspended.

The Court adjourned from 11.20 p.m. to 11.40 a.m.

The PRESIDENT: Please be seated. The sitting is resumed. Je donne maintenant la parole à M. Pierre d'Argent. Vous avez la parole, Monsieur.

M. D'ARGENT : Je vous remercie, Monsieur le président.

V. L'IMPUNITÉ DONT JOUISSENT SES FORCES DE SÉCURITÉ MANIFESTE L'INTENTION GÉNOCIDAIRE DU MYANMAR

1. Monsieur le président, Mesdames et Messieurs les juges, c'est toujours un honneur de prendre la parole devant la Cour et de le faire, aujourd'hui encore, au soutien de la Gambie dans cette affaire d'une gravité et d'une importance exceptionnelles.

2. Il me revient d'aborder la question de l'impunité dont jouissent les commanditaires et les exécutants des « opérations de nettoyage ».

3. Parce qu'elle est — vous allez le voir — délibérée et organisée par le Myanmar, cette impunité dénote son *dolus specialis*. Et ma plaidoirie y sera consacrée. Par ailleurs, cette même

¹⁵² *Procureur v. Radislav Krstić*, ICTY, IT-98-33-T, Trial Judgment (2 août 2001), par. 596 ; Ocelli Project, *Burn, Destroy, Erase*, accessible à l'adresse suivante : <https://ocelli.c4ads.org/investigation> ; 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 septembre 2018), par. 1000-1004, 1434-1438 ; UN Human Rights Council, *Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 septembre 2019), par. 224. MG, vol. II, annexe 49.

impunité constitue une violation continue de l'obligation de punir les actes de génocide. Et M. Jones y reviendra demain.

4. Monsieur le président, parce que la question du manquement à l'obligation de punir le génocide ne se pose que si des actes de génocide ont été commis, le Myanmar soutient que la Gambie commet une faute de logique en suggérant que l'impunité constitue un indice de *dolus specialis* alors qu'il revient au demandeur d'établir qu'ont été commis des actes de génocide, lesquels supposent l'existence d'une telle intention¹⁵³.

5. Mesdames et Messieurs les juges, la Gambie se rallie bien entendu à la jurisprudence de la Cour et elle convient que l'obligation de punir le génocide ne peut être violée en l'absence de génocide¹⁵⁴. Toutefois, en soutenant que l'impunité délibérément organisée par le Myanmar au bénéfice de ses militaires impliqués dans les opérations de nettoyage est un facteur déterminant permettant de conclure avec plus de certitude encore — s'il en était besoin — à l'existence de son intention génocidaire, la Gambie ne commet aucune faute de logique. Bien au contraire, nous formulons ainsi une proposition de bon sens, une proposition que la Commission d'établissement des faits des Nations Unies a reprise à son compte et qui a considéré en effet l'absence de poursuites pénales crédibles, fût-ce sur la base d'incriminations prévues par le droit commun, comme le septième et dernier indice d'intention génocidaire¹⁵⁵. En effet, Mesdames et Messieurs de la Cour — vous le savez bien —, punir est un attribut de la souveraineté et une prérogative régaliennne par excellence ; ne pas punir alors qu'il existe des raisons manifestes d'intenter des poursuites révèle immanquablement la volonté, l'intention, des plus hautes autorités de l'État. Et l'ancienne agente du Myanmar dans cette affaire — aujourd'hui prisonnière de la junte — le comprenait fort bien puisqu'elle posa devant vous et de manière rhétorique la question suivante lors des audiences en indication de mesures conservatoires : « Can there be genocidal intent on the part of a State that actively investigates, prosecutes and punishes soldiers and officers who are accused of wrongdoing? »¹⁵⁶

¹⁵³ CMM, par. 12.3-12.16 ; DM, par. 12.5.

¹⁵⁴ *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie)*, arrêt, C.I.J. Recueil 2015 (I), p. 128, par. 441.

¹⁵⁵ UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 septembre 2019), par. 224, 226 et suiv. MG, vol. II, annexe 49.

¹⁵⁶ CR 2019/19, p. 17, par. 23 (Aung San Suu Kyi).

6. Monsieur le président, Mesdames et Messieurs les juges, le point de départ de mon analyse, qui n'est pas contesté entre Parties, est que la Constitution du Myanmar dispose que les membres des forces armées ne peuvent être poursuivis et sanctionnés que par la justice militaire¹⁵⁷. De plus, le commandant en chef des forces armées, qui est aussi le chef de l'État, le général Min Aung Hlaing, est l'autorité judiciaire suprême au sein de la Tatmadaw ; ses décisions en matière de justice militaire sont définitives et sans appel¹⁵⁸.

7. Par ailleurs, le système de justice militaire de la Tatmadaw est bien organisé. Et je cite à nouveau l'ancienne agente du Myanmar : « The Office of the Judge Advocate General in Myanmar is by our standards well resourced, with more than 90 staff and a presence in all regional commands throughout the country.¹⁵⁹ » En d'autres termes, le système de justice militaire est entre les mains des militaires et ce système est capable de déployer son autorité partout où les forces armées sont elles-mêmes déployées dans le pays. Et ainsi, comme vous venez de l'entendre de la voix de M. Al Ameen, le plus haut magistrat de l'armée, *Judge Advocate General Aung Lin Dwe*, s'est rendu en 2017 dans le nord de l'État de Rakhine, non pour enquêter, mais pour aider à dissimuler les preuves des atrocités commises contre les Rohingya.

8. Mesdames et Messieurs les juges : la mise en place par le Myanmar d'un véritable système d'impunité révélateur de son *dolus specialis* apparaît clairement en analysant son comportement de manière chronologique. Et je distinguerai à cet égard trois périodes d'impunité.

9. La première période d'impunité commence durant la première vague des opérations de nettoyage et se prolonge tout au long de l'intervalle temporel qui sépare les deux vagues d'opérations : l'impunité consécutive à la première vague assura aux militaires participant à la seconde qu'ils allaient pouvoir participer à cette seconde vague sans aucun risque d'être inquiétés et en pouvant redoubler de férocité.

¹⁵⁷ Constitution de la République de l'Union du Myanmar (2008), point *b*), par. 20, par. 319. MG, vol. VI, annexe 176.

¹⁵⁸ *Ibid.* MG, par. 11.12, notes 1353 et 1354 : Constitution de la République de l'Union du Myanmar, point *b*), par. 343, vol. VI, annexe 176 ; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), par. 1579 et 1580. Vol. II, annexe 40 ; CMM, par. 12.52.

¹⁵⁹ CR 2019/19, p. 17, par. 22 (Aung San Suu Kyi).

10. Une deuxième période d'impunité s'étend depuis le début de la seconde vague des opérations de nettoyage le 25 août 2017 jusqu'à l'introduction de la présente affaire, le 11 novembre 2019.

11. Enfin, une troisième période d'impunité commence avec la saisine de la Cour et continue jusqu'à aujourd'hui. Et le comportement du Myanmar durant cette dernière période est évidemment teinté par la présente affaire, le défendeur souhaitant se présenter devant vous sous le meilleur jour possible alors que sa position fondamentale n'a en rien changé.

1. L'impunité durant la première vague et jusqu'à la seconde vague des opérations de nettoyage

12. Monsieur le président, Mesdames et Messieurs les juges, le Myanmar ne conteste pas qu'il n'a diligenté aucune enquête ni poursuite pénale contre des membres de ses forces de sécurité engagés dans la première vague des opérations de nettoyage alors qu'elle avait lieu, soit entre octobre 2016 et février 2017. Cette impunité se prolongea entre la fin de la première vague et le début de la seconde en août 2017.

13. Toutefois, durant cette période déjà, en créant de prétendues commissions d'enquête qui étaient autant d'écrans de fumée, le Myanmar tenta de donner le change à la communauté internationale émue — justement émue — de la violence aveugle s'étant abattue sur les Rohingyas.

14. Le 26 octobre 2016, le parlement de l'État de Rakhine institua une commission d'enquête composée de 11 parlementaires de cet État. Interrogé par la *BBC* le 7 novembre 2016 sur les viols généralisés et bien documentés des femmes rohingyas commis lors des opérations de nettoyage qui étaient en cours, le président de cette commission d'enquête, M. Aung Win, répondit avec un mépris consommé pour les victimes que de tels faits étaient inconcevables car les femmes rohingyas « are very dirty. The Bengali women have a very low standard of living and poor hygiene. They are not attractive. So neither the local Buddhist men nor the soldiers are interested in them.¹⁶⁰ »

15. La Cour ne sera dès lors pas surprise d'apprendre que le rapport de la prétendue commission d'enquête de l'État de Rakhine, daté du 27 décembre 2016, affirma qu'aucun acte

¹⁶⁰ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), par. 1599. Vol. II, annexe 40, par. 1599, p. 402, rapportant un interview de la *BBC* (J. Fisher, « Muslim civilians “killed by Burmese army” ») (*BBC News*, 7 novembre 2016), including a video of the conversation). Aussi IIMM, *Efforts to investigate and punish sexual and gender-based crimes committed against Rohingyas: Evidence analysis*, par. 48. RG, vol. II, annexe 8.

répréhensible n'avait été commis par les forces armées et de police au cours des premières *clearance operations*¹⁶¹.

16. À la même époque, en décembre 2016, le Myanmar créa encore un autre écran de fumée sous la forme de la commission d'enquête sur Maungdaw, laquelle était chargée de faire la lumière sur les attaques d'octobre et de novembre de la même année dirigées contre les Rohingya. Composée de 13 membres, cette commission était présidée par le général Myint Swe, vice-président du Myanmar à l'époque et ancien chef des services de renseignement de l'armée. Tous les autres membres de la commission furent nommés par les autorités militaires. On y retrouvait notamment le chef de la police, le général de division Zaw Win et un ancien général de la Tatmadaw, M. Aung Kyi. Lors de la première réunion de cette commission d'enquête, son président donna le ton : face aux rapports critiques émanant d'organisations internationales, il s'agissait de « réduire leurs inquiétudes » et de travailler rapidement¹⁶².

17. C'est ainsi que le 3 janvier 2017, moins d'un mois après sa création, la commission Maungdaw publia un bref rapport intermédiaire. Les prétendues attaques dirigées *contre* les forces de sécurité du Myanmar y étaient abondamment détaillées. En revanche, s'agissant des « external allegations » selon lesquelles des violences génocidaires et des viols avaient été commis par les forces de sécurité, la commission se contenta d'affirmer brièvement, dans la droite ligne du discours officiel et tout en prétendant avoir mené des « special investigations », que la présence de la population « Bengali », de même que le prétendu accroissement du nombre d'érudits islamiques et de mosquées « are proof that there were no cases of genocide and religious persecution in the region »¹⁶³. S'agissant des accusations de viols, tortures et incendies, la commission s'en remit entièrement aux dires des forces de sécurité : « Responsible security personnel performing their duties in those villages submitted that they have been ready to take legal action against those who

¹⁶¹ MG, par. 11.66, note 1492 : Republic of the Union of Myanmar, Rakhine State Parliament, « Enquiry Committee on 9/10 Maungdaw and Rathedaung Bengali terrorist attacks submitted its preliminary report to 3rd regular meeting's 9th day of Rakhine State Parliament of 3rd term », *Facebook* (27 décembre 2016) (original et traduction anglaise). Vol. VI, annexe 147 ; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), par. 1610. Vol. II, annexe 40, note 1493 : HRW, *A History of Shielding Abusers* (2018), p. 3. Vol. IV, annexe 119.

¹⁶² International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar* (janvier 2018), p. 20, vol. IV, annexe 108. MG, par. 11.68.

¹⁶³ Republic of the Union of Myanmar, President Office, *Interim Report of the Investigation Commission on Maungdaw* (3 janvier 2017), par. 10. MG, vol. VI, annexe 162.

committed crimes if there was sufficient evidence. »¹⁶⁴ Pour les viols en particulier, la commission entendit réduire les inquiétudes de la communauté internationale comme son président l'avait annoncé et elle affirma : « the Commission interviewed local villagers and women by using various methods and didn't find sufficient evidence to take legal action up to this date »¹⁶⁵. En réalité, les interviews en question étaient totalement biaisées, les témoins étant interrompus dans leurs déclarations et leurs propos déformés par les interprètes, ainsi que le Mécanisme d'enquête indépendant pour le Myanmar de l'ONU l'a clairement établi¹⁶⁶.

18. Le rapport final de la commission Maungdaw — dont le manque d'indépendance et la méthodologie déficiente furent abondamment critiqués à l'époque par les observateurs avertis¹⁶⁷ — fut déposé le 8 août 2017. La commission soutint avoir conduit « a careful investigation into external allegations of rape, torture, arson, human rights violations, discrimination and even genocide in Muslim villages »¹⁶⁸. Mesdames et Messieurs les juges, le compte rendu de cette enquête prétendument détaillée tient en sept paragraphes s'étalant de la seconde moitié de la page 8 au début de la page 12 du rapport. Et, j'invite la Cour à lire ces pages, reproduites à l'annexe 149, volume VI, du mémoire de la Gambie. En substance, il y est systématiquement affirmé que les accusations dirigées contre les forces de sécurité n'ont pas pu être confirmées, que certaines allégations non autrement décrites continueraient de faire l'objet d'une enquête, que pour certaines autres « action was taken »¹⁶⁹, sans autre précision, tandis que d'autres allégations encore nécessiteraient des devoirs d'enquête supplémentaires qui ne sont pas plus précisés et dont on ne sait s'ils furent entrepris.

19. Quelques mois plus tôt, le 9 février 2017, à la fin de la première vague des opérations de nettoyage et sur suggestion de la commission de Maungdaw, la Tatmadaw créa une prétendue commission d'enquête dirigée...

The PRESIDENT: May I interrupt you? There is a switch mistake.

¹⁶⁴ *Ibid.* par. 11.

¹⁶⁵ *Ibid.*

¹⁶⁶ United Nations Independent Investigative Mechanism for Myanmar, *Efforts to investigate and punish sexual and gender-based crimes committed against Rohingya: Evidence analysis* (27 mars 2024), par. 54. RG, vol. II, annexe 8.

¹⁶⁷ Voir MG, par. 11.68, 11.71, 11.72, 11.73 et 11.74.

¹⁶⁸ *Republic of the Union of Myanmar, Summary of the Report of Investigation Commission for Maungdaw in Rakhine State* (8 août 2017), par. 34. MG, vol. VI, annexe 149.

¹⁶⁹ *Ibid.*, par. 37.

Mr D'ARGENT: I understand, Mr President. I will slow down. Apologies to the interpreters and to the Court. Donc la Tatmadaw créa une prétendue commission d'enquête dirigée par l'inspecteur général des services de défense, le général Aye Win, et composée de cinq membres, qui étaient bien sûr tous des militaires¹⁷⁰. Entre le 10 février et le 4 mars 2017, soit en 23 jours, cette commission prétend avoir interrogé 2 875 habitants dans 29 villages du canton de Maungdaw, soit en moyenne 125 villageois par jour, ce qui est proprement extraordinaire — c'est-à-dire, en réalité, soit faux, soit expéditif.

20. Le 23 mai 2017, trois mois avant la reprise des « clearance operations », les conclusions de l'enquête furent annoncées : douze des dix-huit accusations contenues dans le *Flash-Report* du 3 février 2017 réalisé par le Haut-Commissariat des Nations Unies pour les droits de l'homme à la suite d'interviews de réfugiés Rohingya ayant fui au Bangladesh depuis le 9 octobre 2016¹⁷¹ étaient « totally wrong », les six autres accusations étant « untrue due to false accusations and exaggerations »¹⁷².

21. Alors qu'aucun détail n'était fourni pour justifier ces conclusions péremptoires, la commission de la Tatmadaw prit la peine de révéler des faits d'une gravité exceptionnelle méritant assurément qu'ils fussent rapportés — jugez-en : un soldat avait utilisé une motocyclette sans la permission de son propriétaire tandis que trois individus avaient été sanctionnés pour avoir tabassé l'administrateur d'un village¹⁷³.

22. Voilà, Mesdames et Messieurs de la Cour. Voilà comment le Myanmar appréhendait, à la veille de la seconde vague des opérations de nettoyage, la violence déployée par ses forces de sécurité au cours de la première vague. Il est clair que les plus hautes autorités de l'État et de l'armée entendaient couvrir les exactions commises, et qu'ainsi ces autorités les approuvaient. Mais en assurant de cette manière l'impunité à leurs auteurs, il est difficile de ne pas considérer que le Myanmar entendait aussi s'assurer de leur participation, dans les mêmes conditions d'impunité, à la seconde vague de destruction qui allait s'abattre sur le groupe des Rohingya.

¹⁷⁰ MG, par. 11.77.

¹⁷¹ OHCHR, *Report of OHCHR mission to Bangladesh — Interviews with Rohingyas fleeing from Myanmar since 9 October 2016 — Flash Report* (3 février 2017). MG, vol. II, annexe 30 et aussi MG, par. 11.79 et UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), par. 1608. MG, vol. II, annexe 40.

¹⁷² MG, par. 11.79 et vol. II, annexe 40, par. 1608.

¹⁷³ *Ibid.*, par. 1608 et notes infrapaginales.

23. Le 24 août 2017, soit la veille de la seconde vague, la commission consultative sur l'État de Rakhine créée par le Myanmar et présidée par l'ancien Secrétaire général des Nations Unies Kofi Annan, déposa son rapport définitif — la veille de la seconde vague. Comme dans son rapport intermédiaire quelques mois plus tôt¹⁷⁴, la commission insista sur le fait que la situation résultant de la première vague constituait une véritable crise sur le plan des droits de l'homme et, ne prenant manifestement guère au sérieux les prétendues enquêtes que je viens de mentionner, la commission Annan souligna l'importance d'assurer que les forces de sécurité accusées de graves violations de droits humains rendent compte de leurs actes, la commission soulignant et relevant l'existence d'un « significant risk of renewed violence »¹⁷⁵.

24. Il n'est malheureusement guère étonnant que les recommandations de la commission Annan en matière d'enquête et de lutte contre l'impunité aient été en substance ignorées par le Myanmar qui, comme vous le verrez, fit semblant de les mettre en œuvre. En effet, avant même que la commission Annan ne dépose son rapport définitif, le porte-parole du gouvernement — qui était également à l'époque le directeur général du bureau du président — déclara le 10 juillet 2017 :

« Whenever there is an accusation from the international community, we say we are taking action in line with the recommendations of the Kofi Annan commission. The commission is serving as a shield for us. Was it not for the Kofi Annan commission, the allegations would be much worse, I think. »¹⁷⁶

25. Le message fut assurément bien compris par les membres de la Tatmadaw qui, vous l'avez entendu, allaient redoubler de férocité dans leur entreprise destructrice lors de la seconde vague des opérations de nettoyage.

2. L'impunité durant la seconde vague des opérations de nettoyage, après celle-ci et jusqu'à la saisine de la Cour

26. Entre le début de cette seconde vague le 25 août 2017 et jusqu'à la saisine de la Cour le 11 novembre 2019, l'attitude du Myanmar en matière d'impunité ne changea fondamentalement pas.

¹⁷⁴ Advisory Commission on Rakhine State, *Statement by Kofi Annan, Chair of the Advisory Commission on Rakhine State (Interim Report)* (16 mars 2017). MG, vol. VI, annexe 163.

¹⁷⁵ Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on the Rakhine State* (août 2017). MG, vol. IV, annexe 103, p. 15.

¹⁷⁶ Htet Naing Zaw, « U Zaw Htay: Kofi Annan Commission is Govt "Shield" », *The Irrawaddy* (10 juillet 2017). MG, vol. IX, annexe 265.

27. Pourtant, durant cette période, les appels de la communauté internationale à mettre fin aux exactions et à l'impunité systémique de la Tatmadaw se multiplièrent : ainsi, en particulier, le 11 septembre 2017, le haut-commissaire des droits de l'homme exhorta le Myanmar à « mettre fin à ses opérations militaires cruelles et à faire en sorte que les auteurs de toutes les violations commises aient à rendre des comptes »¹⁷⁷ ; le 6 novembre 2017, par la voix de son président, le Conseil de sécurité des Nations Unies rappela qu'il était essentiel que des enquêtes transparentes sur les allégations des graves violations soient menées et que justice devait être rendue aux victimes¹⁷⁸ ; le 5 décembre 2017, le Conseil des droits de l'homme — qui, vous vous en souvenez, avait créé la mission internationale indépendante d'établissement des faits en mars de la même année¹⁷⁹ — appela à nouveau le Myanmar à « mettre fin à l'impunité pour toutes les violations ... en particulier celles commises à l'encontre de personnes appartenant à la communauté musulmane rohingya »¹⁸⁰. À la même époque, de nombreux États exhortèrent le Myanmar à mettre fin aux exactions en cours et à enquêter à leur sujet de manière transparente et crédible, ce qui n'avait manifestement pas été fait¹⁸¹ et fut également dénoncé par des organisations non gouvernementales réputées¹⁸². Et le 22 décembre 2018, l'Assemblée générale se déclara « profondément préoccupée par les constatations de la mission internationale indépendante d'établissement des faits ... qui a[vait] conclu » en septembre de la même année « que [les] informations disponibles étai[en]t suffisante[s] pour justifier l'ouverture » de poursuites pour génocide, la mission ayant identifié les plus hauts responsables militaires birmanes à cet égard¹⁸³.

¹⁷⁷ MG, par. 11.31, note 1397 : UN OHCHR, *Opening Statement by Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights at the 36th session of the Human Rights Council* (11 septembre 2017), p. 2. Vol. III, annexe 62.

¹⁷⁸ MG, par. 11.32, note 1398 : UN Security Council, *Security Council Presidential Statement Calls on Myanmar to End Excessive Military Force, Intercommunal Violence in Rakhine State*, UN doc. SC/13055 (6 novembre 2017), p. 4 (vol. III, annexe 64).

¹⁷⁹ UN General Assembly, Human Rights Council, *Resolution 34/22 on the Situation of human rights in Myanmar, adopted 24 March 2017*, UN doc. A/HRC/RES/34/22 (3 avril 2017), par. 11-12. CMM, vol. VI, annexe 231.

¹⁸⁰ MG, par. 11.33, note 1399 : UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN doc. A/HRC/RES/S-27/1 (5 décembre 2017), par. 5. MG, vol. III, annexe 65.

¹⁸¹ MG, par. 11.36, 11.37.

¹⁸² MG, par. 11.38, 11.39.

¹⁸³ *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar), mesures conservatoires, ordonnance du 23 janvier 2020, C.I.J. Recueil 2020*, p. 21 par. 54, citant Nations Unies, Assemblée générale, résolution adoptée par l'Assemblée générale le 22 décembre 2018 sur la situation des droits de l'homme au Myanmar, doc. A/RES/73/264 (22 décembre 2018), par. 1-2. Vol. III, annexe 72.

28. Le Myanmar n'en fit rien, ou plutôt il poursuivit ses opérations de diversion, renforçant encore davantage l'impunité.

29. Le 12 septembre 2017, alors que la seconde vague des opérations de nettoyage était en cours, le Myanmar créa un comité prétendument chargé de mettre en œuvre les recommandations de la commission Annan. Ce comité comptait 18 membres du gouvernement et de la présidence. Le comité rendit un rapport de 19 pages en juin 2018 dans lequel il était affirmé sans autre précision que les forces de police dans l'État de Rakhine opéraient selon les prescrits légaux et enquêtaient en cas de violation de ceux-ci¹⁸⁴. Le comité affirma également que la commission nationale des droits de l'homme du Myanmar, saisie de plaintes, procédait à des enquêtes. Dépendant des autorités militaires, cette commission nationale des droits de l'homme semble n'avoir mené aucune enquête débouchant sur des poursuites¹⁸⁵.

30. Le 14 décembre 2017, un conseil consultatif composé de cinq membres internationaux et de cinq membres nationaux fut créé afin d'assister le comité national de 18 membres chargé de mettre en œuvre les recommandations de la commission Annan. Parmi les membres internationaux de ce comité consultatif, l'ambassadeur Bill Richardson, ancien représentant permanent des États-Unis auprès de l'ONU, démissionna quelques semaines après avoir été nommé. Il déclara vouloir refuser de participer à un mécanisme qu'il décrivit comme étant appelé à devenir « a cheerleading squad for government policy »¹⁸⁶. Quelques mois plus tard, un autre membre du comité, l'ambassadeur Kobsak Chutikul, un diplomate thaïlandais, démissionna également de ce conseil consultatif, après avoir dénoncé en des termes encore plus explicites « the hoax » — la « farce » — que constituaient les commissions et conseils successifs établis par le Myanmar qui étaient « all for show »¹⁸⁷.

31. Et le même show continua. En octobre 2017, l'armée créa une nouvelle commission d'enquête interne sur les opérations militaires de la seconde vague. Toujours dirigée par le général

¹⁸⁴ MG, par. 11.58, note 1467 : Republic of the Union of Myanmar, Committee for Implementation of the Recommendations on Rakhine State, *Report to the People on the Progress of the Implementation of Recommendations on Rakhine State* (janvier à avril 2018). Vol. VI, annexe 165 ; *ibid.*, par. 11.59, note 1469 : Republic of the Union of Myanmar, Committee for Implementation of the Recommendations on Rakhine State, *Report to the People on the Progress of the Implementation of Recommendations on Rakhine State* (janvier à avril 2018) (vol. VI, annexe 165), p. 15.

¹⁸⁵ MG, par. 11.60.

¹⁸⁶ MG, par. 11.62, note 1481 : Eli Meixler, « U.S. Advisor Bill Richardson Refuses a Role in Myanmar's "Whitewash" Crisis Panel », *Time* (25 janvier 2018). Vol. IX, annexe 275.

¹⁸⁷ MG, par. 11.63, note 1484 : Shibani Mahtani et Wai Moe, « A year after the assault on the Rohingya, Myanmar's generals are unapologetic », *The Washington Post* (21 août 2018). Vol. IX, annexe 290.

Aye Win, la commission était à nouveau exclusivement composée de militaires. Et à nouveau, elle fit preuve d'un zèle tout à fait particulier, interrogeant cette fois non moins de 3 217 villageois en 26 jours. Remettant son rapport le 17 novembre 2017, soit un mois après sa création, la commission conclut de manière parfaitement prévisible que « tous les membres des forces de sécurité, des dirigeants aux simples soldats, connaissaient les ordres et les directives des organes supérieurs et s'y sont strictement conformés »¹⁸⁸. De manière emphatique, la prétendue commission d'enquête affirma qu'« aucun innocent n'a perdu la vie ... [que] pas un seul coup de feu n'a été tiré sur eux »¹⁸⁹ et que « [l]es forces de sécurité n'ont pas tiré sur des villageois innocents ni commis de violences sexuelles ou violé de femmes »¹⁹⁰.

32. Toutefois, deux mois plus tard, le 11 janvier 2018¹⁹¹, la même commission d'enquête de la Tatmadaw fut forcée de revenir sur ce rapport négationniste péremptoire. En effet, entretemps et ainsi que M. Njai l'a rappelé hier, des journalistes de Reuters avaient révélé le massacre de dix villageois à Inn Din. Comme vous l'avez entendu, ils auraient été tués par vengeance¹⁹². La commission d'enquête de l'armée expliqua en outre que, compte tenu de l'impossibilité d'amener dix prétendus terroristes « bengalis » à un poste de police durant les opérations militaires en cours, il fut décidé... de les liquider au cimetière du village. À la suite de ce massacre, sept membres des forces armées furent condamnés par une cour martiale à dix ans de travaux forcés. Mais à peine sept mois plus tard, ils furent graciés et libérés sur décision du chef de l'État¹⁹³.

33. Cette grâce présidentielle, Mesdames et Messieurs les juges, contraste avec le sort réservé aux journalistes de l'agence Reuters qui publièrent la preuve irréfutable et photographique de l'exécution sommaire de ces dix villageois — preuve photographique que vous avez sous

¹⁸⁸ MG, par. 11.81, note 1536 : « Information released by the Tatmadaw True News Information Team on the findings of the Investigation Team in connection with the performances of the security troops during the terrorist attacks in Maungtaw region, Rakhine State », *The Global New Light of Myanmar* (14 novembre 2017), par. 3. Vol. IX, annexe 272.

¹⁸⁹ « Information released by the Tatmadaw True News Information Team on the findings of the Investigation Team in connection with the performances of the security troops during the terrorist attacks in Maungtaw region, Rakhine State », *The Global New Light of Myanmar* (14 novembre 2017), par. 4. Vol. IX, annexe 272.

¹⁹⁰ *Ibid.*

¹⁹¹ UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), par. 1614-1615. Vol. II, annexe 40.

¹⁹² CR 2026/3, p. 78, par. 29 (Njai).

¹⁹³ MG, par. 11.21.

l'onglet n° 4 de votre dossier d'audience¹⁹⁴. Le Myanmar arrêta les journalistes. Ils furent condamnés le 3 septembre 2018 à sept années de réclusion. La condamnation fut confirmée par la Cour suprême. Ce n'est qu'à la suite de la mobilisation massive de la communauté internationale que les journalistes furent libérés le 6 mai 2019 après avoir passé un an et demi derrière les barreaux¹⁹⁵ — soit plus de deux fois les sept mois infligés aux soldats assassins.

34. Pour parer aux prétendues « false allegations »¹⁹⁶ grandissantes qui lui étaient adressées à la suite des travaux de la mission d'établissement des faits des Nations Unies, le Myanmar créa encore, le 30 juillet 2018, une « Independent Commission of Enquiry » — une « commission d'enquête indépendante ».

35. En réalité, cette commission n'était en rien indépendante du gouvernement, son mandat indiquant d'ailleurs qu'elle était chargée d'enquêter sur les violations des droits de l'homme survenues « à la suite des attentats terroristes perpétrés par l'Armée du salut des Rohingya de l'Arakan »¹⁹⁷. La présidente de cette commission donna le ton en déclarant que « les responsables ne seraient pas recherchés », que « personne ne sera blâmé ou montré du doigt » car cela « ne mène à rien » et ne fait que susciter des « chamailleries »¹⁹⁸. La présidente de la commission confirma que les entretiens qu'elle menait eurent lieu « en présence des forces de sécurité »¹⁹⁹. Par ailleurs, Mesdames et Messieurs les juges, un des quatre membres de cette commission, M. Tun Thet, était le coordonnateur en chef du programme pour l'aide humanitaire, la réinstallation et le développement dans l'État de Rakhine, et il avait supervisé les destructions au bulldozer des villages rohingya. Avant de rejoindre cette prétendue commission d'enquête indépendante, il avait déclaré en mars 2018 que le Myanmar avait la « conscience tranquille » et il qu'il n'y avait, dans son pays, « ni nettoyage

¹⁹⁴ MG, par. 11.19, note 1370 : Wa Lone, Kyaw Soe Oo, Simon Lewis et Antoni Slodkowski, « Massacre in Myanmar: How Myanmar forces burned, looted and killed in a remote village », Reuters (8 février 2018) (vol. IX, annexe 279).

¹⁹⁵ MG, par. 11.20-11.21.

¹⁹⁶ MG, par. 11.87 et RM, par. 8.29.

¹⁹⁷ MG, par. 11.89, note 1549 : Republic of the Union of Myanmar, Independent Commission of Enquiry, Mandate. Vol. VI, annexe 164.

¹⁹⁸ MG, par. 11.89.

¹⁹⁹ MG, par. 11.96

ethnique ni génocide »²⁰⁰. Voilà donc, en substance, la réponse du Myanmar aux atrocités commises au cours de la deuxième phase des opérations de nettoyage.

3. L'impunité depuis la saisine de la Cour

36. J'en arrive donc, Mesdames et Messieurs les juges, à la troisième période d'impunité, celle qui se prolonge depuis votre saisine. Et les efforts du Myanmar pour apparaître devant vous comme un État soucieux de ses obligations d'enquête et de poursuite, et faisant diligence à cet égard, ces efforts sont assez facilement démasqués et démontés. Ce qui compte à cet égard, ce ne sont pas les différentes condamnations de prétendus terroristes ou de civils dont le Myanmar fait état ; ce qui compte, ce sont les poursuites — ou plutôt l'absence de poursuites — dirigées contre les membres de ses forces de sécurité, à savoir, d'une part, ses policiers et, d'autre part, ses militaires, pour leur comportement durant les *clearance operations*, et non dans des contextes tout à fait différents.

37. S'agissant des policiers, le Myanmar explique qu'à la suite du rapport final de sa « commission d'enquête indépendante », il a mis en place en janvier 2020 le « Criminal Investigation and Prosecution Body ». Dans son premier rapport consécutif à l'ordonnance de la Cour de janvier 2020, le Myanmar indique que, parmi les 139 cas identifiés par sa commission d'enquête, 23 cas concernaient des membres de sa police des frontières²⁰¹. Ce nombre n'a pas évolué depuis lors, il y a donc désormais près de six ans. L'évolution du statut de ces 23 cas est rapportée dans les rapports semestriels du Myanmar, le décompte qui figure dans le 5^e rapport de mai 2022 étant resté identique jusqu'à son dernier rapport de novembre 2025. Et voici ce bilan : sept enquêtes clôturées faute de preuves, huit enquêtes clôturées car les accusés seraient en fuite, six enquêtes prétendument en cours depuis mai 2022 dont on ne sait rien, et deux cas ayant débouché sur des condamnations²⁰². Ces deux

²⁰⁰ MG, par. 11.93 ; réplique de la Gambie (23 mai 2024) (ci-après, « RG »), par. 8.30.

²⁰¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, First Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (22 mai 2020), par. 100.

²⁰² Fifth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 mai 2022), par. 44 ; Sixth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 novembre 2022), par. 25 ; Seventh Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 mai 2023), par. 29 ; Eighth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 novembre 2023), par. 62 ; Ninth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 mai 2024), par. 25 ; Tenth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (22 novembre 2024), par. 40 ; Eleventh Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 mai 2025), par. 26 ; Twelfth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (21 novembre 2025), par. 23.

cas concernaient seulement des manquements à la discipline, la sanction infligée aux policiers étant... le retrait d'une à deux années d'ancienneté pour le décompte de leur pension. Voilà en ce qui concerne les poursuites de policiers depuis votre saisine.

38. S'agissant des poursuites dirigées contre les membres des forces armées, la « commission d'enquête indépendante » recensa tout au plus 13 « incidents sérieux ».

39. Un premier incident, révélé par les journalistes de Reuters, concernait le massacre des dix villageois à Inn Din, j'en ai déjà parlé et vous savez que cet événement se solda par la libération, après sept mois, des militaires graciés.

40. Le second incident concernait le village de Gu Dar Pyin dont vous a également parlé M. Njai hier²⁰³. Dix-huit jours après la requête introductive d'instance de la Gambie, une cour martiale fut, assez opportunément me semble-t-il, saisie de ces faits remontant alors à près de deux ans et demi²⁰⁴. Elle condamna un sous-officier à un an de prison pour avoir manqué aux règles d'engagement. Un officier fut condamné à la même peine pour avoir manqué à son devoir de supérieur, tandis qu'un plus haut gradé, également condamné pour manquement à son devoir de commandement, se vit décompter un an d'ancienneté pour sa pension²⁰⁵.

41. Dans son rapport de novembre 2020, le Myanmar indique encore avoir commencé à enquêter sur les crimes commis dans les villages de Chut Pyin et Maung Nu²⁰⁶ que mes collègues M^{me} Ho²⁰⁷ et M^{me} Ngum²⁰⁸ vous ont respectivement décrits hier après-midi.

42. S'agissant des événements à Maung Nu, l'enquête déboucha sur la condamnation d'un officier pour manquement à ses devoirs, ce qui lui valut d'être privé d'un an d'ancienneté pour le décompte de sa pension. Deux autres subalternes furent condamnés, respectivement à un an et deux ans de prison, pour avoir volé des femmes rohingya et usé de violence à cette occasion²⁰⁹. Le

²⁰³ CR 2026/3, p. 70 et suiv. (Njai).

²⁰⁴ MG, par. 11.23.

²⁰⁵ Second Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 novembre 2020), par. 53.

²⁰⁶ *Ibid.*, par. 54.

²⁰⁷ CR 2026/3, p. 42 et suiv. (Ho).

²⁰⁸ CR 2026/3, p. 57 et suiv. (Ngum).

²⁰⁹ Third Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (20 mai 2021), par. 36.

565^e bataillon d'infanterie fut entièrement et collectivement disculpé de toute implication dans les incidents de Taung Bazar, à proximité de Maung Nu²¹⁰.

43. Les enquêtes concernant le village de Chut Pyin n'ont pas abouti à la moindre inculpation. Ces enquêtes seraient donc toujours en cours. Depuis son 3^e rapport de mai 2021, quand il ne se prévaut pas de la pandémie du Covid-19, de la mise à la retraite de l'enquêteur principal ou de la situation sécuritaire, le Myanmar explique que les témoins doivent d'abord être rapatriés²¹¹ pour pouvoir avancer dans son enquête. On se demande toutefois pourquoi il n'a apparemment pas interrogé le moindre militaire impliqué.

44. Monsieur le président, Mesdames et Messieurs les juges, je conclus en reprenant la phrase de l'ancienne agente du Myanmar : « Can there be genocidal intent on the part of a State that actively investigates, prosecutes and punishes soldiers and officers who are accused of wrongdoing? » La question était alors rhétorique. Vous connaissez désormais la réponse. Et vous en tirerez toutes les conclusions qui s'imposent : n'ayant *actively* ni véritablement enquêté ni véritablement poursuivi ni sérieusement puni ses nombreux soldats engagés dans ces opérations d'une ampleur et d'une cruauté destructrice inouïe, et ayant à tout moment assuré l'impunité totale des commanditaires, le Myanmar fut bel et bien animé d'une intention génocidaire. Et cette conclusion, Mesdames et Messieurs les juges, — si vous deviez rechercher un élément pour vous convaincre davantage — est renforcée par le fait que le Myanmar, au lieu de les poursuivre et de les punir, a promu certains de ses officiers impliqués dans les opérations de nettoyage, en particulier les officiers ayant commandé les unités

²¹⁰ Fourth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 novembre 2021), par. 48.

²¹¹ Third Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (20 mai 2021), par. 33 ; Fourth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 novembre 2021), par. 45 ; Fifth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 mai 2022), par. 46 ; Sixth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 novembre 2022), par. 27 ; Seventh Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 mai 2023), par. 31 ; Eighth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 novembre 2023), par. 65 ; Ninth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 mai 2024), par. 26 ; Tenth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (22 novembre 2024), par. 42 ; Eleventh Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (23 mai 2025), par. 27 ; Twelfth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (21 novembre 2025), par. 25.

responsables des pires violences sexuelles, ainsi que l'a souligné le Mécanisme d'enquête indépendant des Nations Unies²¹².

45. Je vous remercie, Mesdames et Messieurs de la Cour pour votre bienveillante attention. Puis-je vous demander, Monsieur le président, de bien vouloir appeler à la barre, mon collègue M. Suleman.

Le PRÉSIDENT : Je remercie le professeur d'Argent pour sa déclaration. I now invite Mr Arsalan Suleman to address the Court. You have the floor, Sir.

Mr SULEMAN:

VI. MYANMAR'S COUNTER-TERRORISM DEFENCE IS UNTENABLE

1. Introduction

1. Mr President, Members of the Court. You have heard the excruciating details of Myanmar's genocidal "clearance operations" and the many indicators of genocidal intent associated with their planning, organization and brutal execution, and the failure to punish any of the perpetrators, who continue to enjoy absolute impunity.

2. Myanmar's defence is that it was carrying out legitimate counter-terrorism or counter-insurgency operations. As the evidence shows, that is demonstrably false. Myanmar's "clearance operations" were the antithesis of legitimate counter-terrorism operations.

3. First, I will discuss the many reasons why the "clearance operations," which Myanmar claims to have been directed against ARSA, the Arakan Rohingya Salvation Army, were not legitimate counter-terrorism operations (2). Then, I will demonstrate the same by comparing the anti-Rohingya "clearance operations" with Myanmar's operations against the Arakan Army, the rebel faction composed of ethnic Rakhine Buddhists (3) and with Myanmar's operations against ethnic separatist groups in other regions of the country (4). Next, I will show that Myanmar's evidence is unreliable and not entitled to evidential weight (5). And finally, I will address Myanmar's arguments regarding the context of the "clearance operations" (6).

²¹² United Nations Independent Investigative Mechanism for Myanmar, *Efforts to investigate and punish sexual and gender-based crimes committed against Rohingya: Evidence analysis*, par. 99. RG, vol. II, annexe 8.

2. The “clearance operations” were not legitimate counter-terrorism or counter-insurgency operations

4. The defining features of Myanmar’s anti-Rohingya “clearance operations” cannot reasonably be explained by an intent to counter-terrorism because those operations violated the fundamental tenets of legitimate counter-terrorism operations.

5. The Court has the benefit of two expert reports from Professor Michael Newton, a respected legal scholar, former military officer and specialist in international law related to armed conflict and counter-terrorism operations. The Court also has an affidavit from Professor Newton and will hear from him directly next Thursday.

6. As Professor Newton explained in his reports and affidavit, the fundamental tenets of legitimate counter-terrorism operations include: (1) a clear distinction between the terrorist or insurgent group and civilians; (2) a focus on providing security to or protection for the civilian population; and (3) strictly following rules of engagement to limit collateral damage to civilians²¹³. Myanmar grossly and deliberately ignored and violated all three of these elements in its anti-Rohingya “clearance operations”.

A. No distinction between ARSA and civilians

7. First, it is evident that Myanmar did not distinguish between ARSA’s members and Rohingya civilians. The presentations you have heard from my colleagues regarding the conduct of the “clearance operations” in Min Gyi, Chut Pyin, Maung Nu, other notable villages and generally across northern Rakhine State, clearly show that the civilian population — innocent and unarmed men, boys, women, girls, the elderly, the infirm — that civilian population was specifically targeted.

8. This is the conclusion of the UN Fact-Finding Mission, which reported that the anti-Rohingya “clearance operations”

“have been marked by an equation between an entire civilian population, the Rohingya, and the non-State armed actor that was the perceived or stated threat . . . [N]o distinction whatsoever was made between civilians and civilian objects, on the one hand, and fighters and military objectives, on the other. Everyone and everything was a target . . . The operations and use of force were not targeted at eliminating a specific and limited

²¹³ Expert Report of Professor Michael A. Newton (Oct. 2020), paras. 8-9, 13, 17-18. MG, Vol. XI, Annex 359; Second Expert Report of Michael A. Newton (May 2024), paras. 6-9. MG, Vol. IV, Annex 67; Written Statement of Professor Michael A. Newton (18 Nov. 2025), paras. 3-6.

security threat posed by ARSA; they were targeted at eliminating ARSA's support base, if not the group, the Rohingya, itself."²¹⁴

9. The UN FFM's conclusions are corroborated by other independent sources. For example, the report of the US Department of State also found that "the military, which used the ARSA attacks to justify its so-called counterinsurgency operations in northern Rakhine State, targeted civilians indiscriminately and often with extreme brutality"²¹⁵.

10. Amnesty International, which Myanmar has cited in its pleadings regarding ARSA's actions, concluded in the same report that Myanmar's

"unlawful and grossly disproportionate campaign of violence marked by killings, rape and other sexual violence, torture, village burning, forced starvation tactics, and other human rights violations and crimes under international law . . . target[] the entire Rohingya population living northern Rakhine State"²¹⁶.

11. A joint report by Fortify Rights and the US Holocaust Memorial Museum found that the 2016 "clearance operations" were "targeted attacks on a large number of Rohingya civilians" and that the 2017 operations targeted "hundreds of Rohingya villages and hundreds of thousands of civilians"²¹⁷.

12. Even the International Crisis Group, which Myanmar cites repeatedly, confirms that the Tatmadaw used "disproportionate . . . force . . . which fail[ed] to adequately distinguish militants from civilians"²¹⁸.

13. But you do not have to rely solely on the considered findings of these independent and credible sources. Myanmar itself admits that it targeted all Rohingya in the villages where it conducted operations. It is Myanmar's position that "large-scale mobilisation of the local community was essential to ARSA's activities"²¹⁹. Throughout its pleadings, as you can see on your screens,

²¹⁴ 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 Sept. 2018), para. 1364. MG, Vol. II, Annex 40.

²¹⁵ US Department of State, *Documentation of Atrocities in Northern Rakhine State* (Aug. 2018), p. 2. MG, Vol. VII, Annex 194.

²¹⁶ Amnesty International, *Myanmar: New Evidence Reveals Rohingya Armed Group Massacred Scores in Rakhine State* (22 May 2018), pp. 7-8. CMM, Vol. VI, Annex 268.

²¹⁷ United States Holocaust Memorial Museum, *"They tried to kill us all": Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar* (Nov. 2017), p. 14, available at <https://reliefweb.int/report/myanmar/they-tried-kill-us-all-atrocity-crimes-against-rohingya-muslims-rakhine-state-myanmar>.

²¹⁸ International Crisis Group, *Myanmar: A New Muslim Insurgency in Rakhine State*, Asia Report No. 283 (15 Dec. 2016), Executive Summary. CMM, Vol. VII, Annex 296.

²¹⁹ CMM, para. 3.37.

Myanmar states very clearly that the “clearance operations” targeted ARSA “and its supporters”²²⁰. By “its supporters”, Myanmar means the “local community”, i.e. all villagers, no matter their age or gender, or their engagement in anti-government actions.

14. You may think my interpretation of Myanmar’s position sounds excessive, but Myanmar actually says this in its Counter-Memorial at paragraph 13.214, which you can see on your screens.

It states:

“The terrorists and supporters comprised *men, women, and children*, and were drawn in their thousands from the local communities. Generally speaking, neither uniforms nor insignia were worn by ARSA terrorists and its supporters, who would not be readily distinguishable from civilians not involved in the ARSA activities.”²²¹

15. *And children*. No wonder so many children were targeted for brutal murder — Myanmar considered them terrorists or their supporters. No wonder so many civilians were brutally slaughtered — Myanmar claims that it could not distinguish civilians from ARSA or those it considered its supporters. So, with this outrageous claim according to which each and every Rohingya is a born terrorist and ARSA life-long supporter, Myanmar wants you to accept that it was legitimate for its soldiers to indiscriminately attack and kill everyone.

16. After reviewing Myanmar’s pleadings on this point, Professor Newton also concluded that Myanmar’s own pleadings constitute “an admission that security forces deliberately conflated Rohingya civilians with ARSA and then attacked and destroyed them”²²².

17. To justify its targeting of civilians, Myanmar will surely assert that ARSA mobilized all the villagers, but that is also false. The UN Fact-Finding Mission confirmed that ARSA remained “small” and represented no more than a tiny fraction of the Rohingya population²²³. In fact, the sources that Myanmar relies upon so heavily — the International Crisis Group and Amnesty International — both explicitly reject the claim that Rohingya civilians took up the ARSA cause in significant numbers.

18. The Amnesty International report cited repeatedly by Myanmar makes clear:

²²⁰ See CMM, paras. 1.16, 8.2, 8.108, 13.43, 13.212.

²²¹ See CMM, para. 13.214 (emphasis added).

²²² Written Statement of Professor Michael A. Newton (18 Nov. 2025), para. 9.

²²³ 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 Sept. 2018), para. 1020. RG, Vol. II, Annex 1 (additional excerpts to MG, Vol. II, Annex 40).

“While Amnesty International has confirmed that some Rohingya villagers participated in ARSA attacks, the overwhelming majority of Rohingya did not. Even in the specific villages where attacks occurred, there is no question that most villagers did not take part in ARSA attacks.”²²⁴

19. Similarly, the International Crisis Group concluded that “not many villagers appear to have joined [the] attack on [the army base in Chin Tha Mar village]” — one of the more significant ARSA attacks that Myanmar alleges to have taken place but “which was quickly overpowered”. The report also found that the ARSA commander’s call to his followers to burn down Rakhine Buddhist villages “does not appear to have been widely acted upon as only three non-Rohingya villages are known to have been attacked or burned down by Rohingya”²²⁵. So the alleged massive support for ARSA was actually insignificant.

20. Despite that fact, Myanmar deliberately chose not to distinguish between ARSA and civilians when it carried out the “clearance operations”.

B. No focus on providing security or protection to Rohingya civilians

21. Myanmar also violated the second fundamental counter-insurgency principle of providing security or protection to the civilian population in order not to alienate it.

22. Myanmar has alleged that ARSA was a threat to the civilian Rohingya population. It stated in its Counter-Memorial that “ARSA was responsible for killing many Muslims in the region who worked for the government or were suspected of being informants or collaborators”²²⁶. It went on to state that ARSA engaged in “attacks on civilians, murders of local leaders, violent threats against both the Muslim and Rakhine communities”²²⁷.

23. So, if Myanmar had been engaged in legitimate counter-terrorism operations, then it should not only have distinguished between ARSA and Rohingya civilians; it also should have provided security and protection to the Rohingya civilian population which, it claims, was threatened by ARSA. The evidence indicates that it did no such thing.

²²⁴ Amnesty International, *Myanmar: New Evidence Reveals Rohingya Armed Group Massacred Scores in Rakhine State* (22 May 2018), p. 8. CMM, Vol. VI, Annex 268.

²²⁵ International Crisis Group, *Myanmar’s Rohingya Crisis Enters a Dangerous New Phase*, Asia Report No. 292 (7 Dec. 2017), pp. 6, 7. CMM, Vol. VII, Annex 297.

²²⁶ See CMM, para. 3.6 (2).

²²⁷ See CMM, para. 3.55.

24. As I presented on Monday afternoon, we know that before and during the “clearance operations” Myanmar engaged in a hate propaganda campaign that dehumanized the Rohingya, vilified them collectively as an impure race, as foreigners and terrorists who would swallow up the Buddhist races in Myanmar, and it incited hatred and genocide against them.

25. As explained by Mr Loewenstein, we also know that before the “clearance operations”, Myanmar systematically made the Rohingya less secure, not more. They took down protective fencing and confiscated any materials that could have served as defensive weapons, like kitchen knives. Rather than help the local Rohingya communities defend against the so-called threat from ARSA, they focused on making them completely defenceless against the military’s wanton violence to come.

26. And we also know — from the detailed, village-level presentations of my colleagues about the conduct of the “clearance operations” — that the Tatmadaw did not focus on providing security at all. Just the opposite, time and time again, as you have heard. As summarized by the UN Fact-Finding Mission:

“The operations had a devastating impact on the Rohingya civilian population, which was targeted, brutalised and terrorised. . . . Rohingya-populated areas across the three townships of northern Rakhine State were deliberately destroyed, in a targeted manner.”²²⁸

27. Professor Newton also concluded that Myanmar attacked Rohingya civilians rather than taking actions to protect and secure them from ARSA²²⁹.

28. Beyond destroying Rohingya villages during and after the “clearance operations”, the evidence shows that, even after these operations were conducted, rather than protecting Rohingya civilians and their property, Myanmar sought to erase and replace them permanently. You heard from Mr Loewenstein yesterday about the findings of the IIMM’s September 2025 public summary of its report entitled “The Destruction and Dispossession of Rohingya Land and Property during the 2017 Clearance Operations”²³⁰. That detailed report identified seven representative examples of a

²²⁸ 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 Sept. 2018), para. 883. MG, Vol. II, Annex 40.

²²⁹ Second Expert Report of Michael A. Newton (May 2024), paras. 11-18. MG, Vol. IV, Annex 67.

²³⁰ UN Independent Investigation Mechanism for Myanmar, *The Destruction and Dispossession of Rohingya Land and Property During the 2017 Clearance Operations* (29 Sept. 2025), available at <https://iimm.un.org/en/myanmar-mechanism-report-identifies-entities-benefitting-destruction-and-dispossession-rohingya>.

“systematic pattern” in which “the 2017 clearance operations combined land seizure, targeted destruction of livelihoods, and forced displacement to erase Rohingya presence from their ancestral homeland”²³¹.

29. The IIMM concluded that “[t]he ubiquity and consistency of these operations, using bulldozers, excavators and dump trucks to systematically flatten villages across northern Rakhine State, is consistent with an organized campaign aimed at permanently erasing Rohingya presence”²³².

30. The IIMM found that Myanmar was systematically “dispossessing Rohingya of their land and property, and foreclosing the possibility of their return”²³³. Myanmar was also replacing the Rohingya with more favoured ethnic groups. The IIMM reported that “hundreds of new houses funded by regional governments and foundations were handed over to ethnic Mro and Daing Net families and recent immigrants from Bangladesh”, which “indicate that the Myanmar authorities carried out demographic replacement under the guise of development and resettlement”²³⁴. There is a separate IIMM report on this topic, at Annex 7 of The Gambia’s Reply, which confirms that Myanmar had a “wider strategy to alter the ethnic makeup of Rakhine State to remove or reduce the influence of Muslims”²³⁵.

31. The IIMM concluded that, collectively, these acts “created very serious impediments to the ability of Rohingya to ever reconstitute the communities where they had lived for generations”²³⁶. And that was the point. Myanmar did not even pretend to try to protect Rohingya civilians from ARSA; the goal was always their destruction as a group within Myanmar.

C. No adherence to rules of engagement to limit collateral damage to civilians

32. Myanmar also violated the third fundamental tenet of counter-terrorism by failing to adhere to rules of engagement and to limit collateral damage to civilians.

²³¹ *Ibid.*, para. 6.

²³² *Ibid.*, para. 47.

²³³ *Ibid.*, para. 53.

²³⁴ *Ibid.*, para. 55.

²³⁵ United Nations Independent Investigative Mechanism for Myanmar, *Analysis of the Myanmar’s Government Encouragement of Resettlement by Buddhists from Bangladesh to Rakhine State* (22 Mar. 2024), para. 31. RG, Vol. II, Annex 7.

²³⁶ UN Independent Investigation Mechanism for Myanmar, *The Destruction and Dispossession of Rohingya Land and Property During the 2017 Clearance Operations* (29 Sept. 2025), para. 61, available at <https://iimm.un.org/en/myanmar-mechanism-report-identifies-entities-benefitting-destruction-and-dispossession-rohingya>.

33. Myanmar's rules of engagement, which were annexed to its Counter-Memorial at Annex 152, reflect standard counter-insurgency doctrine as set forth by Professor Newton. They require, for example, the military to "[d]istinguish between civilians and combatants", "minimize collateral damage to civilians and property through the use of proportionate force", "give advance warning before attack", "[a]ttack only when necessary to attain the military objectives", "[d]o not take or destroy properties owned by civilians", and "provide special protection for children and women"²³⁷.

34. But Myanmar did not follow its own rules of engagement. It failed to distinguish between civilians and ARSA; it failed to protect the civilian population; it admitted to including women and children among its military targets; and it deliberately destroyed the villages of the Rohingya civilian population.

35. Furthermore, on its face, the rules of engagement indicate that the "mission objective" was to "counter attacks by AA and ARSA terrorists"²³⁸. Period. Not to attack alleged ARSA *supporters*. Not to attack and kill Rohingya civilians. Not to destroy their villages and every trace of them.

36. There is compelling evidence from diverse sources establishing that orders were given to Tatmadaw soldiers to kill all Rohingya. These sources include, among others, the following seven:

- (1) The August 2017 video of the Tatmadaw soldier telling Rakhine civilians, "[w]e will be moving around the area, clearing the villages of these animals . . . We have guns. We have bullets. That's what we came with. With ammunitions and the spirit to attack these animals, we have come here."²³⁹ Recall from my Monday afternoon presentation that this video was disseminated by the Tatmadaw repeatedly on Facebook to reach the widest possible audience across Myanmar²⁴⁰.
- (2) The IIMM screening note of P5513, a military defector, who stated that "in 2017, the military did not distinguish between fighters of Rohingya armed groups and Rohingya civilians, so they

²³⁷ *Rules of Engagement for Counter-terrorism Operations against AA and ARSA*, paras. 15, 18, 19. CMM, Vol. V, Annex 152.

²³⁸ *Ibid.*, para. 1.

²³⁹ Video IIMM0000000074 (28 Aug. 2017). MG, Vol. V, Annex 136.

²⁴⁰ United Nations Independent Investigative Mechanism for Myanmar, *Anti-Rohingya Hate Speech on Facebook: Content and Network Analysis* (2023), available at https://iimm.un.org/sites/default/files/2024/11/Hate-Speech-Report_EN.pdf, paras. 320-322.

targeted Rohingya as a group”²⁴¹. The accuracy and reliability of P5513’s account was attested to in a sworn declaration by IIMM investigator Verrall²⁴².

- (3) Two Tatmadaw soldiers who participated in the “clearance operations” and later defected testified in their video statements annexed to the Memorial that they were ordered to kill everyone — men, women and children, all members of the Rohingya group — without distinction, “to shoot at every sight of a person”²⁴³.
- (4) A Tatmadaw soldier from the 33rd Light Infantry Division told the Rohingya during the “clearance operations” in mid-August 2017 in a village in Rathedaung, that “[t]he central government sent us specially to kill you Bengali people”²⁴⁴.
- (5) Nazmul Islam, a former soldier and ethnically Rakhine man who converted to Islam and was held by the Tatmadaw during its “clearance operations” in Min Gyi, stated that a military officer announced, “[w]e have the order to kill everyone”²⁴⁵. His account, which was published in *The Guardian*, is confirmed by his video interview annexed to the Reply²⁴⁶.
- (6) A witness from Maung Nu testified in a sworn statement that he observed a Tatmadaw officer receive instructions by phone and, after hanging up, he told his fellow soldiers, “[w]e will kill them”²⁴⁷. After that the executions of Rohingya civilians in Maung Nu began.
- (7) Moe Yan Naing, a police captain who was stationed in Rakhine, stated in relation to the village of Inn Din that “[t]he troops shot into the village before entering. They shot and killed whoever they found in the village.”²⁴⁸

²⁴¹ United Nations Independent Investigative Mechanism for Myanmar, *Screening of Mechanism Person Code No. P5513* (Sept. 2025), para. 20.

²⁴² United Nations Independent Investigative Mechanism for Myanmar, *Investigator Declaration* (Nov. 2025).

²⁴³ Interview of Myo Win Tun (15 Aug. 2020), p. 5. MG, Vol. V, Annex 142. See also Interview of Zaw Naing Tun (15 Aug. 2020). MG, Vol. V, Annex 141.

²⁴⁴ Simon Lewis, Zeba Siddiqui, Clare Baldwin & Andrew R.C. Marshall, “Tip of the Spear”, Reuters (26 June 2018), p. 10. MG, Vol. IX, Annex 284.

²⁴⁵ Poppy McPherson, “Witness to a massacre: the former Myanmar soldier who saw his village burn”, *The Guardian* (5 Feb. 2018), p. PDF 4. MG, Vol. IX, Annex 278.

²⁴⁶ Video and transcript of Interview of Nazmul Islam (28 Feb. 2018). RG, Vol. III, Annex 41; Statement of Jason Motlagh (Independent Journalist) (14 May 2024). RG, Vol. IV, Annex 70.

²⁴⁷ Fortify Rights, Witness Statement of Mohammadul Hassan (23 Feb. 2018). MG, Vol. X, Annex 337.

²⁴⁸ Reuters Investigates, *Planned Purge: New evidence shows how Myanmar’s military planned its brutal purge of the Rohingya* (4 Aug. 2022), available at <https://www.reuters.com/investigates/special-report/myanmar-rohingya-warcrimes-investigation/>.

37. There can be no doubt that Myanmar purposefully targeted all of the Rohingya population and did not seek to minimize collateral damage. As Professor Newton observes, “Myanmar’s Rules of Engagement [] demonstrate that Myanmar understood and accepted standard COIN [counter-insurgency] doctrine during the entire period that it was ignoring them in practice”²⁴⁹.

3. Comparing Myanmar’s actions against the Arakan Army confirms that the “clearance operations” against the Rohingya were genocidal

38. Mr President, Members of the Court, further proof that Myanmar’s counter-terrorism defence is unfounded comes from comparing Myanmar’s counter-insurgency operations against the Arakan Army with its actions allegedly targeting ARSA.

39. First, I should note some differences between the two groups. While ARSA is made up of members of the Rohingya group, the Arakan Army is comprised of ethnic Rakhine, mainly Buddhists. The Arakan Army was founded in 2009 and was active in Rakhine State years before ARSA even existed²⁵⁰. Myanmar acknowledges in its Counter-Memorial that “since March 2015 there has in Rakhine State also been an armed conflict between the Myanmar Defence Services and the Arakan Army (AA)”²⁵¹, and since “November 2018, attacks by the Arakan Army [] intensified in Rakhine State”²⁵².

40. The difference in the military capabilities between both groups is stark. According to Myanmar, the Arakan Army “has a significant military armoury”²⁵³; it “receives arms and ammunition from the KIA [(Kachin Independence Army)] and the UWSA [(United Wa State Army)]”, and also purchases weaponry and ammunition on the black market at the Thai-Myanmar border”²⁵⁴. The UN Fact-Finding Mission reported that the Arakan army is a “well-trained force that

²⁴⁹ Written Statement of Professor Michael A. Newton (18 Nov. 2025), para. 14.

²⁵⁰ International Crisis Group, *Breaking Away: The Battle for Myanmar’s Rakhine State*, Asia Report No. 339 (27 Aug. 2024), available at https://www.crisisgroup.org/sites/default/files/2024-08/339-battle-rakhine-state_0.pdf; 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 Sept. 2018), para. 408. MG, Vol. II, Annex 40.

²⁵¹ CMM, para. 2.8.

²⁵² CMM, para. 2. 91.

²⁵³ 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. 48.

²⁵⁴ *Ibid.*, para. 44.

operates under a clear command structure”²⁵⁵, and its weaponry includes “sniper rifles, light artillery and improvised explosive devices (IEDs)”²⁵⁶. As confirmed by Myanmar in its most recent provisional measures implementation report, the Arakan Army has effectively taken over almost all of Rakhine State, including all of northern Rakhine State²⁵⁷.

41. In contrast, according to the UN Fact-Finding Mission, ARSA members mostly had nothing but “homemade weapons such as sticks, knives, swords and slings-shots”²⁵⁸. The Mission found that ARSA was a small, poorly organized militia that did not have the skill or resources to launch an attack that could truly challenge Myanmar’s security forces²⁵⁹. Most of those considered to have joined the ARSA attacks received no training at all prior to the 2017 attacks²⁶⁰.

42. These findings are confirmed by the IIMM’s report on evidence of ARSA weapons possession and use, which is annexed to The Gambia’s Reply. The IIMM found that ARSA’s weapons were limited and primitive²⁶¹. At the time of the August 2017 attacks, ARSA only had a “modest arsenal of around 40-70 firearms”; the “majority of ARSA members” used “bladed weapons, sticks, and a small number of locally produced (artisanal) firearms”²⁶².

43. In light of these profound differences between the Arakan Army and ARSA in capacity and level of threat, a comparison of Myanmar’s operations against the Arakan Army with its conduct of the “clearance operations” in northern Rakhine State is especially revealing. Both of these entities operate primarily in Rakhine State. Myanmar considers both of them as terrorist groups²⁶³. Myanmar

²⁵⁵ UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 261, available at https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf.

²⁵⁶ *Ibid.*, para. 263.

²⁵⁷ Twelfth Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86 (4) of the Order of 23 January 2020 (21 Nov. 2025), para. 8.

²⁵⁸ 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 Sept. 2018), para. 1032. MG, Vol. II, Annex 40.

²⁵⁹ *Ibid.*, paras. 1009-1011.

²⁶⁰ *Ibid.*, para. 1030.

²⁶¹ United Nations Independent Investigative Mechanism for Myanmar, *Evidence of ARSA Weapons Possession and Use* (29 Apr. 2024). RG, Vol. II, Annex 9.

²⁶² *Ibid.*, para. 3.

²⁶³ CMM, paras. 2, 8, 2.76; 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. 57.

conducted so-called “clearance operations” against both²⁶⁴. And, most importantly, Myanmar applied the exact same rules of engagement to both²⁶⁵.

44. So, if we were to assume that Myanmar actually followed its rules of engagement, then the nature of military operations employed against both groups should be very similar, perhaps with some differences to account for the greater military capabilities, weaponry and organization of the Arakan Army. But this is not reflected in the evidence. To the contrary, we see very clearly the genocidal intent that permeated Myanmar’s anti-Rohingya operations.

45. It was only against the Rohingya that the Myanmar military targeted the entire civilian population in village after village where it conducted operations. Only against the Rohingya was there such brutal violence that included the indiscriminate killing of thousands of people including children. Only against the Rohingya did the military systematically engage in brutal sexual violence. Only against the Rohingya did the military burn down hundreds of villages, taking care not to burn down the ethnic Rakhine villages adjacent to the Rohingya ones. It was only Rohingya land that was confiscated and built over by the State in an effort to permanently dispossess the Rohingya of their land. And it was only the Rohingya who were subjected to discriminatory policies for decades and a campaign of hate propaganda to dehumanize and incite violence against them.

46. All of these factual differences are borne out in the reporting of the UN Fact-Finding Mission, which specifically investigated Myanmar’s conflict with the Arakan Army in its 2019 detailed report. While the FFM found that Myanmar committed war crimes in its operations against the Arakan Army, it did not find genocidal intent or similar types of genocidal violence against the Rakhine Buddhist population as it found were perpetrated against the Rohingya. Specifically, the FFM did not find any indiscriminate killing of Rakhine Buddhists. Nor did it find that there was brutal treatment, burning of homes, widespread sexual violence or targeting of children in the Rakhine Buddhist villages. Neither did it find comparable, deliberate destruction of those villages, the forced displacement of the civilian population or the prevention of their return.

²⁶⁴ International Crisis Group, *Breaking Away: The Battle for Myanmar’s Rakhine State*, Asia Report No. 339 (27 Aug. 2024), available at https://www.crisisgroup.org/sites/default/files/2024-08/339-battle-rakhine-state_0.pdf.

²⁶⁵ *Rules of Engagement for Counter-terrorism Operations against AA and ARSA*, paras. 15, 18, 19. CMM, Vol. V, Annex 152.

47. In this comparison, the Court can find confirmation that Myanmar acted with genocidal intent during its anti-Rohingya “clearance operations”. These were manifestly not legitimate counter-terrorism operations.

4. Myanmar’s counter-insurgency actions elsewhere further confirm that the “clearance operations” against the Rohingya were genocidal

48. Additional comparisons outside of Rakhine State can be instructive as well. Myanmar recognizes that since the time of its independence, it has “been engaged more or less continuously in internal insurgencies with various ethnically based insurgent groups in different parts of the country”²⁶⁶.

49. According to the UN Fact-Finding Mission, these include the Kachin Independence Army, the Shan State Army-South, the Shan State Army-North, the Ta’ang National Liberation Army, the Myanmar National Democratic Alliance Army and the United Wa State Army²⁶⁷. In its reporting, the FFM pointed out violations of human rights and international humanitarian law by the Tatmadaw in Shan and Kachin States involving these groups.

50. The United Nations has also had a Special Rapporteur monitoring the human rights situation in Myanmar since 1992. The reports of the Special Rapporteur have also focused on violations involving Myanmar’s conflicts with various ethnic armed organizations.

51. Even though Myanmar has engaged in counter-insurgency operations against all of these groups over many years, its actions against them have never included the same indicators of genocidal intent as are present in their actions against the Rohingya — from its anti-Rohingya hate propaganda and racially discriminatory policies through its conduct in its “clearance operations”, and beyond.

5. Myanmar’s evidence is unreliable

52. My next point relates to the evidence that Myanmar offers in support of its counter-terrorism defence. Myanmar presents reports produced by the military related to the

²⁶⁶ CMM, para. 2. 6.

²⁶⁷ UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 Sept. 2019), para. 473, available at https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf.

“clearance operations”, witness statements from seven military or police officers, several witness statements from local residents of Rakhine State and witness statements from two alleged members of ARSA who are prisoners in Buthidaung prison.

53. None of these sources are credible or reliable. First, the military’s own reports show only what the military decided should be reported regarding those incidents. They are not reports from an independent source, nor are they comprehensive as to the events that took place in those villages. Moreover, these reports are contradicted by the evidence from independent and unbiased sources that The Gambia has placed in the record, including the findings of the UN Fact-Finding Mission, dozens of independent NGO reports and sworn witness statements from eyewitnesses.

54. There is also reliable evidence produced by the IIMM that indicates that Myanmar military reports regarding the “clearance operations”, apart from being self-serving, were falsified. The IIMM screening note for military defector P5513 states that regarding the incidents in the village of Sin Oe Pyin in Buthidaung Township, the Deputy Battalion Commander dictated the information for the incident report. According to P5513:

“The report . . . stated that ARSA attacked the military and in response they cleared the village . . . and that when ARSA withdrew from Sin Oe Pyin, they (ARSA) burned down the village. Asked if the contents of the report, as dictated . . ., were consistent with what P5513 had observed, P5513 stated that the report, as written, was not factual or correct. It was in fact [Light Infantry Battalion 562] who burned down the village . . . there were no firearms or ammunition . . . He did not believe that the deceased people were ARSA, but rather [] they were civilians — as evidenced by the fact that he even saw children amongst the dead.”²⁶⁸

55. As to Myanmar’s witness statements, they are all purportedly from 2017 or 2019, but Myanmar never explains the circumstances of their production. They appear to have been part of some Myanmar military inquiry, meaning that they were not part of an independent process. As Professor d’Argent clearly showed, Myanmar’s purported investigations and inquiries were not credible and were part of a system reinforcing impunity for Myanmar’s crimes. Any statements created through such biased processes are not reliable or credible.

56. It is notable that, although Myanmar listed three military officers as witnesses for oral testimony during these hearings, Myanmar ultimately removed all of their names from its witness

²⁶⁸ United Nations Independent Investigative Mechanism for Myanmar, *Screening of Mechanism Person Code No. P5513* (Sept. 2025), para. 31.

list. The statements of two of those officers are among the statements that Myanmar annexed to its Rejoinder but, since Myanmar has not produced them for oral testimony, we cannot question them through cross-examination, nor can they answer questions from the Court.

57. Myanmar also submitted witness statements from two alleged ARSA members who are incarcerated in Buthidaung prison. As Ms Ho noted yesterday, they are thus completely under Myanmar's control in a prison facility that is notorious for torture and other forms of abuse, as documented in the IIMM's report on evidence related to detention of Rohingya in Buthidaung prison and other locations, which was annexed to the Reply. As Ms Ho pointed out, Myanmar's influence on their testimony is readily apparent on the face of their statements. As members of the Arakan Rohingya Salvation Army, it would be odd, to say the least, that they refer to themselves as Bengali, the term that Myanmar seeks to force the Rohingya to adopt.

58. Most of the witness statements have been submitted by Myanmar to argue that the Rohingya burned their own villages down. That claim is contradicted by extensive evidence and analysis by the UN Fact-Finding Mission, UNOSAT and the IIMM — all of which conclude that Myanmar purposefully burned the Rohingya villages. The falsity of that claim is also clear given that Myanmar's efforts to fabricate evidence of such burnings by instrumentalizing the local Hindu community was exposed by journalists²⁶⁹.

6. Context is not a defence to genocide

59. I turn now to my final point, which is that context is not a defence to genocide. Myanmar insists that the context of the "clearance operations" was ARSA's attacks in 2016 and 2017 and that The Gambia ignores this.

60. Of course, The Gambia never ignored this. You can see going all the way back to The Gambia's Application, at paragraph 48, a description of the 9 October 2016 incident by a group of individuals who later called themselves Harakah al-Yaqin, which changed its name several months later to ARSA²⁷⁰. And at paragraph 72 of the Application, The Gambia stated very clearly that

²⁶⁹ Witness Statement of Jonathan Head, signed on 14 October 2020. MG, Vol. XI, Annex 375. See also Jonathan Head, "Rohingya crisis: Seeing through the official story in Myanmar", *BBC*, available at <https://www.bbc.com/news/world-asia-41222210>.

²⁷⁰ See Application instituting proceedings and Request for provisional measures of the Republic of The Gambia (11 Nov. 2019) (hereinafter "AG"), para. 48, fn. 88.

“Myanmar’s pretext for resuming ‘clearance operations’ on 25 August 2017 was attacks on a military base and various security outposts by [ARSA], carried out largely by untrained individuals wielding sticks and knives, with a small number bearing arms and improvised explosive devices”²⁷¹. That same position has carried throughout The Gambia’s pleadings.

61. More importantly, as Myanmar acknowledges, the UN Fact-Finding Mission never ignored ARSA. It extensively reported on ARSA and its activities, including its human rights abuses, which Myanmar cites extensively. The IIMM produced an entire report dedicated to ARSA, analysing its capabilities and the nature of the potential threat it posed. Most of the NGOs whose reports The Gambia cites also reported on ARSA and its abuses. So, all of these entities were fully aware of ARSA when they produced their reports and made their conclusions.

62. The fact that ARSA’s attacks preceded the genocidal “clearance operations” does not make it any less valid that Myanmar and its soldiers had the requisite genocidal intent as they planned and carried out their attacks.

63. It is well established that the context of genocidal acts is not a defence to genocide. It is just that, the context. War has been a context for genocide. The Holocaust occurred during World War II. The Srebrenica genocide occurred during the Yugoslav wars. The Rwanda genocide occurred during a civil war. Just because the context of these past genocides was war or internal armed conflict did not mean that genocide did not take place. The same is true here. Even if the immediate pretext for the “clearance operations” was ARSA attacks, that does not negate or excuse the genocidal acts deliberately perpetrated by Myanmar against the Rohingya group in carrying them out.

64. Moreover, the context relevant to this case extends far beyond the ARSA attacks. It includes Myanmar’s decades-long persecution of the Rohingya, and Myanmar’s many years-long campaign of hate propaganda, and all of Myanmar’s actions after the “clearance operations” — including its impunity, destruction of evidence, and the destruction of Rohingya villages.

65. Finally, it is not true that Myanmar’s “clearance operations” were limited to villages where ARSA attacks allegedly took place. You will recall from yesterday that Mr Loewenstein showed you

²⁷¹ See AG, para. 72 (citing 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 Sept. 2018), para. 750. MG, Vol. II, Annex 40).

Myanmar's figure 8.1 from its Counter-Memorial, onto which we overlaid the map of village destruction during the "clearance operations" produced by UNOSAT, which is figure 1.3 of the Memorial. The resulting map, which is Reply figure 1.2, shows that most of those green dots where Myanmar asserts no ARSA attacks took place are villages that, according to the United Nations, were destroyed during and after the "clearance operations". Myanmar wholly or partially destroyed at least 188 out of the 329 villages where, according to Myanmar, there was absolutely no ARSA presence and no pretence for any counter-terrorism operations. Put simply, Myanmar's argument that the "clearance operations" were only responsive to ARSA attacks is refuted by its own evidence.

66. Myanmar argues that its counter-terrorism operations ended on 5 September 2017, but the UNOSAT figures depict villages that underwent fire damage from 31 August 2017 to March 2018. Myanmar admits that some of the village burning happened after the purported end of their "clearance operations". This is further proof that Myanmar conducted the burnings. If villages were burned after Myanmar claims that its "clearance operations" ended, which is when the military had complete control over the Rohingya villages, then it could only have been the military that burned them, not the Rohingya themselves. In any event, when The Gambia refers to the "clearance operations", it includes the military activities spanning from late 2016 through 2018, when Myanmar was engaging in further village destruction and confiscation of Rohingya lands.

7. Conclusion

67. In conclusion, Myanmar's defence of its "clearance operations" — that it was only engaging in counter-terrorism operations in response to ARSA's attacks — is manifestly false and unsustainable. These operations violated all of the fundamental tenets of legitimate counter-terrorism operations, including Myanmar's own fundamental tenets, as reflected in their rules of engagement. In fact, Myanmar's rules of engagement constitute a powerful and indisputable statement against interest. They constitute a compelling admission by Myanmar of what it should have done if it had intended counter-terrorism. In completely disregarding them, in trampling over them, in setting fire to them along with hundreds of Rohingya villages, Myanmar left only one explanation for its actions — only one reasonable inference that could be drawn from the resulting pattern of conduct: that it deliberately intended to destroy the Rohingya group within Myanmar.

68. Mr President, Members of the Court, thank you for your kind attention. This concludes The Gambia's presentations for the morning session. After the lunch break Mr Loewenstein will continue The Gambia's presentations.

The PRESIDENT: I thank Mr Suleman, whose statement brings this sitting to a close. The oral proceedings in the case will resume this afternoon at 3 p.m., when The Gambia will continue its first round of oral argument.

The sitting is closed.

The Court rose at 1.10 p.m.
